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Congressional Health, Congressional Failure

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Congressional Health, Congressional Failure

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Dedication

To Anthony and Dorothy, Lister and Charlotte, Ron and Joan

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Who ought one thank after six long years in graduate school? One's initial advisor, who offered sage guidance and without whom one would not have gained admission, passed through coursework, let alone comps? Or one's dissertation co-supervisors, who have acted as pilots bringing a ship into port, while simultaneously acting as foremen overseeing the construction of that same vessel? Or one's professors more broadly, each of whom added something special to one's repertoire of skills (writing for analytic clarity), knowledge (of the greats, canonical or otherwise) or approach (writing fairly and sympathetically). Or one's colleagues, who step outside the critical mold of "graduate students," to offer scholarly advice and friendship? Or even the authors of the works cited within this dissertation? After all, without their writing (and all the people who helped them) one's task would have been more daunting or maybe even impossible… Or most of all, ought one thank one's spouse, whose loving generosity extends and expands beyond all reasonable bounds? Perhaps especially if one's spouse has attained an expertise on eighteenth century tariff politics?

As luck would have it, I am not forced to choose, and I thank them all. But maybe it is reasonable, fair (and just) to thank one above the rest, my spouse, Regina Mills, and nominate her as best.

Abstract

Congressional Health, Congressional Failure

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Abstract: The United States Congress is one of the most disparaged institutions in contemporary political life. Citizens and pundits decry it. Many experts also concur, calling that branch of government "broken," "dysfunctional," "decayed," "disastrous," and even, "a constitutional shrinking violet." The institution is even attacked from within, by Members of Congress (MCs) themselves. Yet, amongst all this reasonable critique, something is missing: the standard of health against which one ought to assess the Congress. This work aims to remedy this gap in the literature by providing "a well-thought-through ideal which we can use to hold up to [the Congress] for comparison" (cf. Waldron 2009), along with evidence of the viability of that standard in empirical cases.

To develop a comprehensive conception of congressional health, I turn to the Constitution. I argue that the constitutional design of Congress, including the Preamble, shows that the Congress was designed to remediate the flaws of the Confederation Congress and to better promote the general welfare of the nation. I thus find that the chief desideratum of legislative health is the tendency of Congress's rules, structures and norms to foster a representative lawmaking process responsive a popular majority in a deliberate way.

The constitutional approach to Congress is then enriched through a treatment of three historical cases, namely, the First Congress, the Antebellum Congress, and the New Deal Congress. These case studies provide particularly clear examples of institutional structures and

norms that past congresses used successfully (or failed to employ) to meet the extensive challenges of a national lawmaking assembly in a large, diverse, federal republic.

Returning to the present, armed with the appropriate positive standards for evaluating that institution, I find that the contemporary Congress's rules and norms fail to consistently generate an effective and representative lawmaking process. The United States Congress avoids the sobriquet of "failure," only through a limited respect for its dwindling norms held by a small number of MCs and the open acknowledgement of its difficulties by a wider group of legislators. A lack of independent institutional perspective, however, stands between the body and any realistic prospects for reform.

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Introduction: "The Most Disparaged Branch"

Political scientists, public intellectuals, citizens and journalists have all sought to evaluate Congress in recent years. Citizens are predominately negative in their appraisal. In 2010, for instance, a Pew poll asked citizens to describe the U.S. Congress in one word. Eighty-eight percent of respondents used the opportunity to criticize their national legislature; many used descriptors such as "inept," "corrupt," and "incompetent."[1] While scholars are less unanimous, many are similarly critical. These scholars hold that the contemporary Congress is "broken," "dysfunctional," "decayed," "disastrous," or in more colorful terms, "a constitutional shrinking violet" (Mann and Ornstein 2006, Mayer and Canon 1999, Tulis 2009, Mann and Ornstein 2012, Chafetz 2012).[2] Accounts do differ, however, as Congress is sometimes presented as a representative body with a difficult institutional job (Sinclair 2009) that governs the country relatively well, even during times of polarization and divided government (Mayhew 1991/2005, 2017).[3]

Considering the importance of this dispute, it is surprising to note that these criticisms and measured defenses have generally been undertaken before determining what functionality is and how the current institution fails (or succeeds) in meeting that standard of functionality. In short, there is no generally operative description of what a

[1] March 2010 poll undertaken by the *Pew Research Center for the People and the Press*, quoted in Taylor (2013, 1).

[2] Journalist Ezra Klein (2012) is more poetic: "This is the worst Congress ever."

[3] In similarly poetic terms, scholar Andrew Taylor suggests that all in all, "it is a pretty good legislature" (Taylor 2013).

"well-functioning," "well-ordered" or "healthy" Congress would consist of. The consequences of such a state of affairs are severe, as "We cannot undertake intelligent disparagement or criticism of our legislative institutions if we do not have a well-thought-through ideal which we can use to hold up to them for comparison" (Waldron 2009b, 354). Simply put, one must know something about what a healthy Congress is before one may diagnose its illnesses. Before attacking or defending Congress, a preliminary question must then be answered: *What is an appropriate standard for congressional health?* Since Congress is a purposefully created institution, answering this question requires more than a metaphorical step on the scale or a check of the pulse. Counting the number of bills passed by Congress or the days in session will not be sufficient.[4] To develop a *conception of congressional health* one must instead answer a series of related questions: 1) What is the purpose or aim of the institution of Congress? 2) How will a well-ordered Congress go about achieving this aim? 3) How was a well-functioning Congress constituted in the past? Only after fully answering these questions can one reasonably identify an instance or instances of congressional failure.

Fleshing out what I mean by *congressional health* will help to illustrate which aspects of this term have already been explored in contemporary scholarship and which remain to be articulated. By referencing the *concept* of health – and more specifically health with respect to an institution – I mean to say that certain aspects of the structures,

[4] The insufficiency of purely counting-based approaches is clear. Even attempts to develop quantitative sets of indicators, as seen in the "Healthy Congress Index" produced by the *Bipartisan Policy Center*, supplement such indicators with qualitative consideration of the appropriations and committee processes.

rules, and norms of an institution conduce to its well-functioning. An institution is healthy to the extent that these well-ordered structures, rules and norms outweigh any institutional features hindering its function. Thus, by health I do not intend to make claims about an ideal condition whereby an institution functions perfectly, just as a patient who has received a clean bill of health from his physician realizes that his doctor is not suggesting his physical condition approaches that of Usain Bolt or any other world-class athlete. On the other hand, when only the minimum requirements to survive are being met a patient is not considered healthy; a patient on life-support is not generally considered healthy. Analogously, an institution accomplishing only the task of its self-perpetuation, likewise, cannot be said to be healthy.

By referring to a *conception* of congressional health I draw attention to the fact that the United States Congress is a particular legislature and that its particularity is related to its place within the constitutional edifice of which it is a part. That is to say, the attributes of Congress that will characterize it as healthy are related to what it was *intended to do* (its purposes or aims) and how it was *designed to function*. This consideration means that it makes little sense to evaluate Congress as an institution with respect to functions that it was not designed to carry out. The attributes that make Congress healthy thus may or may not be attributes that conduce to health in the Parliament of the United Kingdom or any other legislature.

While this point is rather straightforward, it is apparent that a good deal of popular criticism that Congress receives is inattentive to this point. The Senate was not designed to be representative, if by representative one means respecting the principle of

one person, one vote. If one criticizes the Senate for its lack of representation on these grounds, as some do (see Klein 2013), one must criticize *the Constitution* on this ground (as Levinson [2006] does) rather than the Congress. Finally, this conception, as it relates to an institution with a long history, should be attentive to this history. A conception of congressional health should be informed by instances or cases where particular institutional features helped the body achieve the aims and responsibilities entrusted to it by the Constitution. In short, a conception of congressional health should integrate insights from *how Congress was constituted* in eras or epochs where it was generally well-functioning.

The extant literature does not provide such a comprehensive conception. Scholars have investigated congressional functionality, but they generally probe only one particular dimension of failure, such as abdication (Fisher 2000, Farrier 2004, Tulis 2009, Chafetz 2012), gridlock (Binder and Smith 1997, Binder 2003), the quality of deliberation (Bessette 1994, Loomis 2011, Wallner 2012), or polarization (Theriault 2013, Muirhead 2014). No matter the quality of these works, they only provide a partial understanding of congressional health as a whole.[5] Others do examine these questions more directly, but they do so only with respect to the Senate (Swift 1996, Wirls and Wirls 2002). While several works – those of Mayer and Canon (1999), Mann and Ornstein (2006, 2012), and Taylor (2013) – tackle the question of evaluating Congress more

[5] This is, of course, more of a description than a critique as these authors did not set as their task the articulation of an analytically sophisticated conception of congressional health.

directly, each suffers from flaws that render their implicit or explicit standards problematic.

If my appraisal is accurate, scholars, politicians and citizens are engaging in a debate of great significance for the polity without attending to its proper foundation. Even so, this rather serious criticism must be qualified appropriately. Congressional experts can shed light on the question of congressional health as they have carefully attended to the institutional rules and attributes of the contemporary Congress. My first task is thus to take their studies of the current institution and determine what implicit standards of congressional health can be developed from their explicit critiques or defenses of the modern Congress, and what assumptions are shared by the field. In Chapter One I find that (1) a rather detailed vision of an "ideal Congress" can be derived from these accounts and (2) two key implicit assumptions about a functional Congress emerge. Nevertheless, I find that these accounts are not ultimately compelling as a comprehensive conception of congressional health. Extant political scientific accounts fall short largely because they are (i) not systemic, (ii) are not informed by the whole sweep of American political history and are (iii) not sufficiently aligned with the constitutional design that continues to frame our system of governance.

Since even the most sympathetic account of the current literature does not provide consistent and sophisticated accounts of the three domains of congressional aims, functions, and healthy instantiation of those designs, it is necessary to undertake a fresh look at each of these matters. To determine the ends which Congress was designed to effectuate, I examine the Constitution itself. While that document does not, in so many

words, announce the purposes of the Congress, the framework in constitutional theory known as *positive constitutionalism* offers a path forward. Scholars working in this area have revealed the degree to which constitutions as such – and the U.S. Constitution in particular – ought to be viewed as purposive endeavors for positive ends, rather than as merely lists or sets of limitations on government. Besides the examining the Preamble itself, which takes on increased importance when viewing the Constitution in this light, engaging in an explicit textual analysis comparing the Articles with the Constitution in Chapter Two allows one to identify principles of the institutional design of Congress: principles that can guide one in developing a comprehensive conception of how that institution was designed to function. This task is aided by the commentary of those who saw "further and better" than most (Storing 1981); moreover, borrowing from the subtlety of the *Federalist* as well as contemporary constitutional theorists such as Barber (2003), Waldron (2016), and Whittington (2017) allows one to identify not only how the Congress was designed to operate but to determine the authoritative ranking of ends within the system (i.e. representation was the foremost virtue sought in the legislature). By the conclusion of Chapter Two, I thus show that a healthy Congress is one whose rules, structures and norms promote a representative lawmaking process, responsive to the immediate desires of a majority of the populace, while simultaneously reflecting a future deliberative majority.

Yet, even this conception is limited, if it only focuses on the prospective design of the Constitution for creating new legislative institution. Fully understanding the constitutional design of the legislature is critical, but its formation and development

during the "extended founding" is just as important. The First Congress (1789-91) under the Constitution did more than just link the plan articulated in the Constitution with one particular, concrete instantiation of that plan; the House and Senate were populated in many cases by the same men who framed the Constitution itself. In the First Congress more than half of the members of the Senate (15 out of 26), and a number of very prominent members of the House (9 out of 65 including Madison) participated in the Constitutional Convention (Swift 1996, 48-49).[6]

In sum, the fundamental institutional features of the First Congress were created, in many cases, by the very men who debated and drafted the words that framed that body. By examining the ways in which the first Congress handled the emergent crises of 1789 one can develop a conception of congressional health with greater specificity, clarity, concreteness than otherwise would be possible from a mere abstraction alone. In this way an example of congressional health in the Early Republican Period can help to inform the more abstract and general institutional attributes that could be expected to conduce to congressional health; they can help generate a picture of how the Congress was designed to operate in practice. Moreover, examining and evaluating an actual Congress can show that the standards of congressional health arising from the Constitution and *The Federalist* are achievable in practice, rather than being unattainably utopian. To this end, observing the First Congress at work only on "high politics," such

[6] While the presence of these framers in the First Congress does not suffice resolve questions of "original intent" or provide an authoritative example that every subsequent iteration must pattern itself after, the First Congress provides a vantage point for seeing at least one example of how Congress can be constituted.

as the development of the Bill of Rights, will not do. Beyond these critical matters, it is equally important to also look at the difficult work in bargaining, deliberation and representation that was undertaken in more mundane matters, such as setting the schedule for the first national revenue act. In the First Congress, MCs spent significant time and energy trying to reconcile the need for delegate representation of interests and deliberative trusteeship over promoting the national interest. Chapter Three focuses on details such as these to illustrate one way in which the Congress can self-consciously develop norms, rules and structures that would help it promote the general welfare.

While examining the text of the Constitution, the writings of framers and theorists, as well as the inner-workings of the First Congress will all be a good start in developing a conception of congressional health, it will not complete the process. In the first place, holding out the Congress of the "extended founding" as a sole exemplar of congressional health poses conceptual and analytical difficulties. It makes little sense to consider Congress as healthy only when it literally engages in a process of construction of the structures of government, its internal rules and norms, *ex nihilo*. The purpose of building institutions is to make many of these structures and rules at least semi-permanent. The actors within the institution then utilize those rules, structures and norms to aid in the function of the institution and to achieve its aims (North 1991). While the capacity for reform seems, prima facie, to be an important attribute of institutional health, it need not accomplish reform each time from scratch. Holding out the first Congress as the sole model of institutional health thus poses the problem of choosing a quite unreasonable and undesirable standard to apply to the rest of U.S. political history.

But more fundamentally, the account would be incomplete primarily because the concept of heath itself suggests a possibility of disorder or failure. In order to have a good understanding of congressional health it is necessary to distinguish a healthy Congress from a stressed institution or a failed institution.

To remedy the possible deficiencies in a conception of congressional health emerging from the founding alone, I proceed in Chapter Four and Five to investigate one case of congressional failure and one case of health in the subsequent development of the polity. It is worth saying something further about this methodology. The process of case selection in this project differs from the manner in which cases are generally selected. In ordinary social scientific inquiries cases are selected to help generate hypotheses that will be tested rigorously in subsequent work, to show a causal mechanism in action, or even as the main form of evidence for a historical or developmental theory of politics (Gerring 2007). The inquiry undertaken here demands a somewhat different task: selecting cases to gain greater resolution on the conception of congressional failure developed in the first stage of my project. Selecting and describing instances where the Congress was constituted in a healthy manner, and those in which it failed institutionally, is methodologically in the service of distinguishing between these institutional states. Continuing with the medical analogy, until one can perform a successful "differential diagnosis" of the institution, the conception of congressional health is incomplete. If a Congress lacks the attributes specified (such as self-consciously developed structures to aide in responsiveness) and is yet quite successful, or possesses them and appears quite unable to promote the general welfare, the conception of congressional health advanced

in this work will prove to be inappropriate for evaluating the real-world institution of Congress.

The cases selected for this study, the antebellum Congress and the Congress of FDR's One Hundred Days, so far from operating to reprove the conception of congressional health operating in this work, provide substantial evidence of its validity. Consider the antebellum Congress: In the mid-nineteenth century the Congress (and the Senate in particular) was thought to be in a "Golden Age," where the legislature had comparatively more influence than the President (differentiating them from the present status of Congress) and was ostensibly dedicated to a statesmanlike lawmaking process, emphasizing public-spiritedness and deliberation. Close investigation of the antebellum 33rd Congress of 1854 shows that these generalizations were false or misleading so far as that institution was concerned. Prioritizing partisan loyalty over responsiveness or representativeness, that institution destroyed its own deliberative capacities over the course of a relatively small number of weeks. Even as the Senate appeared to spend a month seriously deliberating over the Kansas-Nebraska Act, analysis of what occurred on the floor shows that deliberation occurred over a fitful two-day span, while "speeches" with little to no deliberative content filled the other four weeks of the month. Robbed of the capacity to trade arguments regarding the particular merits of the policy under investigation, the Congress produced perhaps the most baneful bill in its entire history. Chapter Four is thus dedicated to a close analysis of that institution, coupled with a careful decomposition of its norms, rules and structures to illustrate the completeness of that bodies dereliction of their constitutional place.

The New Deal Congress of the First Hundred Days provides another opportunity for illustrating the way that responsiveness and deliberative policymaking representative of the important interests in the society can promote the general welfare. Commonly considered FDR's personal Congress, fit to be molded to his command (at least in these pivotal early days of emergency), investigation of the record show something more complex. *Responding* to exigent circumstances, the Congress did allow the initiative to be set by the President, but the Congress retained in deliberative capacities by leveraging the power of bicameralism, as intended by the design of the Constitution.[7] The House acted as a transmission belt, marshalling the bills proposed by the President through the legislative process with minimal change at maximum speed. The Senate, however, saw amendment activity and deliberation over the bills proposed to the extent that the Congress occasionally moved in the opposite direction as the President. Even more than that, by attempting to frame a representative policy-making process, the Congress provided the maximum chance of success of some of the more experimental and sometimes ill-considered presidential initiatives such as NIRA.[8] The New Deal Congress, besides showing that the standards for congressional health articulated in this project are still relevant in the twentieth century, provides an explicit refutation to the idea that the national interest can only be promoted by the President, or to the equally fallacious idea

[7] The mere fact of the existence of such an institution seems to cast doubt on accounts that the Congress is essentially a relic of a bygone era (Howell and Moe 2016), as modernity does not appear to obsolete the notion of bicameralism, at least as practiced in this Congress.

[8] I say "attempting" rather than "succeeding," as the New Deal Congress failed to comprehensive represent all important interests. One way it failed to do so was through rules such as the filibuster. This rule operated to prevent any action directly referencing civil rights of black Americans from reaching a vote.

that any congressional deference to the President is a shirking of its duty. Chapter Five, thus concludes by injecting some needed optimism into conversations regarding Congress; if at the time of direst need the Congress could play a key role in righting the Republic, surely the polity need not resign itself to the permanence or constitutional necessity of a dysfunctional Congress.

In the end, a well-conceived conception of congressional health "speaks its own importance" (Hamilton et al 1787/1963, 27). Existing not only in the design of the Constitution, it is also alive in the motivations and considerations of reelection-minded MCs of the past and present. Such a conception has the potential to be useful not only academically, but also civically, in an effort to help politically engaged citizens and politicians to properly diagnose the disorders plaguing our contemporary legislative institutions, and to guide them to the kind of reforms which could place Congress on a healthy footing one again. By tracing out such an account, one is not led to a simple set of proposals for reforms, but rather to a more complete understanding of legislative functionality in the past and present.

The work thus concludes with a relatively brief but targeted investigation of the contemporary 115th Congress, in the light of the investigation undertaken in this project. While not precisely on the low-level of the antebellum Congress, it is possible to rather precisely target the institutional failures of Congress, especially those related to the attempt to repeal the ACA. While the contemporary Congress as a body contains a substantial repository of information regarding the diverse political and economic interests of the nation, its internal processes consistently fail to utilize this resource. Such

norms and processes have led the Congress to a harrowingly close approach to democratic debacle. In attempting to repeal a divisive, although narrowly popular law, that institution was poised on the precipice of replacing that law, the ACA, with a vastly more unpopular policy, the AHCA. Besides the fundamental unresponsiveness of this maneuver, the replacement was evaluated by the Congress's own scorekeepers as a potential disaster in the making. Only the action of a very small number of Republican Senators were able stop the body form inflicting grievous wounds upon itself (and perhaps the nation). The silver-lining emerging from that near-miss is fleeting institutional self-consciousness: several of the Senators seemed surprisingly self-aware in identifying the source of dysfunction. It was not partisanship, or ideology, that those such as Senator McCain pointed to as the cause for the Congresses difficulties, but rather an intentional turn away from "regular order." In short, even some in the current stressed institution of Congress recognize that norms, rules, and structures are pivotal in getting the body back on its right footing. An account of congressional health, of what the Congress *should* look like, is thus both a needful and a timely thing.

Chapter One: Scholarly Analysis of "The Broken Branch"

State of the art work on Congress speaks to the concept of congressional health even if it does not do so explicitly. Indeed, the literature is full of sophisticated and important investigations of congressional performance and governance. The majority of such works focus their criticism on particular aspects or elements of the contemporary institution of Congress. Writing about these alleged failures, scholars have articulated what I will label throughout this chapter "the dimensions of congressional failure." These include the demise of the regular order, a lack of civil discourse on the floor, abdication of constitutional responsibilities, and failures of deliberation. While scholars differ as to how explicitly they articulate the standard that they use to judge Congress, one can nonetheless abstract positive attributes of a "Good Congress" from these critiques. Indeed, at least implicitly, any critique presupposes a certain ideal against which to contrast the current suboptimal institution.

Critiques and evaluations of congressional performance are not the only place where one can find helpful reflection on the institutional health of Congress. Other scholars, while investigating the quality of modern governance and the policy process, illustrate key presumptions in the field regarding congressional health. These presumptions emerge even in works that are not straightforwardly normative investigations. The normative implications of ostensibly "value-neutral" work arise on account of the need to ground empirical investigations on certain baseline assumptions. Setting up such assumptions is necessary to the practice of contemporary empirical political science. This practice means that even purely empirical studies call upon certain

ends of politics – the aims, goals and normative content of political behavior - even when they fail to examine or even state those ends.

Examination of two such threads of contemporary political scientific research reveals that the field trades on key assumptions about congressional functionality. The first debate I examine concerns whether or not gridlock is a major problem in the contemporary, polarized Congress. This debate, carried out at a high level of sophistication by Mayhew (1991/2005, 2009, 2011) and Binder (2003, 2015) reveals a shared assumption regarding congressional functionality: scholars believe that productivity is an essential element of congressional health. In other words, a Congress that can and does produce "landmark legislation" is a "good Congress." The second debate I investigate regards the legitimacy, constitutionality and expedience of the filibuster. Schickler and Wawro (2006) have sparred with Binder and Smith (1997) over the degree to which the filibuster procedures are protected and entrenched by "path dependence" and how much the filibuster has affected the policy process. It is apparent, regardless of their final answer to these questions, that these interlocutors believe that Congress must, at minimum, allow a determined and cohesive majority to have its way and to manifest its will in the lawmaking to process. Combining the insights emerging from the evaluative and descriptive work of scholars yields a set of standards: *a healthy Congress is a constitutionally-assertive, productive and majoritarian legislature, supported by institutional loyalty, and legitimated by transparent, responsible deliberation on policy.*

While there is nothing irrational or inexplicable about the findings and assumptions that I outline above, they present an incomplete product when it comes to developing a *systematic and comprehensive* account of congressional health. Certainly, the individual findings of many of the scholars surveyed here are unquestionable; for example, it is simply true that an institution paralyzed or dominated by a faction unresponsive to reasoned debate is unhealthy. Nevertheless, I conclude this chapter arguing that the ideal presupposed by contemporary critiques of Congress, together with the assumptions of the foremost practitioners in the field, are not sufficient for generating a comprehensive and systematic conception of congressional health that is informed by *the logic of constitutional design*. The meaning of this phrase will be unpacked "negatively" in this chapter. That is, I will demonstrate that these assumptions and presumptions are not tied to a defensible account of constitutional purposes and aims of the legislative branch. Only in the next chapter will this concept see a positive definition and explanation: an articulation of how one generates standards of institutional health by examining the text of the Constitution and other authoritative texts, such as the governing documents of the pre-Constitutional regime, namely the Articles of Confederation.

THE DIMENSIONS OF CONGRESSIONAL FAILURE

Most of the works evaluating the contemporary Congress are devoted to critiquing specific elements or characteristics of the institution. Surveying this swath of the Congress literature reveals myriad "dimensions of failure:" aspects of the institution that have fallen under heavy scholarly critique. Examination of these varied critiques of

the present Congress can be divided into three broad categories: procedures, norms, and inter-branch relations.

Congress has been heavily criticized in recent years for its abandonment of certain rules and procedures that were previously taken as settled rules of the game. Mann and Ornstein (2006, 2012) argue that the demise of regular order – the rules of the so-called "textbook Congress" that call for a bill to be reported to a committee, marked up, etc. – has had the effect of allowing the majority to steam-roll the minority party, particularly in the House of Representatives. The end of the regular order, they argue, leads to a lack of representation of minority views and concerns in final versions of legislation. According to Mann and Ornstein the procedures previously allowed a bill to be marked up in relatively consensual fashion with frequent bargaining between the two parties. The current process does not approximate the previous one at all, as bills are hastily assembled into unwieldy omnibus legislation that is placed on the floor under closed rules.

Furthermore, in a manner that greatly complicates the "School-House Rock" version of lawmaking, particularly in the House, bills are now subject to ad hoc specialized rules (Oleszek 2011, Sinclair 2012). Bills frequently come onto the House floor under a closed rule – i.e. without the possibility of amendment. Open rules, where Members have an opportunity to propose amendments to a given bill, have thus become rarer, sometimes vanishingly so. From 1989 through 2008, only 32 percent of rules were open. "During the 111th Congress [2009-2011], no legislation was brought to the floor under a simple open rule" (Sinclair 2012, 28). The dominance of the Rules Committee

by the majority party has led to even more peculiar features, such as the emergence of special rules. One such example is a special rule that, when passed, automatically amends the underlying substantive bill under consideration, with no vote on the substantive matter required.

> Because a self-executing provision in the rule allows language to be incorporated into legislation without a vote, it can be used to pass matters that members would be leery of voting for openly. Without a recorded vote, the visibility of the issue is decreased and responsibility for it is obscured. In 2004, $12.8 billion in new tax breaks for business were quietly incorporated into the transportation bill through a self-executing rule (Sinclair 2012, 35-6).

Legislation responsiveness to majority preferences can certainly be imperiled in an environment where substantive votes can be transformed into procedural votes – votes which MCs seldom need to explain due to their low salience.

According to critics, Congress's processes are also imperiled by its "Tuesday-Thursday Club," was a term once used derisively to describe a group of MCs who skipped out on important Monday and Friday business to attend to matters in their district (see Nokken and Sala 2002). Observers of Congress note that scheduling House business around this growing custom unduly shortens the amount of time and attention that it can give to serious national concerns and problem solving (Mann and Ornstein 2006, Taylor 2012). Critics further allege that the Congress, to give extra time to constituency service and fundraising, has in fact altered its time in session to make the "Tuesday-Thursday

Club" a norm of congressional scheduling rather than a violation. One piece of solid quantitative evidence to back up this allegation is that the present Congress spends roughly one hundred days less in session than the Congress of thirty years ago (Taylor 2012, 184). A Congress with a higher workload, spending fewer days in session is not a recipe for success, according to the institution's detractors.

Institutional rules and procedures are not the only target of contemporary blame. Scholars argue that the Congress's policy making process must be capable of preference aggregation in a civil fashion. Norms, they argue, are as important as formal rules. While partisan rancor certainly cuts against the norm of civil debate, scholars do not see partisanship as inherently pernicious. They do, however, argue that it must be a partisanship amenable, in the end, to compromise for the sake of partisan principles (Muirhead 2014).[9] Partisanship which is closed to the possibility of compromise is not partisanship, in this account, but rather zealotry (Muirhead 2014, 49-51).

While not all scholars go so far as Muirhead as labeling extreme partisanship zealotry, many scholars contend that the norms of comity and mutual accommodation have broken down in the contemporary Congress (Sinclair 2014, Theriault 2013). Such behavior has risen to such heights that it has received a new designation: "partisan warfare." It is not unusual to see senators – who might be supposed to be the nation's

[9] Muirhead suggests that extremists will brook no compromise of their sacred principles. He suggests that partisans will compromise, especially so that their principles will at least partially upheld. This approach could be questioned; if the underlying principles are extreme, such as those of white supremacists, for instance, does being willing to compromise to achieve only some preference for whites really consist of healthy moderation.

elder statesmen – openly questioning each other's motives, patriotism, and integrity, not merely in a political campaign, but right on the Senate floor (Theriault 2013). While overheated rhetoric is thought to be almost a natural outgrowth of the House's size and close connection to the moral and political passions roiling the broader society, the appearance of such a phenomenon in the Senate is more troubling. Indeed, this change is reputed to be a deep and lasting departure from the norms that characterized that "august" body in both the nineteenth century (Tocqueville 1840/2004) and in the mid twentieth century (Matthews 1959).[10] Since the binding power of norms is certainly enhanced by their adherence, the violation of the norm of courtesy is likely to lead to further violations of other salutary norms, such as apprenticeship, specialization, and reciprocity (Matthews 1959).

Moreover, the growing incidence of partisan warfare is said to threaten the ability of the Senate to reach the bargains and compromises necessary to solve the nation's problems. It may even impair the ability of the government to merely "keep the lights on." In the latter years of the Obama Administration it was frequently necessary for the Senate to come to the nation's "rescue" by preventing conflict between a liberal president and a conservative House from spiraling out of control. The influx of more "partisan warriors" to the Senate could endanger the formation of future working groups of

[10] "When you enter the chamber of the House of Representatives in Washington, you are struck by the vulgar appearance of that august assembly… In a country where education is almost universal, it is said that not all of the people's representatives are capable of writing correctly… A short distance away is the chamber of the Senate, whose narrow confines contain a substantial proportion of America's famous men. Scarcely a man is to be seen there who has not distinguished himself by some recent achievement… Every word uttered in this assembly would do honor to Europe's greatest parliamentary debates" (Tocqueville 1840/2004, 229).

senators to achieve compromise in these polarized times. The partisan wrangling and harsh invective made common by these "partisan warriors" is unlikely to change in the immediate future and is likely to grow worse. The very competitiveness of recent elections exacerbates the fundamental cause of partisan warfare (Lee 2009). In short, critics say, comity is dead in Congress and unlikely to return, at least in the short term.

The last category of Congressional critique concerns relations between the Congress and the other branches of the government. This literature could be summarized under an accusation: the contemporary Congress suffers from a deficit of institutional strength. Criticism in this arena has centered on something scholars call "abdication." It has been argued that the modern (post-war) Congress has abdicated a number of its constitutional responsibilities to the executive (Fisher 2000). This abdication is said to occur in at least two primary areas; foreign policy and appropriations. Constitutionally, the war powers of the United States represent shared property of both the Congress and the president. For instance, the document confers the right to declare war to Congress but locates the powers of commander-in-chief in the presidency. Furthermore, the Constitution does not fix absolute barriers or provide commentary on how these powers are to be shared, provoking contestation between the branches (Zeisberg 2013). Yet, in recent memory the Congress has seemed very hesitant to even contest for a fraction of its theoretical power to mold foreign policy. Even the War Powers Act, which was designed to fortify Congress in this regard, has not led to a more assertive Congress. Instead, Congress has allowed the President to sidestep and even violate the terms of this act numerous times since it was placed on the statute book in the 1970s (Fisher 2000, Tulis

2009). As of 2018, the conflict against ISIS is still being waged under the authority provided by the authorizations for the 2001 and 2003 conflicts in Afghanistan and Iraq. Even though President Obama explicitly asked the Congress to authorize the conflict in a prime-time address from the Oval office (Nakamura 2015), the Congress has yet to engage in even the most preliminary steps to undertake such an authorization.

In terms of the spending power matters are somewhat more complex. The last half-century has seen the Congress cede tremendous amounts of budgetary power to the president (through powers of impoundment and even the short-lived line-item veto) (Fisher 2000). It should be noted that in some cases the Congress may have been purposefully and strategically ceding power in order to overcome its own institutional weaknesses, a less obviously pernicious act than outright abdication (Farrier 2004). If Congress recognizes a weakness or pathology in its operation and then utilizes a delegation of authority to counteract this weakness, in so doing Congress is arguably enhancing its institutional health rather than degrading it. A prominent example of such an activity was the formation of base-closing commissions after the end of the Cold War. In this case the Congress recognized a pathology in its operation; although a majority favored a drawdown in military spending, individual MCs could not afford the political costs of voting to close any base in their district. Congress overcame this pathology by establishing a commission, whose recommendations could not be amended, only voted up or down after debate.

In any case, Congress has nevertheless seemed all too often turn to the president and other extra-legislative bodies such as bipartisan commissions and the like to resolve

budget problems (Farrier 2004). While on their face these expedients seem similar to the base-closing commission, they have proved pernicious in practice, likely because they have been structured in such a way as to evade votes, rather than to force the Congress to take a "tough vote." For example, President Obama and the Congress were at loggerheads over the issue of entitlement reform from the 2010 Midterm elections all the way through the end of his presidency. Although numerous commissions and ad hoc committees have addressed the issue, very little substantively has occurred to indicate that the Congress has taken ownership of the budget. The Congress has, in fact, failed to pass all twelve of its regular appropriations bills on time each year since 1997, instead turning to the expedient of continuing resolutions and other stopgap measures to handle recurring budgetary crises (Tollestrup 2014, 15). Congress cannot effectively protect its institutional powers in inter-branch relations if it cannot effectively manage its own internal concerns.

Besides abdication of its own responsibilities, the weakening of the legislative branch vis-à-vis the other two "equal and coordinate" branches has been manifest in separation of powers disputes. It has been argued that the contemporary Congress is floundering about in a weakened institutional state compared to both the executive and the court. Moreover, it refuses to utilize its means of constitutional self-defense. Calling this either a lack of constitutional self-assertion (Chafetz 2012) or institutional decay (Tulis 2009), scholars have noted that the Congress has a host of powers that it could use to exercise oversight over the executive, but that it chooses not to do so. Chafetz and Tulis both point to the fact that Congress can compel attendance at oversight hearings by

finding an absent witness in contempt of Congress. The Congress need not be reliant on the ordinary judicial system to achieve its legitimate constitutional ends. Indeed, the Capitol has its own on-site jail that could be used to hold any who chose not to testify to Congress; they are not at liberty to leave until they testify. This penalty can either be "for a specified period… or an indefinite period (but not, at least by the House, beyond the end of a session of the Congress) until [the person] agrees to comply" (Garvey and Dolan 2014, 11). The Congress, however, admits its own impotence when it tries to have the federal court system exercise its contempt findings (Chafetz 2012). For instance, the Republican-led Congress resorted to suing President Obama during the latter part of his time in office. Rather than focusing on passing bills, conducting hearings, or investigating Obama Administration executive officials, it instead chose to sue the Obama administration in Federal Court to achieve its policy goals. This admits, indirectly but clearly, that the Congress is unable to hold the Presidency to account without the help of the judicial branch.

Norms and procedures can have compounding effects on one another; one "compound" dimension of failure is that of deliberation. Whether deliberation is defined as "reasoning together about the nature of a problem and solutions to it," (Smith 1989, 238-9) "a process of collective policy making in which legislators work through alternatives in a … rational manner," (Taylor 2012, 30) or "meaningful floor debate… [and] committee markup" (Mann and Ornstein 2006, 169-70) nearly all agree that it is an essential element of a high-quality policy process. Many argue that the Senate in particular, which was to be a mature and deliberative body – the saucer in which to pour

the overheated ideas, policies and rhetoric coming out of the People's House – has seen a remarkable change in norms so that its floor now resembles that of the House of Representatives (Loomis 2011, Wallner 2012). Indeed, despite the high level of scholarly attention placed on deliberation it appears that a similar high regard to the art of deliberation is not shared by MCs. Deliberation in Congress appears to be far less important and central to the tasks of legislators than was the case in even the near past (Bessette 1994, Mann and Ornstein 2006). Examining this common impression, Taylor (2012) finds that the quality of deliberation has sharply declined over time, where quality is operationalized as the extent to which MCs interact and reason with each other concerning the common good.[11] Rather than engaging in arguments with their colleagues, MCs deliver self-contained speeches which do not even feign an interest in what was said by the previous speaker. Many of the "speeches" delivered to the Congress, are in fact not speeches at all, but instead statements read to C-SPAN cameras, while the chamber is entirely empty.

As aforementioned, the folkways of the Senate (Matthews 1959) were said to encourage reciprocity, courtesy, and specialization amongst the members of this august body. While these norms had many purposes, one was to manage deliberation in a body

[11] Taylor finds simultaneously that that the modern era has seen "greater aggregate quantity, participation, and equality" of deliberation (2012, 178). He thus argues that this combination of results qualifies as mixed and fails to support the thesis that deliberation has worsened over time. I do not find Taylor's conclusion convincing. A greater quantity of lower quality deliberation is a decisively worse result than a lower quantity of high quality deliberation. I would also argue that this state of affairs is likely worse than a low quantity of low quality deliberation, as that would at least indicate that MCs have prioritized a different aspect of their congressional responsibilities. To the contrary, the contemporary reality is that MCs are giving more time and energy to decidedly poor attempts at deliberation, wasting their time and thereby coarsening the political culture in the process.

where unlimited debate was allowed. Anecdotally, it appears that these norms are operative no longer. In the absence of these norms pure partisan politicking takes the place of even the pretense of deliberation. While this may seem extreme, recent years have seen partisan teams join together in such embarrassing escapades such as the recent "letter to Tehran." The Iran episode saw a majority of the majority party of the Senate (but still a minority overall) attempt to circumvent executive negotiations with Iran on the issue of nuclear proliferation. Combining a decided lack of cool deliberation with a profound lack of self-assertion, the forty or so signatories admitted their inability to do anything about the proposed agreement with Iran until after the next election (Baker 2015). The Senate could have used its leverage as a deliberative constitutionally-empowered body to insist on its rights; they could have argued that the executive agreement being made with Iran was so significant that it ought to be made into a treaty and brought before the Senate for ratification. Of course, the right addressee for these arguments resided in the Oval Office, not halfway across the world in Iran. Instead, the Senate apprised a major international rival (and perhaps future enemy) of the United Sates of a remarkable fact: they are thoroughly unable to exercise the constitutional mandate given to them by the treaty power in the United States Constitution.

THE CONGRESSIONAL IDEAL

Taking a bird's eye view of the foregoing, one can identify the implicit or explicit standards that scholars use to evaluate and criticize the contemporary institution of Congress. Given that every critique supposes the existence of some preferable alternative

arrangement, this should not be an unreasonable claim. In addition, the claim that Congress has "decayed," or that norms have "broken down" implies rather clearly historical or precedential models of the ideal, making the process of abstraction considerably easier. In sum, I argue that the ideal Congress emerging from these critiques is that of a *constitutionally-assertive legislature, supported by institutional loyalty, and legitimated by transparent, responsible deliberation on policy*.[12] While the idea (or ideal) of deliberation is a constituent part of a wider and elaborated-upon notion of deliberative democracy, the other attributes are not as often given as explicit treatment. For this reason, I will turn to these features first and illustrate the *implicit* importance of the attributes of institutional loyalty and transparency as standards or ideals of Congressional behavior. Only after illustrating their significance will I turn to what is by far the most explicitly remarked upon attribute of an ideally functioning legislature: deliberation.

Constitutional self-assertion, which I define as a norm that encourages MCs to see themselves first and foremost as members either of the "the People's House" or the "Most Powerful Senate in the World," seems to be an *implicit* attribute of congressional health in most criticisms of Congress. Scholars rightly and importantly acknowledge another form of loyalty – partisan loyalty – as incredibly significant in shaping the current institution. Parties in Congress emerged almost immediately after the ratification of the Constitution and have persisted throughout subsequent American political

[12] The statement here refers only to standards extracted from the normative or evaluative critiques examined thus far in the chapter. This ideal thus differs from the statement on page 15; in a subsequent section the rationale for adding *majoritarianism* and *productivity* will be described.

development (Aldrich 2011). Partisan loyalty (although its existence as separable from shared political preferences is subject to some controversy – cf. Krehbiel 1993) shapes member behavior and can even cause a member to vote entirely opposite of what his or her political self-interest would dictate. For example, in 1993, President Clinton, who was desperate to pass his budget, pressured Rep. Marjorie Margolies-Mezvinsky (D-PA) to change her vote from no to yes. Even though she represented a Republican leaning district and had previously promised to oppose the budget due to its tax increases, partisan loyalty (among other factors) led her to change her position. She supported the bill even though the vote virtually ended her legislative career (Hinds 1993).[13] Furthermore, partisan loyalty can even be praised as a norm that ties together MCs and unites them in achieving goals with a time horizon longer than just the next election (Muirhead 2014).

Constitutional self-assertion, a "pride of place" possessed by legislators, is less often discussed that partisan loyalty, but appear to implicit hold that it is necessary to surmount some of the key dilemmas posed by the very institution of Congress and the pathologies posed by partisan loyalty. The types of activities that can maintain the institutional health of Congress often cut against personal self-interest and the incentive posed by partisan team play. Canon and Mayer (1999) argue that the Congress is characterized by two collective dilemmas, which they term the institutional dilemma and the policy dilemma. Both dilemmas refer to the fact that "rational" (i.e. self-regarding)

[13] Margoles-Mezvinsky's vote was so clearly against her political interests that Republicans derisively jeered her as she made her way no to the floor, with chants of "Goodbye, Marjorie!" (Hinds 1993, 30).

actors often lack the incentives to carry out the difficult work needed to make Congress function well. In the institutional dilemma Members of Congress are given incentives to prioritize their own individual election prospects at the cost of the institution of Congress. The primary behavioral manifestation of this dilemma is "running for Congress by running against Congress" (Fenno 1978, Mayer and Canon 1999). Members of Congress wage their reelection campaigns on the premise that they are far superior to the other legislators of Congress. They thus present their continued services as necessary to fight the corruption and incompetence overwhelming the *institution as a whole*. All incumbents successfully utilizing such a means secure reelection at the price of downgrading their own institution. The second dilemma, the policy dilemma, concerns the incentive that operates, particularly in distributive policy making, to push rationally calculating legislators to enrich their constituents at the cost of the national interest. While members are responsible for enacting polices to advance the general welfare, their reelection incentives encourage them to take a narrow view of such responsibilities and a more favorable view to the special interests of their constituents.

The dilemmas posed by Canon and Mayer and not the only ones caused by conflicts of interest within the Congress. With respect to partisan interests it is often said (see Mann and Ornstein 2006, 2012) that Congress is much less energetic in its constitutional role of oversight and investigation of the Executive Branch when the same party holds both Capitol Hill and the White House. For this to be a valid criticism of Congress, scholars such as Mann and Ornstein must suppose that it is possible for norms

to restrain such pathologies and to offer countervailing incentives to resist personal or partisan reasons for shirking the duties of a Congressperson.

The most plausible norm one could utilize in theory to combat the growing indifference shown by MCs toward their constitutional and institutional responsibilities is loyalty to their respective chamber of Congress. In this way constitutional assertiveness and institutional loyalty are alloyed. The easiest way to construct such a norm is through the example of an MC whose notions of institutional loyalty seemed rather eccentric: the late Senator Robert Byrd (D-WV). In many respects Byrd is the caricature or epitome of institutional loyalty, both in terms of genuine devotion to the good of his institution and in terms of the manner in which self-interest can be allied with the power of norms (Tulis 2009). He carried a copy of the Constitution in his pocket at all times and was wont to quote directly from it if he felt the situation merited it. Byrd's knowledge of Senate rules was tied intimately with the sense that the Senate needed certain norms to ensure its smooth functioning in a body where each of the hundred members could halt the proceedings at any time (cf. Mathews 1959). Byrd's knowledge of the rules undoubtedly redounded to his political benefit on many occasions, but one should not shy away from noting the importance of the norm of institutional loyalty in shaping and legitimating such institutional maintenance work, which otherwise would have little incentive operating in its favor. One need not even inquire into a biographical investigation of Byrd's life to determine if loyalty or personal benefit was the primary motivating factor in his personal calculation – the fact is that he was led to take actions that would not be expected by calculations of political expedience alone.

The extant literature also suggests that an ideal Congress would be transparent in its lawmaking and deliberations (Taylor 2013, Waldron 2009b). While this is an explicit aspect of many conceptions of legislative functionality, what is less often elaborated is the manner in which the current Congress, which is televised nearly twenty-four hours a day on C-SPAN, could be said to be worthy of critique on this ground. Surely, the contemporary legislative institutions are much more transparent than those of the past, as even committee hearings are televised by C-SPAN, and even the contents of closed sessions frequently become public knowledge. This degree of public visibility is only heightened by its contrast with the past. When one compares present Senate recordkeeping and publicity with the norms and procedures of the Senate in the Early Republic, which kept closed sessions between 1789 and 1794 (Swift 1996, 58), it is odd that anyone could criticize the present institution on this ground.

Connecting what is implicit in critiques of current policymaking with this frequently articulated standard of transparency allows one to see the rather clear damage done by the breakdown of regular order, even in a time of high media access to Congress. Scholars (Mann and Ornstein 2006, Sinclair 2014) bemoan the deviation from the regular order not only because ad hoc procedures can reduce the quality and efficaciousness of policy proposals, but also because they attack what has become a very tenuous electoral connection (see Gilens and Page 2014) between the wishes of constituents and their representatives. Special rules, omnibus measures, and governing by crisis may allow MCs to evade responsibility for bills and make the process of electoral accountability more difficult even for relatively well-informed voters.

To explain how this could be the case, consider the example of governing by crisis. Rather than working through the ordinary budget process the contemporary Congress has often had recourse to continuing resolutions to fund the government. These expedient measures generally pass through both chambers of Congress primarily because MCs would rather avoid the prospects of a government shutdown. The Congress has utilized the deadline for funding the government (generally the start of new fiscal year on September 30th) and the crisis that missing such a deadline would provoke to shepherd through continuing resolutions for most of the last ten years (Tollestrup 2014). The use of deadlines to motivate MCs to do unpleasant things (like raise the debt-ceiling and appropriate money for institutions they would rather not fund like Planned Parenthood) is not inherently problematic, but the posturing and politicking that occurs around these manufactured crises can potentially complicate accountability and transparently greatly.

Governing by crisis cuts against the standard of transparency because the manufactured crisis offers plenty of opportunities for MCs to equivocate, even more than is usual or necessary for politicians who must compromise to govern. Governing by crisis allows MCs an opportunity to "stand on principle," or in the parlance of political science, "advertise and credit claim," (Mayhew 1987) and take votes against an increase in the national debt or for a cut in national spending, all the while knowing that they will vote for a continuing resolution in a few weeks which will do the exact opposite. Indeed, these later votes will occur under conditions where they can shift blame to other individuals for being "forced" to vote yes. Sometimes MCs may go further than this, in a strategy known as "vote no, but hope yes." This stratagem sees MCs vote against their

sincere preferences: when the final compromise comes up for vote the MC votes against it, hoping that enough of their more moderate colleagues will vote for the bill and pass it.

Besides the other problems inherent in brinksmanship,[14] this type of behavior makes electoral responsibility more difficult. Strategic MCs can use governing by crisis to claim both the bona fides of a prudent politician who knows when to compromise and that of a principled leader who refuses to compromise one's principles. Since the action of voting on principle can be made more salient through media coverage and directed messaging to the MC's constituents and the final vote on passage to avoid a shutdown will be much more likely to be covered in the media as a showdown between the Presidency and the Congress, the final vote is likely to be much less salient in the mind of voters. Such manipulation is certainly a violation of norms of transparency, even if everything happens in plain sight and with high levels of press and popular access to the voting records to MCs.

Regardless of the nature of what ideal transparency would consist of, critics would argue that manipulations such as these must be ended. In the service of increasing transparency, Mayhew (2006, 233-4) has suggested the creation of a media outlet that condenses the week's C-SPAN activities into a digestible and entertaining 30-minute block. He argues that this would go far in aiding the public's ability to hold their MCs responsible and tightening a fraying electoral connection. Irrespective of the way

[14] One obvious problem that 'playing chicken' is a dangerous game; sometimes the other side does not blink. Government shutdowns have therefore occurred during three of the last four presidencies; incredibly the last one occurred in the Trump administration even though Republicans have unified control of Washington.

forward, it is relatively clear that Congress scholars and critics see transparency as an essential component of an ideally functioning legislature.

While inference is necessary to establish the importance of institutional loyalty to most critics' concepts of the ideal functioning of Congress, deliberation (or the lack thereof in the contemporary Congress) is an explicit feature of most critiques of the institution (cf. Mann and Ornstein 2006, 2012, Sinclair 2014). A positive image or ideal of deliberation need not be developed from these critiques, however, as the field already contains several examples of efforts to enshrine deliberation as a key element of ideal legislative functioning. Generally, it appears that there are three levels on which an ideal Congress would be deliberative. The three levels can be arranged from highest to lowest – both in terms of the normative and political significance of the topic up for debate and the danger of conflict. This yields three visions of deliberation: (1) high deliberation over principles (or values);[15] (2) political deliberation over interests; and (3) practical deliberation over efficaciousness.

While some theorists of democracy and liberalism see a settled sense of what justice entails as a precondition for the establishment of a political regime (cf. Rawls 1971/1999), such a settled definition or conception of justice does not seem in evidence in contemporary debates over issues such as same-sex marriage, abortion and health care. Rather than being dismayed at such a consideration, it is possible to argue that such a

[15] Values, in this sense, can be taken to mean the fundamental ends of politics, as distinguished from technocratic disputes over techniques of governing, or the horse-trading and bargaining of interest-based politics.

conflict over fundamental values provides an opportunity for the democratic articulation of arguments for and against accepting certain values as authoritative for the society (Waldron 1999). In the highest ideal of deliberation, a legislature, as a representative body literally embodying the various sides and perspectives on a given controversy, is arguably the best venue for the articulation of the "authoritative allocation of values" (cf. Easton 1965). To be more concrete, one could image the debates occasioned by the issue of slavery in the mid-nineteenth century as an attempt by the Congress to settle questions of *principles*, in this case questions of justice. That attempt at settlement failed. Indeed, it was perhaps doomed to failure by the lack of representation of the most interested "party" to the dispute in the Congress. Nevertheless, the act of deliberation itself, as weighing and debating the relative value of union, compromise, and justice for the enslaved, remains as the instantiation of the theoretical concept.

This ideal of deliberation is rather exalted and difficult to reach; moreover, it is perhaps good that the Congress need not always be grappling with issues as morally fraught as that of slavery.[16] Indeed, the issue of majority tyranny can hardly be addressed at all by allowing a legislative body to set the authoritative values of society without limitation. In the American context this must be the fundamental reason for the existence of the written constitution and review of legislation by an independent Judiciary.[17]

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[16] After all, it could very well the case that polities are most solid when there is frequent recursion to values or principles which are shared, rather than to those which divide us.

[17] But see Waldron (2009a) for the argument that legislators are likely better moral reasoners than judges and, notwithstanding the problem of the tyranny of the majority, should be given the power to settle such disputes.

A more restrained version of the deliberative ideal can be marshaled based on alternative institutional grounds. It can be argued that the attributes of legislatures qua institutions make them uniquely qualified to carry out deliberation over *interests*. That is, an ideal legislature should devote itself to deliberation over interests because this role is better suited to being carried out by the legislature than by an executive officer alone or by members of the bureaucracy (Waldron 1999, 2009b). A legislature is, almost by definition, made up of a relatively large number of members who represent diverse constituencies throughout the nation. These legislators are moored to the permanent interests of their constituents: as such they are uniquely qualified to speak to the way that a given law will affect those interests. One function for Congress to play is thus deliberating over interests: to attempt to advance the "permanent and aggregate interests" of the nation (Hamilton et al 1787/1960). Suffice it to say, it is extremely difficult to determine what the aggregate interests of a large and diverse nation are on a subject such as taxation or trade policy. Suppose a given trade policy, like the hotly debated Trans-Pacific Partnership (TPP), would have been likely to benefit the nation as a whole while negatively impacting selected geographic or economic sectors. The mid-level deliberative ideal suggests that a well-functioning Congress would take these various interests into account and develop a comprehensive policy that offsets losses to those interests. If it chooses not to do so a deliberative legislature would have *reasons* to explain why those interests were not sufficiently important to warrant support.

Finally, a deliberative Congress would address itself, both on the floor and in committee, to reasoning together over the merits of public policy (Bessette 1994). This

type of deliberation is not devoted to debating the fundamental values of society and need not even seek to arbitrate between different interests, but instead serves a crucial function in addressing questions of *efficacy* and *expedience*. An ineffective, poorly-drafted, duplicative, or poorly-thought-out bill is unlikely to solve the problem it was meant to address. After reaching a settlement on which interests will be affected by a bill, under this standard it is not good enough for MCs to simply bargain, horse-trade, and logroll to get the votes for final passage. Bargaining activities could be even part of deliberation, especially in the example of a trade deal as discussed above. The key is that deliberation must focus on investigating the likely intended and unintended effects of a given bill, and must be carried out by the MCs themselves, not delegated to either the bureaucracy or the President.[18] MCs also ought to debate the alternative means available to meet a given aim or purpose and reason together about which means are both "necessary and proper" to achieve that end.

One final aspect of the deliberative ideal is that there must be *reasons* provided for and against a given bill. This is true for even horse-trading and bargaining. If the MCs do not specify why a specific state, interest, district ought to be preferred to another, or why splitting the difference between two budgetary amounts could lead to good

[18] An example where this ideal was not met, was in the passage (and veto-override) of a 2016 enactment allowing victims of the September 11th Attacks the right to sue Saudi Arabia. Regardless of the merits of the issue, it falls far below the standard for senators to deliberate over unintended consequences of a law after it passed. The veto-override passed the Senate with only one "nay" vote. Nevertheless, "Within hours of their vote, nearly 30 senators signed a letter expressing some reservations about the potential consequence of the law, including the prospect that the United States could face lawsuits in foreign courts 'as a result of important military or intelligence activities'" (Steinhauer et al 2016). Such concerns should obviously be expressed as part of the deliberation over a bill, not after passage.

outcomes, then the Congress has failed to meet this ideal. It bears noting that it is an open question whether these reasons must be provided in public. Bessette (1994) holds that excessive transparency can get in the way of deliberation and that reforms to increase the transparency of Congress have led to greater grandstanding and less deliberation on the merits. On the contrary, Waldron (2009b) holds that it is essential that all these levels of deliberation occur in an environment of relative publicity. From Waldron's admittedly reasonable point of view, resolving questions related to the fundamental values of society in a closed-door meeting would be less than ideal. It remains unclear whether occasional executive sessions, or deliberations carried out by Congressional leaders and the President, on matters of interest or of mere means would be subject to the same critique.

THE POLICY PROCESS: ASSUMPTIONS OF CONGRESSIONAL FUNCTIONALITY

Examining contemporary critiques of Congress is not the only way to determine what the field takes to be congressional health or functionality; one can also examine empirical studies more generally. Such an examination reveals that even practitioners with different interpretations of the institution of Congress share certain presuppositions or assumptions regarding what a functional Congress entails. While scholars differ sharply over the issue of gridlock and its causes, the key figures in the debate regarding gridlock nonetheless agree that productivity is an important aspect of a functional modern legislature. In addition, despite significant disagreement over the causes and effects of the filibuster, the field seems to possess certain shared assumptions about the nature of

majority rule in the Congress; that is, the field seems to share an agreement that a determined majority must be able to work its will in the legislative process.

Turning to the issue of productivity, a major and counterintuitive finding has spawned a research agenda exploring the issue of gridlock. Journalistic accounts of gridlock starting in the 1990s emphasized the degree to which Congress was paralyzed by partisan conflict and was simply unable to address policy areas covering a wide swath of its agenda. While "the eye-ball" test seemed to bear out the accuracy of this claim, initial quantitative analysis did not. Examining both ordinary enactments and so-called landmark legislation, relatively rudimentary statistical work showed that there was no statistically significant difference in the rate of legislative productivity between unified and divided control of government (Mayhew 1991/2005). While there were some mixed and inconclusive findings regarding what might explain such an unexpected result, the main finding was relatively clear: the level of productivity in Congress seemed relatively constant.

As such claims clashed with the scholarly and popular perceptions of the pervasiveness of gridlock (Krehbiel 1998), it was not long before a debate emerged, claiming that the previous research had not fully answered the question. For the most part the empirical debate comes down to a question of numerators and denominators. Whereas Mayhew simply counted the number of enactments, scholars critical of this methodology suggested that the size of the agenda is an important factor in deciding whether the productivity of Congress has declined. Binder (2003) argues that if the size of the agenda (as measured by the total number of issues and highly salient issues

mentioned in national papers of record) increases but number of enactments stays the same, that the productivity of Congress must be said be *decreasing*, as the ratio of addressed issues to unaddressed ones has declined. Taking this measure of productivity to be the correct one, Binder (2003, 20115) finds that the Congress has become less productive in recent years as the size of the agenda has expanded tremendously with very little increase in the number of agenda issues addressed per legislative session.

Arbitrating between these two sides of the debate is not part of the project undertaken here; what is important in this context is that the debate itself takes place based on a shared assumption about the nature of congressional functionality. Mayhew, who often casts himself as a defender of Congress, and Binder, who is more critical, nonetheless agree that a Congress should be productive and that a lack of productivity would be a sign of *dysfunction*. Binder is relatively straightforward. She claims that despite the multiple veto points constraining legislative action, that productivity is a key requirement for a functional cotemporary Congress and is in no way foreclosed by the institutional design of Congress (Binder 2003, 32-33).

Mayhew, while explicitly denying that his account is normative, nevertheless makes similar assumptions about Congress and indeed must make them if his argument is to remain consistent. This is so on account of his decision to address, within the body of his conclusion, several normative claims. Even though he found that divided government was not responsible for gridlock, he considers several alternative arguments for why divided government might matter nonetheless. One such normative argument holds that that the non-rich would benefit more from unified Democratic government than from any

other alternative. This is because the Democratic platform is addressed, at least in part, to ameliorating the condition of previously or currently disadvantaged racial, ethnic and SES groups. Mayhew finds that the Great Society-level productivity is not the only way to expand the safety net for these groups. Mayhew sees the "constancy" in productivity as benefiting these groups, even in times of divided government with philosophically opposed presidents. He cites the expansion of Pell Grants, changes to Social Security, and other reforms during the Nixon and Ford Administrations as evidence of this fact. In spite of divided government and Republican control of the White House, "the laws just kept getting passed" (Mayhew 1991, 197). Regardless of his earlier claims, one cannot refute a normative argument without making at least an implicit normative claim of one's own. While Mayhew makes no explicit normative claims, arguments such as these suggest that the status quo (by his lights, relatively constant productivity) is not problematic. One can only conclude from this that the relatively constant productivity over time, even in spite of changes in the mood of the electorate, is a necessary component of a functional Congress.

A similar process has played out regarding scholarly investigation of the filibuster. The ability of a minority of Senators to frustrate the wishes of a majority of their colleagues is a curious power; one immediately wonders whether there is a principled reason to allow Senators to do so, or whether narrow partisan aims motivate both the existence of the institutional rule and its present prevalence. This query gains in urgency when one considers the fact that the filibuster is used much more frequently in the contemporary Congress than in any other epoch. Examining the history of the

filibuster, Binder and Smith (1997) find that filibuster is grounded mainly on political interest. They make the claim that the invention of the filibuster was in essence an accident resulting from changes in the rules of the Senate.[19] They further argue that this rule has been locked in and preserved against the wishes of the majority, primarily because changes to the rule itself are subject to being filibustered by a minority who wishes to keep the rule intact. This rule can be described in terms of path dependency, or the tendency of rules, once established, to remain in effect, even when more efficient ways of carrying on legislative business may be available or even preferred by majorities of current members of the institution.

Binder and Smith, while primarily undertaking a descriptive and empirical investigation of the filibuster rule, explicitly end their work by drawing out the normative implications of the "stickiness" of the filibuster rule. Specifically, they normatively critique the filibuster because they argue that no reasonable principle defends the ability of minority of Senators to control action on the floor and deny the majority the ability to pass laws that they favor. While this seems a rather bold claim, they marshal strong evidence that the filibuster was critical in stopping civil rights legislation favored by majorities in the House and Senate in both the late nineteenth century and the mid-twentieth century (Binder and Smith 1997, 136-137). If the filibuster rule had been

[19] In 1806 the Senate was in the process of tidying up its rule book. During this process the "previous question motion" was dropped from the rule book. This incidental change meant the body had dropped, "its only potential means of permitting a majority to cut off debate and vote on pending measures" (Binder and Smith 1997, 5). Despite this change, filibusters were not common in the early Senate, as majorities were frequently able to pass legislation, despite the dilatory motions and speeches of their peers.

developed primarily as a way for religious, cultural or racial minorities to protect certain civil rights against majority tyranny, that would have been one thing. But the filibuster, as practiced in American political history, is the history of racial supremacists using the strength of their preferences, and their belief that their opponent's preferences for racial equality were less strong, in a gambit to preserve their supremacy over minorities. Given this fact, Binder and Schickler argue that the filibuster should be radically reformed, to give effect to the will of the majority of Senators.

These empirical claims are not free from controversy in the field; Wawro and Schickler (2006) argue that this rendering of the history of the filibuster is descriptively and empirically incomplete. Investigating the fact that the filibuster and associated institutional rules and norms have changed over time, they argue that majorities of the Senate have generally been able to pass legislation with far less than the number of votes to break a filibuster. If the filibuster rule generally required all bills to achieve supermajority support to pass, the coalition size enacting laws throughout American political development should be large; they find on the contrary that relatively narrow majorities have succeeded in the Senate. Moreover, they find that even before the existence of the cloture rule that very slim majorities were able to pass key legislation.[20] Finally they note that reformers have been successful in changing the filibuster several

[20] In the absence of a cloture rule (created in 1917), technically even one Senator could have held up a bill through continuous delaying tactics, holding the floor, and dilatory motions. If this were truly an undemocratic check on the minority, Wawro and Schickler argue, we would expect the coalition size in this time period (pre-1917) to approach 100%. Wawro and Schickler find that it does not (2006, 107). Schickler and Wawro compare the period immediately before and after Cloture reform and find that the coalition sizes before 1917 were actually larger than those after 1917.

times over the course of the history of the Senate. Focusing particularly on the nineteenth century and early twentieth century, they show that sub-filibuster level majorities have been successful in imposing changes on the filibuster that were not fully consensual, cutting against Binder and Smith's argument that the filibuster itself has always been protected by filibustering minorities. Even in the early nineteenth century, narrow majorities were able to curb obstruction through chair rulings and other precedents that cut down on the ability of Senators to engage in dilatory motions and other obstructive activities (Wawro and Schickler 2006, 87). Wawro and Schickler (2006, 280) thus characterize the Senate as a place of "remote majoritarianism," an institution where the *supermajorities* are required for immediate action, but where the consent of a *mere majority* of senators can alter these super majoritarian procedures.

One must note, however, that this argument makes no inroads at all against Binder and Smith's claim or assertion that a healthy or functional Congress would see a determined majority able to enact its preferences into law. In fact, Wawro and Schickler (2006, 27-28) completely accept this contention and make it part of their "defense" of the filibuster.[21] They argue that the filibuster is legitimate because a majority of Senators have never been willing to totally abandon it). They re-describe the filibuster's privileging of minority rule as an institutional rule supported by a majority of members of the Senate. That is to say, a majority of Senators has never, up to this point, been willing

[21] Wawro and Schickler do not position themselves explicitly as such, but they nonetheless argue that very little in the way of reforms are necessary in the contemporary Senate; majorities are already empowered to do what they will in the Senate.

to completely dispense with the filibuster, largely because they rationally conclude that they would like the power the filibuster provides to be in their hands were they to be in the minority of the Senate. This argument holds that any institutional rule supported by a majority of Senators must be in accord with the notion that determined majorities must be able to work their will – it is simply in this case a determined majority committed to the individual and collective rights provided by the filibuster. Wawro and Schickler (2006) predict that in the case that a majority of the Senate experience such obstreperous obstruction that they no longer support the filibuster that the rule will be changed – just as it has been changed in the past. "The committed support of the majority of the Senate is necessary" to reform or alter the filibuster, but under this condition reform is institutionally possible (87). Not only is reform possible, but it has actually occurred with mere majority support before. Thus, even the argument in favor of the filibuster is to be made consistent with the presumption that a majority must be able to prevail in the Congress.

CONSTITUTIONAL LOGIC AND THE PREVAILING ACCOUNT OF THE CONGRESS

Even though contemporary scholarship does not utilize the concept of "congressional health," it has been shown that the leading works in the field have much to offer in developing such an account. By examining the works critical of Congress, one can develop a portrait of the essential attributes of congressional health. Such an endeavor has been carried out above in great detail. By similarly examining descriptive or explanatory work in the field, it is possible to identify assumptions shared widely by

practitioners studying Congress. This is not the end of the matter, however, as evaluation is the next step. One must next ask whether the prevailing account of congressional health and functionality stands up to critical inquiry.

The conclusion of such an evaluation is stark: despite the insights canvassed in this chapter, turning to implicit understandings of the field cannot completely answer the question: What is congressional health? This is because the standard fleshed out above – of a *constitutionally-assertive, productive and majoritarian legislature, supported by institutional loyalty, and legitimated by transparent, responsible deliberation on policy* – is underdeveloped and undertheorized. An assertion that these attributes are important to the Congress is hardly false; in fact, several are critically important for the institutional health of the Congress. Rather, three problems with the current literature evaluating Congress render the current account incomplete. I would summarize these problems or flaws as issues of scope, of history, of and constitutional-alignment

In terms of scope, no synoptic work has attempted to synthesize or combine the various elements of congressional health into one comprehensive account. This is important, because some of the most important attributes of congressional health – such as responsiveness to public opinion and deliberativeness – are in tension with one another. By tension I do not mean that they are in logical contradiction.[22] Instead we find

[22] But for an account that the Congress is fundamentally based on *contradictory* purposes of articulating a national common good and representing individual interests see Canon and Mayer (1999). In the previous chapter, it was mentioned that this was a very unsatisfactory picture of Congress. The failure of this account is straight-forward; it has no way of explaining the fact that the degree of congressional dysfunction *varies*.

a tradeoff: maximizing responsiveness might result in a reduction in the quantity and quality of deliberation. In the case of unified partisan control of all three branches, responsiveness can have the effect of eliminating salutary inter-branch relations and substituting mere partisan teamplay. The currently existing work, often focusing only on one attribute at a time, lacks sufficient attention to this fact. A synoptic account, on the other hand, would allow one to say that one attribute is more pivotal or foundational than another. It would likewise be able to evaluate trade-offs between one attribute and another and determine if those trade-offs enhance or diminish the institutional capabilities and responsibilities of the Congress. In November 2015, the House of Representatives quickly passed a bill designed to make it more difficult for Syrian refuges to be resettled in the United States. Is this an example of a healthy Congress responsive to majority sentiment,[23] or an example of an unhealthy one ignoring its responsibilities to coolly deliberate and determine whether the Syrian refuges pose a threat to national security at all? The current account cannot say.

The second problem imperiling our current understanding of congressional functionality is an insufficient attention to the sheer fact of history. The United States Congress is an institution whose history matters a great deal in constructing or articulating standards of health and functionality. Unfortunately, very little scholarly work has been devoted to identifying examples of Congresses in the political history of the United States that have been generally successful in meeting the complex

[23] A November 2015 Gallup Poll found that 60% of Americans were opposed to resettling refugees from Syria (Jones 2015).

responsibilities entrusted to the legislative. This is not to say that there has been no work on the history of Congress, and some of this work can be enlisted to identify healthy Congresses and how they were constituted. But in the main the work on the history of parties (Aldrich 1995, 2011, and Holt 1999), the institutionalization of Congress (Polsby 1968, Schickler 2000, 2001), and even the development of the Senate (Swift 1996) has occurred outside a research paradigm where broad concepts such as institutional health would arise.[24] In fact, the subfield most likely to be concerned with development and disintegration of institutions, American Political Development, has had very little overlap with the study of Congress (Katznelson 2011).

The lack of historical context creates theoretical problems for otherwise plausible accounts of institutional wellbeing. Consider the current state of the literature. When many contemporary political scientists write about Congress they compare it to the "textbook Congress" of the 1950s and early 1960s, heralding compromises and bargains reached between Republicans and Democrats in this era.[25] That time period was so much less conflictual than today that the modus vivendi was commonly considered to be most reflected in the motto of Speaker Sam Rayburn: "If you want to get along--go along" (*New York Times* 1961). While this seems superficially superior to our exceptionally partisan present-day Congress, one should ruminate on the "textbook Congress" in its

[24] In areas in which this question would arise, the lack of attention to history has been stark. Taylor (2013), in his work evaluating Congress, builds an entire checklist of attributes that the attributes to congressional functionality with reference to the present alone. No doubt making the endeavor feel more relevant and applicable, this standard is in no way an evaluation of congressional health, but is instead a way for cotemporaries to mark characteristics of this institution which they prefer.

[25] This same problem seems to imperil Taylor's (2013) account as well.

totality. In particular, one should consider the unrepresentative nature of the committee chairmen who blocked meaningful liberal action favored by the majority of Congress throughout this time period (Sinclair 2009).

The lack of a systemic account of Congress magnifies the contemporary literatures general inattention to congressional history. Indeed, one needs to construct a conception of congressional heath encompassing both its aims and functions before one can determine whether one should positively evaluate the "textbook Congress:" a legislative body that achieves civility, compromise, and productivity at the cost of representativeness. In the end, one may hail these Congresses nonetheless for their other healthy attributes, but one should do so based on a strong theoretical foundation. We are currently stuck evaluating the contemporary Congress by comparing it to the textbook Congress: The Congress that existed at the time when the discipline of political science rounded into its contemporary shape. This is simply not a theoretically justifiable reason for making the textbook Congress our frame of reference.

The historical specificity of Congress is related to and indeed the source of the final and *most important* flaw in our contemporary view of congressional functionality: the current way we criticize Congress does not possess a firm constitutional basis. This issue must be resolved before we can evaluate the Congress by a fair and rational standard. The Congress of the United States is a particular legislature: an institution derived from a specific constitutional design. Prima facie, it is undeniable that Congress' design must be taken into consideration when one attempts to evaluate it. While this is a seemingly banal consideration, this principle has not been carefully attended to in

previous investigations of Congress. Consider two instances where this lack of attention to constitutional design is evident: 1) in the controversy surrounding the issue of productivity and 2) in the literature regarding the Congress' constitutional assertiveness (or lack thereof).

The assertion that the Congress must achieve a certain level of productivity to be functional sounds very reasonable. It is, after all, constitutionally mandated that the Congress pass appropriations bills at least biennially if it appropriates money for the armed forces at all.[26] Yet, simply stating that a healthy Congress should be productive leads to unexpected results when this assertion is not placed in context. Grading Congress on productivity means that the legislature at the beginning of President G.W. Bush's first term (the 107th Congress) would be graded higher than any Congress since the 1980s (Binder 2015, 11). While partisan differences of opinion may yield different perspectives of evaluation on that Congress, it does not seem as if indicators of national health such as the GDP or Gallup polling on the state of the nation subsequent to that Congress verify the claim that it was the best Congress since the Reagan Presidency. Productivity is not valuable, in and of itself, without the other attendant characteristics attributes of institutional health (Mann and Ornstein 2006).

Besides the over-simplifying effect of evaluating Congress on just one attribute, there is a far more important consideration: it is not clear that productivity is even an

[26] Article I, Section 8, Clause 12 stipulates that the Congress has the power "to raise and support Armies, but no Appropriation of Money to that Use shall be for a longer Term than two Years." The Congress is required to pass annual budgets on the basis of a mere statute, the Budget and Accounting Act of 1921.

attribute aligned with the design of the Constitution. If productivity was the paramount function sought for Congress, Article I of the Constitution is oddly structured to fit that purpose. Instead of a single-house legislature with an empowered central leadership, the nation has a bicameral legislature with electoral mechanisms designed to ensure that the composition of each body is distinct from one another. This is not a productivity maximizing structure. Additionally, the commentary of prominent framers such as James Madison speaks to the fact that excessive productivity was thought to be pernicious: many of Madison's concerns about the nation prior to the Constitutional Convention concerned the mutability of state laws – that laws were constantly being made and unmade with a frequency that created instability and made healthy economic development difficult (Hamilton et al 1788/1963, 378).

While one would think that the strand of the literature emphasizing the place of the Congress within the separation of powers system would avoid the above difficulties, this is not always the case. Many of the investigations of constitutional assertiveness, such as that of Fisher (2000), are taken from what one may call an institutional vantage point. Fisher and others – sometimes termed "insularists" - contend that the war power is the exclusive province of the legislature. Further they argue that this is what the original design suggests. While there is reason to suppose good institutional and constitutional consequences may follow if an MC takes up this position, it seems odd for scholars to be

so tied to one institution that they see the world from its perspective.[27] There are many reasons for considering the war powers of the United States as shared property of both the Congress and the Executive. The document certainly vests the right to declare war in Congress, but the powers of commander-in-chief, when forces are called into the service, are given to the presidency. Whether this gives the power to the president to involve the nation in a purely defensive war (or a preemptive strike) without consulting Congress at all is in no way obvious from the text itself. And while the text may not be dispositive, this lack of permanent settlement does seem to imperil the thesis of the pro-Congress insularists.[28]

The same confusions regarding power struggles appear in work examining the tools that Congress possesses to win separations of powers struggles with the executive. While Chafetz (2017) provides a long list of tools and powers the legislature could utilize to win disputes with the President, it is not clear this should ever be a *goal* of Congress as such. Both cases of congressional health canvassed in this work (the First Congress and the New Deal) consider institutions where the inhabitants of Congress cooperate, largely as it was the deliberative sense in Congress that such cooperation would promote the

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[27] An MC making this argument when joined with others in Congress will then face a President making exactly the opposite claims about the proper view of war powers. The "right answer," if one exists, would thus emerge through contestation, communication, and deliberation, not through the maximalist position of either side.

[28] This argument is a simplified version of an argument made by Zeisberg (2013). Zeisberg means to criticize settlement accounts of war powers that conclude that the text and meaning of the Constitution has given one correct answer as to the proper vesting of this power. She holds that a relational understanding of war powers is anything but fixed and that constitutional authority to declare war or set foreign policy is developed through inter-0branch dialogue, see above note.

general welfare. I hold that confusions such as these are unavoidable if an account of how Congress ought to function is not tied to a sophisticated understanding of the contours and purposes of its design from a constitutional, rather than institutional perspective.

With these three theoretical flaws in mind, much work remains to develop an account of congressional health. While developing a comprehensive standard to evaluate legislative institutions is not original to this work,[29] developing a systematic standard applicable to Congress is. To develop this well-thought-through ideal, in the American constitutional context, will be the task of the remainder of this work. In order to develop a thorough-going and systematic account of congressional health we must be attentive to the theoretical context of our constitutional design, while articulating institutional standards from the constitutional design that frames our federal government (see next Chapter) and examine how that constitutional design was instantiated, particularly in the pivotal extended founding of the Early Republican Period (see Chapter Three). Only at the conclusion of such an account could we be said to possess an account of congressional health sufficient to intelligently criticize our present institutions.

[29] Among others, see the work produced by Jeremy Waldron (2009b). Waldron has remarked on the need for such a comprehensive account at length, see above reference in the Introduction. Whereas Waldron, being a philosopher, operates on a high level of generality applicable to liberal democracies at large, the standards articulated in this project are designed specifically with the American polity in mind.

Chapter Two: A Constitutional Conception of Congressional Health

While Congress is the first institution structured by the U.S. Constitution, analysis of its place in our regime is beset by a paucity of research on the role or purpose of Congress. Creating problems in the realm of constitutional theory and in the study of institutional politics, a lack of attention to this question imperils our attempts to fairly evaluate Congress. Theoretically, "the problem … is that we have not developed a normative theory of legislation that could serve as a basis for critiquing or disciplining … the antics of the past or present membership … of the US Congress" (Waldron 1999, 1).[30] Especially in a time of academic and popular depreciation of Congress, it is all the more important to develop such an account. Yet, it is apparent that, "no scholarly consensus exists on Congress's role, how it should protect its constitutional prerogatives, and why" (Farrier 2010, 21). Beyond lacking such consensus, scholars have yet to articulate a systematic, historically, and constitutionally sensitive account of Congress's role. In sum, we do not possess the appropriate tools for diagnosing the ails of the contemporary constitutional system.

In fairness to contemporary scholars, however, this lacuna is not wholly unexpected or unreasonable. While a series of essays in *The Federalist* (Nos. 67 – 77) present a comprehensive theory of the Presidency, and Chief Justice Marshall's opinion

[30] Waldron further notes that, "No one seems to have seen the need for a theory or ideal-type that would do for legislation what Ronald Dworkin's model judge, 'Hercules,' purports to do for adjudicative reasoning" (Waldron 1999, 1). While not an ideal-type to the same extent as that presented by Dworkin, the standard of congressional health articulated in this chapter is intended as a response to this invitation.

in *Marbury v. Madison* articulates the Judiciary's account of its own role, the sections of the *Federalist* devoted to Congress are comparatively less explicit on this matter. Although Publius treats the Congress in fifteen consecutive essays (Nos. 52 – 66),[31] the question of congressional purpose or health is not specifically centered. Indeed, most essays in this section treat or anticipate counterarguments to the Constitution, and are devoted to the "negative" task of rebutting these potentially damaging allegations.[32] Even essays No. 62 and 63 of *The Federalist,* which are ostensibly devoted to the Senate are, in fact, a list of the "inconveniences which a republic must suffer from the want of such an institution" (Hamilton et al 1787/1961, 376). Implicit statements about the purpose of the Senate can be extracted from such a negative list,[33] but even this kind of extrapolation fails to articulate the central purposes of *Congress as an institution*. In sum, *The Federalist* does not explicitly detail the appropriate standards a voter (or expert) should use to evaluate that body or its members. Absent a clear annunciation of Congress's purpose(s) either in the text of the Constitution or in Founding Era authoritative

[31] Throughout this (and later chapters) I refer to Publius rather than Hamilton, Madison or Jay. I take the stance that the collective author Publius presents one comprehensive argument regarding the Constitution. While the citations in this chapter are to essays written by both Madison and Hamilton there is no inconsistency between the arguments each deploy (despite their later political disagreements) regarding the failures of the Articles or the prospects for the Congress under the Constitution. For a systematic analysis of *The Federalist* arguing that Publius presents a "consensual" document focused on shared principles see Carey (1984), but cf. Adair (1974) or Mason (1952) for an alternative that emphasizes the alleged "split personality" of Publius.

[32] Essay No. 53, for instance, rebuts the idea that tyranny will automatically result from the Constitution's abandonment of annual terms for representatives, while No. 56 confronts the idea that there are too few members in Congress to adequately represent the nation.

[33] Indeed, later in this chapter I extract inferences regarding the purpose and healthy ordering of Congress from essays such as these. The point is that nowhere is the purpose or role of Congress baldly stated in this authoritative text.

commentary, one might be tempted to throw up one's arms and abandon the quest for a comprehensive standard for evaluating its function.

Fortuitously for those interested in either the Congress or the Constitution, this is not the end of the matter; a political and constitutional theory called "the positive constitution" stands ready to assist scholars in evaluating Congress. Positive constitutionalism holds that constitutions qua constitution are more than contracts that limit the powers of government over individuals. While they may indeed still "limit" government, this conception holds that the primary purpose of a constitution must be to structure certain goals for government to achieve and provide the power and authority to the individuals or institutions nominated in that document to carry out those functions.[34] The articulation of the purpose of Congress, and a concomitant development of standards designed to evaluate whether a particular Congress has succeeded in fulfilling its role, is greatly aided by a conception of constitutionalism that is likewise "purposive." Indeed, by determining the role of Congress from a "purposive reading" of the text of the Constitution, one can develop standards regarding its well-functioning, as the tendency of its norms, rules and structures to facilitate (or inhibit) its purpose will be the key to evaluating its success (or failure) as an institution.

Demonstrating that the purpose of Congress is *to minister to the general welfare*, and that a relatively concrete set of criteria for evaluating the Congress, as an institution, can be derived from such a comparatively general purpose, requires three distinct moves.

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[34] "Constitutions empower [by establishing] institutions that allow people … to pursue projects that they cannot achieve on their own" (Waldron 2016, 34).

First, it is necessary to show that the positive constitution approach is appropriate in analyzing the text of the Constitution, as that document is often interpreted as a frame of negative liberties (i.e. claims protected against government interference).[35] This part of the project is conducted through an explicit contrast of the Constitution with the document that preceded it: The Articles of Confederation. Such a contrast reveals the degree to which the negative foundation of its predecessor was rejected in the text of the U.S. Constitution of 1787.[36] Second, I derive the attributes of a healthy Congress from a close reading of the text of the Constitution, in the same spirit as that conducted by contemporary positive constitutionalists (see Barber 2003, Waldron 2016) and past statesmen such as Frederick Douglass (see Douglass 1860/1950; Ives 2018). Doing so reveals nontrivial insights into the nature of a healthy, functional legislature, providing an important corrective to prevailing perspectives on Congress in the academy. Third, I present strong evidence that these standards for evaluating Congress are rigorous and theoretically sound, all the while being realistic enough for practical politicians to (at least occasionally) meet. Through an analysis of a selected set of House debates in the First Federal Congress, I show that representatives discussed the Constitution and the role

[35] Minimally, I seek to show that the positive constitution is *a* reasonable way to interpret the text. Throughout, I also intend the argument to stand for the maximalist argument that such a view is *the best* way to understand the U.S. Constitution.

[36] Analyzing the original Constitution of 1787 is appropriate for setting a standard for today's Congress because that document, although amended, remains largely intact, especially with respect to Article I.

of Congress in strikingly similar terms to those laid out in this ostensibly theoretical chapter.[37]

THE REJECTION OF THE NEGATIVE ARTICLES OF CONFEDERATION

Studying the Articles of Confederation holds the prospect for greatly aiding in the understanding of constitutions as such, as well as the current U.S. Constitution. Yet, a difficulty emerges immediately upon setting about demonstrating this notion: "The Articles of Confederation have been assigned one of the most inglorious roles in American history. They have been treated as the product of ignorance and inexperience and the parent of chaos (Jensen 1948, 3). If one supposed the Articles to be solely a product of the chaotic wartime years of the Revolution, one would doubt that they could shed light on any matter of interest to a constitutional theorist. I follow an earlier interpreter of the Articles, however, in seeing the Articles, and the disputes regarding their drafting in the Continental Congress (lasting well over a year) as evidence of an intentional and thorough design.[38] Simply put, "The Articles of Confederation were designed to prevent the central government from infringing upon the rights of the states" (Jensen 1948, 243).[39] The constitutional theory undergirding the Articles of

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[37] While not intended to lend credibility to an originalist impulse that what occurred in the First Congress ought to be binding over future Congresses, this evidence should nonetheless assure a dedicated originalist that the majority of the first occupants of the nation's legislative bodies conceived of the role of Congress in terms conformable with the theoretical claims of this chapter.

[38] "An analysis of the disputes over the Articles of Confederation makes it plain that they were not the result of either ignorance or inexperience" (Jensen 1948, 239).

[39] But cf. Hoffert (1992) for an account that the Articles is just as purposive as the Constitution of 1787. He argues that it was designed "to form a perpetual union of sovereign states whereby those states may protect and defend their mutual friendship, liberties and general welfare" (34). Further, Hoffert holds that

Confederation was then "negative constitutionalism," the idea that constitutions are primarily (or maybe even solely) charters that limit and restrict the scope of government. This "negative" purpose—restricting the power of the central government—characterizes the Articles of Confederation to such an extent that it was generally unable to function.[40]

While the relevance of this finding to the task of developing a relevant standard of congressional health seems remote at first, it is helpful to recall a key point within *The Federalist*. Publius argued that, "the principal defects of the Confederation … do not proceed from minute or partial imperfections, but from fundamental errors in the structure of the building, which cannot be amended otherwise than by an alteration in the first principles and main pillars of the fabric" (Hamilton et al 1787/1961, 103). Given this contention, it stands to reason that the Constitution intended to replace the most pivotal "first principles" of the Articles. Altering the "negative" principle purpose of the Articles requires recourse to a variant of constitutionalism which is not so limited. The U.S. Constitution, as defended by those such as Publius, must then be based on a conception

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"differentiation and integration of state and national communities suggest that the Articles sought more complex and positive political objectives than those based solely on suspicion of power and fear of its abuse … as [states] must be transcended to secure and protect the general welfare of the enlarged … community in a just society" (36). While there is some merit to this view, the balance of evidence presented in this chapter will show that the predominant purpose of the Articles was negative. Moreover, the claims of Hoffert founder on inconsistency, as the general welfare referred to even in his own words is that of the states, not of the "perpetual union" framed by these states.

[40] The Treaty of Paris (of 1783) and the Northwest Ordinance (of 1787) were formulated under the Articles, somewhat qualifying the claim that they lead to total inaction. One must wonder, however, whether the terms of the Ordinance would have been enforced by a government as ineffectual as that under the Articles; in fact, the weakness of the central government had severely hampered enforcement of the terms of the Treaty of Paris, especially due to unimpeded state efforts to expropriate property from loyalists, leading the British to ignore the some of the terms which they had agreed to as well (see Hamilton et al 1787/1961, 38 and 101).

of positive constitutionalism, otherwise it would remain fundamentally flawed. The remainder of this section carefully tests the validity of this chain of reasoning through a close textual analysis of both the first and second constitutions of the United States of America.

The Articles of Confederation and Perpetual Union represent an apotheosis of the idea of constitutions as mere limitation on the powers of government. In fact, the Articles specified that the "government" framed by its strictures would not even be fully sovereign over the territory that would make up the new nation.[41] The very first substantive article, Article II, provides that, "Each state retains its sovereignty, freedom, and independence, and every power, jurisdiction, and right, which is not by this Confederation expressly delegated to the United States, in Congress assembled."[42] Even in the midst of such radical qualification of power, the text makes clear that not only will states remain sovereign, but that these states contract (in advance) to refuse to the national government any power (no matter how needful to the preservation of the union) not expressly delegated to the central government. The cascading set of restrictions on the national government announced in the Articles is further enhanced by a structural power given to the states – the state legislatures retain the right to recall their delegates from the

[41] Publius suggested that the Articles did not properly frame a government at all. He argued that "The great and radical vice in the construction of the existing Confederation is in the principle of LEGISLATION for STATES or GOVERNMENTS, in their CORPORATE or COLLECTIVE CAPACITIES, and as contradistinguished from the INDIVIDUALS of whom they consist" (Hamilton et al 1787/1963, 103, capitalization original). This vice, Publius says, "is in itself evidently incompatible with the idea of GOVERNMENT" (104).

[42] Article I literally provided the name "The United States of America" to the new nation.

Confederation Congress at will.[43] Legislators under the Articles will not then be "agents" in the sense of being free to choose and deliberate, but instead will be agents in the sense of the modern "principal-agent relationship," and fully replaceable by the principal, their respective state. Cementing the preeminence of the states over the Union, each state was represented equally, no matter the size of the state or the size of the delegation sent to Congress.[44] And as a final measure of emphasis that the government would simply minister over "the mutual and general welfare" of the *states*, the document was framed with no conception of popular sovereignty of any kind, whether at the ratification stage, or ongoing, as no elections were mandated for representatives to the legislature of the Union.[45]

Even the powers granted to the new national government were hemmed in and restricted to the point that no important action could be taken by a majority of the states, but rather only when a supermajority of nine state delegations concurred. The number of

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[43] Article V provided that, "For the most convenient management of the general interests of the United States, delegates shall be annually appointed in such manner as the legislatures of each State shall direct, to meet in Congress on the first Monday in November, in every year, with a power reserved to each State to recall its delegates, or any of them, at any time within the year, and to send others in their stead for the remainder of the year."

[44] Article V further provides that "No State shall be represented in Congress by less than two, nor more than seven members," meaning that there is no equality between members of Congress, some of whom would have diluted voting strength, not only in reference to the population of their state, as in the current Senate, but even in the body itself.

[45] Article II stated that "The said States hereby severally enter into a firm league of friendship with each other, for their common defense, the security of their liberties, and their mutual and general welfare, binding themselves to assist each other, against all force offered to, or attacks made upon them, or any of them, on account of religion, sovereignty, trade, or any other pretense whatever." Note the use of the general welfare refers to the *states* which make up the union rather than the general welfare of the United States or its *people*.

restrictions, and the manner with which the document carried out such restriction is worth quoting at length:

> The United States in Congress assembled shall *never* engage in a war, *nor* grant letters of marque or reprisal in time of peace, *nor* enter into any treaties or alliances, *nor* coin money, *nor* regulate the value thereof, *nor* ascertain the sums and expenses necessary for the defense and welfare of the United States, or any of them, *nor* emit bills, *nor* borrow money on the credit of the United States, *nor* appropriate money, *nor* agree upon the number of vessels of war, to be built or purchased, or the number of land or sea forces to be raised, *nor* appoint a commander in chief of the army or navy, unless nine States assent to the same: *nor* shall a question on any other point, except for adjourning from day to day be determined, unless by the votes of the majority of the United States in Congress assembled (Article IX, cl. 6, emphasis added).

Not content to restrict the power of government by limiting the central government to expressly delegated powers, this supermajority requirement provides that nine states must agree before anything of consequence can be done in the Confederation Congress. Even the style of the restriction is heavy-handed in its use of the word "never," followed by eleven instances of the word "nor," reemphasizing at every turn the restricted and cramped nature of the power to be exercised under the Articles. With such a stark requirement for action, it must be said that the overwhelming structural tendency of such

a government would have to be toward inaction.[46] The Articles of Confederation were indeed designed with limitation chiefly in mind, as the "government" framed by that document would (and did) have a very difficult time doing much of anything.

The degree to which the Articles of Confederation shackled the central government is radical, but certainly is explained by the circumstances prevailing at the time of its drafting. The Articles were drafted and debated over the course of more than a year of on and off deliberations, from 7 June 1776 to 17 November 1777 (Jensen 1948). As the drafting of the Articles were underway in the Second Continental Congress, the States were in bloody conflict with Great Britain, and it is clear that the delegates had "no intention of re-creating in America a form of government similar to that which they were fighting to overthrow" (Jensen 1948, 163). Simply put, the Articles of Confederation were framed in the light of a simple hostility to central government as such; the conception guiding the Articles of Confederation was proto-libertarian, holding that all central government is a pernicious threat to liberty and ought to be restricted from exercising any power which could violate the rights of individuals or the states.[47]

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[46] The Articles of Confederation especially prejudiced the government toward inaction when the Congress was not in formal session. Article X stipulated that a "Committee of the States" could act as a caretaker when the Congress was not assembled, but it specifically forbade any power "be delegated to the said Committee, for the exercise of which, by the Articles of Confederation, the voice of nine States in the Congress of the United States assembled be requisite." Since engaging in war was on that list described on the previous page, the United States could technically not engage in war, as a formal matter, under the Articles of Confederation when Congress was not in session. Thankfully this weakness in the government was not actively preyed upon by any foreign state during the decade in which the Articles operated as the first national constitution.

[47] This final statement will have to part company therefore, with Jensen (1948) who argued that the Articles represented a "democratic" form of government most consistent with the philosophy of the Declaration of Independence. Jensen suggests that prevailing doctrine of democracy was that majorities in the states should have the unconstrained right to do what they wish within their states, and that this doctrine

Separately, and importantly, it must be admitted that a level of distrust of governmental power (and a fear of its abuse) is natural and reasonable, even outside the immediate context of 1776.

Even so, the Constitution of the United States of America, written in 1787 after some experience with "government" under the Articles, was not framed on the principle of simple hostility to government as such (see Edling 2003). Instead, the Constitution was framed in context of a general agreement, even among both Antifederalists and Federalists, "that there [were] material imperfections in [The Articles of Confederation]" (Hamilton et al 1787/1961, 101). The Constitution aims to remediate those "material imperfections" by founding a truly national government, dedicated to a comprehensive (although limited) set of ends, and structured by grants of authority and power designed to effectuate those ends. The U.S. Constitution still places "limits" government (both at the state and national levels),[48] but it does so for the sake of achieving the ends stated in the Preamble of the Constitution under the framework of republican government.

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was identical with the Declaration. Further he suggests that the Constitution was a kind of counterrevolution against the Declaration by the conservative Federalists who wished to maintain oligarchic privilege through the creation of a federal government that would restrict the democracy of the common man at the state level. A full refutation of this view would take the reader far afield, but for one sharp rejoinder, consider Article IV of the Articles of Confederation which stated that to, "better … secure and perpetuate mutual friendship and intercourse among the people of the different States in this Union, the free inhabitants of each of these States, paupers, vagabonds, and fugitives from justice excepted, shall be entitled to all privileges and immunities of free citizens in the several States." While some historians since Charles Beard have argued that the Constitution was framed as instrument of class domination, it is not the U.S. Constitution which contains this statement that the poor are not entitled to the privileges and immunities of citizenship.

[48] Such as the restriction in the original Constitution that Congress shall pass no Bill of Attainder, as well as the Bill of Rights and 14th Amendment of the current Constitution.

As Publius articulates, the Constitution replaces a document framed with an excessive suspicion of power that disabled it from even functioning, with an alternative theory of constitutionalism. Whereas it might have been sufficient to simply contend for a technically functional government, Publius contends that the delegates of the Constitutional Convention faced a complex task. Rather than simply representing a direct tradeoff, where government is restricted to protect individual autonomy from arbitrary coercion, Publius presents the chief undertaking of the Convention (and thus constitutionalism) was "in combining the requisite stability and energy in government with the inviolable attention due to liberty and to the republican form" (Hamilton et al 1787/1961, 222). Presented as a triad, *energy*, *stability*, and *republican liberty* represent the important positive attributes of any normatively-attractive constitutional order.

The Constitution thus replaces a theoretically impoverished and unworkable understanding of constitutionalism with one that recognizes that constitutions are framed to generate certain types of good government, not just to restrict them.[49] A complication immediately emerges, however, when viewing constitutionalism in this light: providing such a government is rather difficult.[50] "On comparing [energy and stability] with the vital principle of liberty, we must perceive at once the difficulty of mingling them

[49] An important consideration is that a more powerful government empowered by a positive constitution will in fact be rights-enhancing when compared with the alternative. Indeed, "Individual liberty mattered [to the framers,] but the overriding goal of their efforts was to improve representation, not lessen it, and to ensure that the general welfare was the government's paramount concern. The Founding-Era idea of 'natural rights' thus … favored broader governmental power just as much as limits to that power. In short, natural rights called for good government, not necessarily less government" (Campbell 2017, 87).

[50] "That [such a task] could not be easily accomplished will be denied by no one who is unwilling to betray his ignorance of the subject" (Hamilton et al 1787/1961, 223).

together in their due proportions" (Hamilton el al 1787/1961, 223). Whereas stable government suggests a very constant administration and minimal turnover of personnel, republican liberty presupposes that citizens "will rule and be ruled in turn" (see Book 6 of Aristotle's *Politics*) with frequent rotation; while energetic government seems to demand one individual invested with the power to get things done, especially in emergencies (see Schmitt 1922/2005) votaries of republican liberty are (rightly) suspicious of just such super-empowered individuals (see Schlesinger 1973, Fisher 2013). It is easy to see in today's world examples of regimes where these trade-offs are neglected to maximize the sought-after end, whether energy in Putin's Russia, or stability in single-party dominated Communist China. In the regime framed by the Constitution of the United States such a "mingling" of these goals is accomplished through the tripartite structuring of the government as well as the internal design of each branch.

Showing that this new theory of constitutionalism does not exist solely in the mind of Publius,[51] or is advanced merely to provide a rationalization for the messy compromises of the Constitutional Convention, is the Preamble of the Constitution. While often considered overly general or vague, when viewed in the light of Publius's theory of a good constitutional order, the Preamble provides a clear indication of the *purpose* of the Constitution. It states: "We, the people of the United States, in order to form a more perfect Union, establish justice, insure domestic tranquility, provide for the

[51] The new theory of constitutionalism adopted by Publius (and ostensibly operating in the background of the Constitution) is likely related to, or even constitutive of, the "great improvement" to the "science of politics" described by Publius in "Federalist No. 9" (Hamilton et al 1787/1961, 67).

common defense, promote the general welfare, and secure the blessings of liberty to ourselves and our posterity, do ordain and establish this Constitution for the United States of America." It is immediately worth noting that the six ends of government outlined in the Preamble constitute a comprehensive set of aims to be pursued, but do not exhaust every possible purpose for which a government could (or has been) founded. Missing from the list are ends such as promoting the piety, salvation, or moral virtue of the community or the individuals which make it up. Such a list, while clearly positive, thus acts as a "limit" on government by defining the legitimate spheres of the national government's reach.[52] Likewise absent from the list are lower ends such as mere order.

The Constitution, when viewed in the light of the Preamble, appears as a purposive endeavor to accomplish objects that are considered insecure or impossible without the foundation of government. "The objects… set forth are six in number: union, defence, welfare, tranquility, justice, and liberty" (Douglass 1860/1950, 477). Not only the six aims, but the predicates used in conjunction with these aims suggest an active and *energetic* pursuit of those objects, rather than just their protection against government interference. The Constitution requires that justice be "established," that the common defense be "provided for," and that the general welfare of the nation be "promoted." Each of these ends requires that action be taken, not merely abstained from. The ends of union

[52] This fact must surely be relevant to Publius's contention that the Preamble "is a better recognition of popular rights, than volumes of those aphorisms which make the principal figure in several of our State bills of rights, and which would sound much better in a treatise of ethics than in a constitution of government" (Hamilton et al 1787/1961, 512). Publius claims, contrary to the common saw that the ends described in the Preamble are primarily aspirational or idealistic, that the Preamble is in some way distinct from the "treatise[s] of ethics" that make up the states' bills of rights.

and tranquility specify that *stability* is to be sought, but not a negative order to be accomplished through a destruction of *liberty*, as that would be a "remedy … worse than the disease" (Hamilton et al 1787/1961, 73). The promotion of stability is also not a negative aim to be achieved through a stifling embrace of the status quo, as tranquility is to be sought in the context of "perfecting" the "Union." Indeed, the twin goals of promoting the general welfare and superintending over a more perfect union strongly imply that the government should be dedicated to an ongoing process of growth (or development), as mere stasis would be unlikely to achieve these objects.

Ultimately, a reasonable understanding of the constitutionalism at back of the document itself must account for its explicitly purposive nature, especially when contrasted with the Articles. Therefore, the remainder of this chapter will more forward based on the principle that the Constitution is framed for certain defined and known purposes, and that the institutions framed by this document must likewise be interpreted and founded in line with those purposes.[53]

A General Welfare Orientation: The Attributes of a Healthy Congress

The United States Congress is vested with all the legislative authority granted by the Constitution; its role is thus to minister over all the aims articulated in the Preamble. Even if "establishing justice" will be carried out by a Justice Department in the Executive, or a (District Appellate or Supreme) Court in the Judiciary, the funds to pay

[53] For the government would not function if its constituent parts where not operating in accord with the purposes outlined for the government as a whole or unity.

for such an institution will be appropriated by Congress.[54] Moreover, the structure of such institutions will also be duly settled in positive law, passed by Congress, and presented to the President for his signature.[55] The senior Justice Department official or Judge operating in those institutions will only be authorized to carry out these functions because they will have been so confirmed by the Senate.[56] Certainly, the Congress depends on the other branches to execute its policy choices and to impartially pronounce judgments under law; but, as these examples show, Congress is the government's will when it sets out to pursue the ends defined in the Preamble. Without the action of Congress, the critical purposes for which the government were founded are fundamentally insecure.

Nevertheless, among the ends to be attained by the government under the U.S. Constitution, promoting the general welfare stands out as the preeminent purpose entrusted to the United States Congress. Reasoning from general principles, only the national legislature stands for the ongoing bi-yearly consent of the entire nation, through the elections for the House of Representatives. Only the legislature represents the United States in its plurality, as a democratically-elected source of the people's law. Only through passage of generally applicable law can the entire nation's well-being be

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[54] Article I, Section 9: "No Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law."

[55] Article III, Section 1: "The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish."

[56] Article II, Section 2: "[The president] shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law."

ministered to with a substantial degree of representation for the nation's various and conflicting interests, values, and principles. The alternatives are radically suspect as the Judiciary is designed to be insulated (at least to some extent) from the popular will, and the singular Presidency (although plural in the Executive Branch) is elected through a mechanism that can distort the majority will, to say nothing of the general will.

Beyond these reasoned suppositions, there is textual support for the contention that the legislature should concern itself foremost with promoting the general welfare of the people of the United States. Article I, Section 8 of the Constitution features the second use of the term "general welfare," through its authorization that, "The Congress shall have the power…To lay and collect taxes, duties, imposts and excises, to pay the debts and provide for the common defence and general welfare of the United States." Rather than articulate every cause for which Congress may have to authorize and appropriate funds from the national treasury, the emphasis placed on the term "general welfare," through its repetition in the Preamble and Article I, implies that Congress's role is to provide for people's welfare (including a provision of funds and personnel for the armed services). When combined with the necessary and proper clause,[57] this provision seems to flatly disprove the contention that the Congress operates only within the bounds of *expressly* delegated powers, as did the Articles of Confederation. Yet, this does not prove that Congress must center the national government in its deliberations over the

[57] Article I, Section 8 also allows Congress "To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof."

general welfare—Congress might investigate a pressing national issue and find that it might be solved or remediated through well-ordered free markets, or state-level decentralized problem-solving.[58]

A healthy or functional Congress will thus be one that provides the institutional support for the promotion of the general welfare of the people of the United States.[59] Given the aspirational quality of this goal, it is important to note that congressional health takes for granted the existence of low politics (bargaining-based compromise, ambition, partisanship, faction, or the like); indeed, our constitutional order presupposes that "enlightened statesmen will not always be at the helm" (Hamilton et al 1787/1961, 75).[60] These caveats aside, a constitutionally derived conception of congressional health is as follows: *a healthy Congress is one whose* ***rules, structures and norms*** *promote a* ***representative*** *lawmaking process,* ***responsive*** *to the immediate desires of the people, while simultaneously reflecting a future* ***deliberative*** *majority.* To justify this assertion, I will sketch each attribute of congressional health one at a time, and then turn in conclusion to the importance of the institutional building housing these attributes.

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[58] Even so, Congress is not relieved of the burden of promoting the generate welfare simply due to a prospective agenda item's absence from an enumerated list in Section 8—as doing so would lead to the absurd result that Congress should disregard natural disasters, due to the absence of the words "disaster relief" in the Constitution.

[59] While disagreement over the definition or even existence of a common good complicates matters, the task of this work is especially eased due to historical context: *The Congress under the Constitution* was framed to ameliorate the defects that plagued *the Congress under the Articles*. Some of the remediation will be found, of course, through recourse to the resources provided by other branches, but much will need to be present in the Congress itself for the nation's laws to be framed in a way that efficaciously addresses the "permanent and aggregate interests" of the Union and its people (Hamilton et al 1787/1961, 72).

[60] Furthermore, and even at the level of ideal, this institutional support is probabilistic, and not guaranteed to be efficacious. A Congress exhibiting the traits of institutional health will occasionally fail to promote the common good, and a defective Congress will occasionally give rise to greater prosperity or wellbeing.

Table 2-1: Schematic Presentation of the Standards of Congressional Health

Attribute	**Analytic Summary**	**Constitutional Affinity**	**Textual / Constitutional Alignment**
Representative	To bring the most important *interests* and *viewpoints* in the country into the lawmaking process, in rough proportion to their presence in the country.	Republican Liberty	Preamble, Art. I, Sec 2 and 3; Absence of provision for descriptive representation; "Federalist Nos. 10, 35, and 56"
Responsive	To pass law that promotes the general welfare, acceptable, in principle, to a *popular majority* of the society at large	Republican Liberty and Energy	Preamble; Absence of general supermajority requirements; Art. I, Sec. 1 and 8; "Federalist Nos. 22 and 57"
Deliberative	To formulate an *effective* public policy that could be seconded by a majority in the future, justifying, with *reasons* given for any interests sacrificed	Stability	Art. I, Sec. 3 and Sec. 7; Absence of recall and instructions provisions; "Federalist Nos. 62 & 63"
"Healthy" Norms, Rules, and Structures	To create a lawmaking process that will ameliorate the *vices* endemic to legislatures	Energy and Stability	Art. I, Sec. 5; Absence of hard-wired requirements for rules; "Federalist Nos. 34 and 51"

The first and most crucial attribute of congressional health is that the Congress promote a representative lawmaking process. In short, "Congress is the primary vehicle by which the citizenry is represented in government" (Whittington 2017, 574). An important indication of the truth of this statement is the name of the most numerous branch of Congress. Unlike the unicameral Confederation Congress, which possessed "delegates" from states, the Congress's largest chamber, and that responsible for originating all money bills, is literally called "The House of Representatives." Whereas other branches represent the United States as a unity,[61] the Congress represents the natural, permanent and valuable diversity of a liberal polity.[62]

But in what way ought Congress represent this diversity? Representation is, after all, a famously multifarious concept, "a rather complicated, convoluted, three-dimensional structure in the middle of a dark exposure" (Pitkin 1967, 10). Examining the text of the Constitution, that which is absent from that text, and the commentary of *The Federalist* reveals the representative frame privileged in this regime: Congress is designed to represent the diversity of the United States in terms of its interests, rather than replicating or reduplicating a United States, in miniature, in the body. By

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[61] The executive, despite its thousands of officials, normatively acts as a single actor, to provide a unified command and control in war, and to act as a singular symbolic figurehead of the nation. The Supreme Court, while itself a multi-member body, seeks through its pronouncements to provide a single, fixed meaning to the law for the purpose of providing a uniform and impartial administration of justice.

[62] As for permanence and naturalness, Publius states that "The latent causes of faction are … sown in the nature of man; and we see them everywhere brought into … activity" (Hamilton et al 1787/1961, 73). While Federalist No. 10 famously focuses on the dangers of faction – defined as interests working against an aggregate or common good – elsewhere Publius identifies the value of diversity for republican liberty, "In a free government the security for civil rights must be the same as that for religious rights. It consists in the one case in the multiplicity of interests, and in the other in the multiplicity of sects" (321).

constructing two legislative bodies, composed of members from fixed geographic constituencies, the Constitution's design promotes the representation of interests and viewpoints at different levels of generality, but does not aspire nor succeed in bringing members into the body in the same proportion as they exist in the wider society, either by class, race, gender, or even partisan affiliation.[63] Congress's design is thus based on substantive rather than descriptive representation.

Saying that the Congress is designed to represent "interests" rather than be a perfect mirror of the nation's racial, gender, class or partisan diversity, requires that something be said about interests. In a liberal society, based at least in part on property ownership, individual rights, and freedom of thought, it is inevitable that people will have concerns which are differentiated from the good of all. Calling such concerns "interests," it is also evident that groups of individuals will come to see that some of these interests are shared among groups smaller than that of the entire polity.[64] While interests mean more than just pecuniary or material interests, as people can have an interest in a political or religious doctrine, generally self-interested economic interests are presumed to predominate in a "commercial republic" (see Diamond 1986).[65] Publius is explicit in

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[63] Consider the 2016 election, which is certainly not among most striking in its divergence from descriptive representation on the basis on partisanship, Republicans make up 55.4% the House of Representatives, despite receiving only 49.1% of the popular votes ("Election Statistics, 1920 to Present").

[64] This is reflected in the *Oxford English Dictionary* definition of interest relevant to politics, "A business, cause, or principle, in which a number of persons are interested; the party interested in such a business or principle; a party having a common interest; a religious or political party, business connection, etc."

[65] As Publius puts it, "the most common and durable source of factions has been the various and unequal distribution of property. Those who hold and those who are without property have ever formed distinct interests in society. Those who are creditors, and those who are debtors, fall under a like discrimination. A landed interest, a manufacturing interest, a mercantile interest, a moneyed interest, with many lesser

announcing lawmaking in this modern liberal order must attend to "interests" when he announces that, "The regulation of these various and interfering interests forms *the principal task of modern legislation*, and involves the spirit of party and faction in the necessary and ordinary operations of the government" (Hamilton et al 1787/1961, 74, emphasis added). Since the very existence of interests, as distinct from the common good of all citizens, raises important normative problems, including the prospect of tyranny by a majority of the interests acting in concert, it is important to see how the attribute of representativeness is designed to "regulate" these "interfering" interests.

Publius famously contends that the value of republican representatives comes from the way in which they can craft competing citizen interests into something resembling the permanent and aggregate good of the whole community. Coming to the conclusion that it would not be possible to rely exclusively on the moral or civic virtue of leaders, Publius argues that elections will produce a due respect for the interests of their constituents in representatives, without leading to representatives who simply mirror their voters. "Is it not natural" Publius asks, "that a man who is a candidate for the favor of the people, and who is dependent on the suffrages of his fellow-citizens for the continuance of his public honors, should take care to inform himself of their dispositions and inclinations and should be willing to allow them their proper degree of influence upon his conduct?" (Hamilton et al 1787/1961, 212). While the original design substituted an indirect election for the Senate, the current operations of the Constitution make this even

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interests, grow up of necessity in civilized nations, and divide them into different classes, actuated by different sentiments and views" (Hamilton et al 1787/1961, 74).

more true of the entire Congress, now that every member of that body is "dependent on the suffrages of his [or her] fellow-citizens" (212).

Refining and enlarging the *views* of contending *interests* (within their own congressional district or state) provides sympathy and knowledge of the interests operating in each electoral district; the Congress as a whole is designed to bring this knowledge together in a rough sort of harmony.[66] Indeed, "Only a national council representing the diverse interests of the country could be properly situated to make policy on the problems that spilled across state boundaries and implicated the collective interest of the nation as a whole" (Whittington 2017, 578). It should be emphasized that the contrary understanding of representation as a mirror for the masses is rejected by Publius *and by the design of the Constitution*. Decisively, the Constitution lacks any prominent mechanism to guarantee descriptive representation of the American people in Congress, whether race, gender, class or party. Publius is rather explicit here, announcing that, "The idea of an actual representation of all classes of the people by persons of each class is altogether visionary. Unless it were expressly provided in the Constitution that each different occupation should send one or more members, the thing would never happen in practice" (Hamilton et al 1787/1961, 210). While Antifederalists such as Federal Farmer contended that, "a full and equal representation, is that which possesses the same

[66] "It is a sound and important principle that the representative ought to be acquainted with the interests and circumstances of his constituents. But this principle can extend no further than to those circumstances and interests to which the authority and care of the representative relate. An ignorance of a variety of minute and particular objects, which do not lie within the compass of legislation, is consistent with every attribute necessary to a due performance of the legislative trust" (Hamilton et al 1787/1961, 344).

interests, feelings, opinions, and views the people themselves would were they all assembled" (Storing 1985, 39), the Constitution fails to provide for this understanding of representation. The Congress has thus never been a descriptive representation of the American people.[67]

Yet, a healthy Congress, one that is seeking to minister to a common good, must do something beyond merely representing interests as ambassadors from their states or districts. "The process of legislation – at its best – [is] something like the following: the representatives of the community come together to settle solemnly and explicitly on common schemes and measure that can stand in the name of them all, and they do so in a way that openly acknowledges and respects (rather than conceals) the inevitable differences of opinion and principle between them" (Waldron 1999, 2). Such a description of a legislative process emphasizes that a healthy legislature will not always be able to lead to all (or even a supermajority) to agree "solemnly and explicitly on common schemes." A representative lawmaking process obtains when the most important interests and viewpoints in the country are presented on the floor (or in the committees) of Congress, in rough proportion to their presence in the country.

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[67] This is not to reject or deny the fact that a degree of descriptive representation is needed for reasons of regime legitimacy. No version of the Constitution has ever textually sanctioned a test of sex, race, gender identity, religion, or class to be a representative, unlike numerous state constitutions that contained property restrictions. But this de jure openness for all to participate is certainly imperiled if, as in many cases in the history of the polity, there were de facto requirements that the representative be upper-class, Christian, straight, white and male. Publius speaks of the de jure openness of the Congress when he states that, "There are strong minds in every walk of life that will rise superior to the disadvantages of situation, and will command the tribute due to their merit, not only from the classes to which they particularly belong, but from the society in general. The door ought to be equally open to all" (Hamilton et al 1787/1961, 213). If it turns out that only particular "situations" yield MCs, this claim is put in doubt, and problems of legitimacy for the regime certainly do arise in full force.

Invoking the necessity of a well-structured legislative process presents an easy segue to the second attribute of a healthy Congress: to promote the general welfare the Congress must move decisively in *responding* to popular majoritarian preferences. As stated by constitutional theorist Keith Whittington, "Structuring a legislature to be *representative* is futile if legislators are not *responsive* to the constituents that they represent" (2017, 580, emphasis added). Further, one can say that the purpose of having responsive legislators is to more efficaciously minister to the general welfare of the nation. Indeed, while the general welfare is something akin to a common good, a good shared by all, there will naturally be disagreements concerning what this entails given the diversity characteristic of the United States both in theory and practice. While this lack of agreement over a common good led some mid-twentieth century political scientists to skepticism regarding the existence of a genuine public interest (see Truman 1971), the Constitution does not require this radical version of "pluralism." Specially, the U.S. Constitution's structural provisions privilege the majority's conception of the common good and provide the means for that view to prevail, except in limited defined conditions: when the Senate is acting on treaties or impeachment, and when either House votes on expelling a member or veto-overrides.

While considerable ink in constitutional theory is focused on the "counter-majoritarian" features of the Supreme Court (see Bickel 1962), or the filibuster (see Chafetz 2011), the text of the Constitution, in Article I, focuses primarily on majoritarian institutions. While infrequently remarked upon due to the number of "veto points" alleged to operate in the lawmaking process, the Constitution is remarkably majoritarian,

especially when compared with its immediate predecessor, the Articles of Confederation. Article I, Section 5 specifies that "a Majority of each [House] shall constitute a Quorum to do Business; but a smaller Number may adjourn from day to day, and may be authorized to compel the Attendance of absent Members, in such Manner, and under such Penalties as each House may provide." As a result of continuous tardiness and absence in the Confederation Congress, the Constitution provides that only a majority of each Chamber even need meet to do legislative business, making a 26-25 vote in the contemporary Senate a constitutionally approved margin for the enactment of any ordinary statute. While majority rule is surely not guaranteed to yield an aggregate or general good, it is the best available procedure for seeking the common good, in an environment of conflict or contestation over just what exactly will promote welfare, establish justice, or render the union less imperfect.

Given the dangers posed by majority tyranny, it is a natural reaction to wonder if requiring a greater consensus for action would result in greater security against this baleful possibility. Yet, Publius, praising the Constitution and criticizing the Articles, makes it clear that this a remedy worse than the potential disease: "To give a minority a negative upon the majority … is one of those refinements which, in practice, has an effect the reverse of what is expected from it in theory. The necessity of unanimity in public bodies, or of something approaching towards it, has been founded upon a supposition that it would contribute to security. But its real operation is to embarrass the administration [and] to destroy the energy of the government" (Hamilton et al 1787/1961, 143). In short, requiring any more than a majority to concur in the ordinary operations of the

government has the perverse effect of letting the smaller number govern the greater. The problem posed by excessive supermajority requirements is exacerbated by the crises which any nation must face in the fullness of time. In Publius's words:

> In those emergencies of a nation … there is commonly a necessity for action. The public business must, in some way or other, go forward. If a pertinacious minority can control the opinion of a majority, respecting the best mode of conducting it, the majority, in order that something may be done, must conform to the views of the minority; and thus the sense of the smaller number will overrule that of the greater… Hence, tedious delays; continual negotiation and intrigue; contemptible compromises of the public good. And yet, in such a system, it is even happy when such compromises can take place: for upon some occasions things will not admit of accommodation; and then the measures of government must be injuriously suspended, or fatally defeated. [The government is thus] kept in a state of inaction. (Hamilton et al 1787/1961, 143-4).

While checking the majority by requiring it to meet additional hurdles of persuasion appears at first to offer security against majority tyranny, instead it offers the prospect of grinding the gears of government to a halt, even in crisis, and substituting minority rule for majority republicanism.

In terms of responsiveness, Congress ought to aim for gaining the lively and interested consent of the general populace to the laws deliberated upon, as the purpose of republican government is to achieve the blessing of self-government without the vices of

direct democracy. It will say little in favor of self-government if the privilege of being a republican lawmaker consists of the ability to make the laws irrespective of the preferences of their constituents. To provide incentives for such an end, "the members of Congress must stand for frequent election. The design of an electoral mechanism is always a delicate balance. Officials must be independent enough to make policy judgments but responsive enough to react to the felt interests of the people" (Whittington 2017, 582). Publius seems to say much the same when surveying the "electoral connection" that will yoke representatives (and now senators) with their voters. "Such will be the relation between the House of Representatives and their constituents," Publius says, "Duty, gratitude, interest, ambition itself, are the chords by which they will be bound to fidelity and sympathy with the great mass of the people. It is possible that these may all be insufficient to control the caprice and wickedness of man. But are they not all that government will admit, and that human prudence can devise? Are they not the genuine and the characteristic means by which republican government provides for the liberty and happiness of the people?" (Hamilton et al 1787/1961, 350-1).[68]

Nevertheless, and as Publius famously reflected, auxiliary precautions must be resorted to ensure that the Congress actually aligns its deliberations with that which has a

[68] Publius further states that "The aim of every political constitution is, or ought to be, first to obtain for rulers men who possess most wisdom to discern, and most virtue to pursue, the common good of the society; and in the next place, to take the most effectual precautions for keeping them virtuous whilst they continue to hold their public trust. The elective mode of obtaining rulers is the characteristic policy of republican government. The means relied on in this form of government for preventing their degeneracy are numerous and various. The most effectual one, is such a limitation of the term of appointments as will maintain a proper responsibility to the people" (Hamilton 1787/1961, 348). The Constitution, which sets a six-year term for senators and a two-year term for representatives, attempted to provide for this responsibility.

potential basis for majority approval, not merely in the Congress, but in the society at large. Among the most important vices of representatives are to forget that they are not the people themselves, but rather, are their deputies. To be responsive to the majority in society is thus not the exact same as producing a proposed course of action which will be approved by 50 percent plus one of the voting senators or representatives. Given the fact that the popular will is fleeting and sometimes difficult to discern, Congress might thus find proxies for the popular will when there is uncertainty or an immediate crisis. One important expedient might consist in relying on executive leadership. Contrary to some congressional insularists, there is nothing inherently dysfunctional about accepting a reasoned argument that the popular will is behind a course of action proposed by an executive. Even so, those promoting the presidency as the seat of popular will also need to be reminded that the executive's claims to be such a mouth-piece for the majority are not self-evident truths. A healthy Congress will in fact attempt to use signs and signals, (polling, election results, correspondence from constituents, petitions, popular protests or assemblies of support) to determine what agenda items the public would like the Congress to focus on, and whether the policies proposed in Congress could conceivably be approved by a majority of the nation's citizens. One sign of a healthy Congress is an active attempt to listen to what occurs outside of the deliberations of Congress. Structuring legislative institutions in this fashion should lead to the passage of legislation that is closely enough tied to citizens' wishes that most citizens, most of the time, feel that the government is working for them.

The necessity of a healthy legislative process aimed at promoting the general welfare likewise is suggestive of the last attribute of congressional health; legislative institutions, such as those structured by Article I of the Constitution, ought to be deliberative to be effective. Simple responsiveness will not be enough; the Constitution is definitively not based on "a simplistic normative model of democracy whereby democratic majorities are to get whatever they want, on every issue, and in short order" (Sabl 2015, 346). While it is common to reflect on the slow and deliberate pace to the legislative process created by bicameralism and the requirement for the President to consent to the passage of law (see Farrier 2010, Chafetz 2017),[69] it makes more sense, especially from the standpoint of positive constitutionalism, to emphasize the fact that deliberation (reasoning together over the merits of public policy [Bessette 1994]), is necessary to the successful promotion of the general welfare. It will not do to simply have Congress put a rubber stamp on popular preferences if the goal being sought is the greater prosperity, security, liberty, or justice of the American polity. A number of possibilities

[69] Farrier (2010), for instance, focuses on the checking impulses of bicameralism, stating that "The sewn-in differences between the House and Senate were designed originally to prevent a unified institutional mind-set even under conditions of small government and shared party power" (25). While certainly true to Publius's treatment of this topic, (see following) this is not the primary (or even secondary) role which bicameralism, and the deliberation it promotes, is meant to play in achieving the general welfare. Chafetz (2017) is somewhat blither when stating that "Ours is an intentionally inefficient system" (313). To state that sheer lawmaking efficiency, as might be measured in the number of bills passed by the legislature in a given increment of time, is not quantity to be maximized by a healthy Congress, seems fair enough. But in no way could the design of Congress be to create an intentionally inefficient system. That would be irrational. Instead, the Congress is designed to efficaciously and effectively promote the general welfare, and the Congress is handed a set of structural channels designed to meet that goal. Bicameralism in Congress is a structural solution to the deficiencies of radical responsiveness and/or rapid lawmaking present at the state level in the 1780s. The Constitution was designed to replace a system of complete inaction; to ascribe to that document the abstract intention to promote delay or indecision seemly flatly erroneous.

require this rejection of simple responsiveness: popular (i.e. majoritarian) preferences regarding constitutional ends might be in error; popular preferences may not contain a sufficient specification of the means for achieving the goal sought; popular preferences may contain a collective short-sightedness that will be self-defeating over the intermediate or long-run; popular preferences might be inconclusive, contradictory or unclear, even while urgent action is needed; popular preferences might contradict normatively important constitutional or moral principles.[70] A healthy Congress ought to be deliberative, not because it is essential to offer numerous veto points to stop a majority, but because the ends the government is structured to achieve are insecure without deliberation. A sufficient degree of reasoned discussion of the agenda items placed on Congress's plate (by exigent events, campaign promises or a popular outpouring of passion or preference) is necessary to ensure that proposals to be as efficacious as they are popular.

In order to minister to the general welfare, a persistent or permanent aggregate good of the nation, each House of Congress must construct a deliberative process – a lawmaking process responsive to a reasoned conception of the general welfare. While neither the word "reason" nor "deliberation" appears in the text of the original Constitution, there are several aspects of the Constitution which structure or allow for this

[70] Publius, for instance, states that a second, more deliberative body "may be sometimes necessary as a defense to the people against their own temporary errors and delusions. As the cool and deliberate sense of the community ought, in all governments, and actually will, in all free governments, ultimately prevail over the views of its rulers; so there are particular moments in public affairs when the people, stimulated by some irregular passion, or some illicit advantage, or misled by the artful misrepresentations of interested men, may call for measures which they themselves will afterwards be the most ready to lament and condemn" (Hamilton et al 1787/1961, 382-3).

needed deliberation. The presentment clause itself, in Article 1, Section 7, constitutionally requires reasons to be given and exchanged between the branches when consent is not given to a proposed law. In order to veto a bill passed by Congress, the president must "return it, with his Objections to that House in which it shall have originated, who shall enter the Objections at large on their Journal, and proceed to reconsider it." Such a procedure envisions, and indeed requires, that the Congress pass a law with a set of arguments for its passage, such that it could be defended against objections from the President. Upon hearing the President's objections, it likewise appears that the process of reconsideration ought to concern a debate occasioned by the reasons advanced by the President against a bill's passage into law, and an attempt to determine if those are conclusive or erroneous. Further, by changing the voting mechanism in Congress to voting as individuals, away from the provision as voting as a bloc as in the Confederation Congress, the suggestion seems to be that each MC should vote in favor or against each proposed bill based on the basis of their own deliberate choice rather than the fixed perspective of the majority of their state legislature (or more controversially, of a simple poll of their constituents).

Moving away from a clause-bound approach to interpreting the Constitution, the addition of bicameralism to the Federal Congress cannot, therefore, be thought of as unalloyed desire to add veto points to the mechanism of government. Instead the purpose of bicameralism, viewed in the context of congressional health, is to promote a second form of majority support: the conceivable *future* support of a majority for the course of action proposed by Congress. A healthy Congress ministers to the permanent and

aggregate welfare of the nation, not a temporary, fleeting well-being or a passionate desire whose actualization will prove more hurtful than helpful. Support for this thesis can be derived not only from the structural provisions of the Constitution, but from the most important treatments of bicameralism in *The Federalist*. As is common in that set of essays, Publius reflects on seemingly paradoxical insight when he states that immediate responsiveness to the people can lead to a surprising defect, "the want, in some important cases, of a due responsibility in the government to the people, arising from that frequency of elections which in other cases produces this responsibility" (Hamilton et al 1787/1961, 381). Publius means that the electoral connection which encourages representativeness, by learning and listening to the interests of their constituents, and responsiveness, by wanting to be reelected on the basis of favoring those interests, can lead to those very interests being neglected. This problem emerges because:

> The objects of government may be divided into two general classes: the one depending on measures which have singly an immediate and sensible operation; the other depending on a succession of well-chosen and well-connected measures, which have a gradual and perhaps unobserved operation. The importance of the latter description to the collective and permanent welfare of every country, needs no explanation. And yet it is evident that an assembly elected for [too short a term will be] unable to provide more than one or two links in a chain of measures, on which the *general welfare* may essentially depend (Hamilton et al 1787/1961, 381-2, emphasis added).

The Constitution was designed, however, with this defect in mind. While the electoral connection between *representatives* and their constituents may encourage this vice, the electoral connection between *senators* and their constituents means that they need to think ahead to consider their prospects for reelection, not this or next year, but more than half a decade down the line. While Publius means this to explain the presence of a small Senate with terms much longer than many expected in a republic, the effects of this incentive structure should prove to be felt throughout a healthy, well-ordered Congress. The design of Congress ensures that the House of Representatives needs the concurrence of the Senate for its proposals to become law. Just as the existence of the President's veto affects the deliberations of Congress, the prospect of seeing one's bill become dead on arrival in the Senate ought to force a degree of deliberation and care into the lawmaking process that might otherwise not exist in "the people's House." Critically, the same incentives ought to convince the Senate to be more attuned to immediate popular preferences than otherwise may be the case, since radically unpopular Senate bills will go down in defeat in the House due to the same differential.

A similar set of compensating bicameral advantages apply when comparing deliberations concerning *interests* in Congress. Wise deliberation regarding interests obtains when interests can find a fair advocacy on the floor of Congress, and when interests must be sacrificed, reasons are given for why this should be the case. Bargaining and compromise are thus acceptable but not as a decision of interests x and y to exclude interest z from the benefits of the policy. Side payments (for losing interests) are thus clearly legitimate and likely even necessary for an argument that the common good, or

general welfare, is being ministered to in its deliberations. While the House deliberations may focus on short-run welfare of only their narrow geographic constituency, the Senate's deliberations can offer reasons to occasionally sacrifice certain short-term goods, for broader, long term aggregate welfare. Bargaining and compromise imply that there is no *ex ante* ideal balance to strike between these twin goods; by providing constitutional support for the views of each, bicameralism enhances the effectiveness of Congress in navigating the tension between responsiveness and deliberativeness.

The idea that constitutional design acts to remediate vices incident to representative bodies is connected to the final attribute of a healthy Congress, and one perhaps less remarked upon that it ought to be: The Congress must be a self-consciously organized institution. A healthy Congress must be cognizant of the fact that collective bodies are susceptible to certain problems (vices in the language of the Framers; collective action [or coordination] problems in the language of contemporary political science) and ought to provide for rules and procedures, as well as enforcing norms, that militate against the weaknesses of such bodies, while fortifying its strengths. The criteria by which we evaluate Congress must therefore necessarily be different than the criteria a voter will use to evaluate her MC; it will clearly be different than that which an MC would use to evaluate a bill. Attempting to directly evaluating a Congress's representativeness or responsiveness without reference to its norms, rules, and procedures, would be to confound accidental attributes, from essential ones. In sum, one must evaluate Congress for its institutional ability to refine or redirect the tendency for MCs to fail to use the appropriate criteria to judge prospective law (due to reasons such

as excessive responsiveness to party or to narrow parochialism) or for Congress to fail prey to its vices (such as indecision or delay).[71]

The Constitution reinforces this natural supposition when it omits the codification of rules, procedures, or norms that the Congress must use in furtherance of their legislative tasks. Only the most fundamental requirements, such as requiring publicity and transparency through the publication of a journal, as well as recorded roll call votes, if requested by one-fifth of each House, are set down in advance; otherwise, the Constitution gives total discretion to Congress.[72] The Constitution states clearly that, "Each House may determine the Rules of its Proceedings, punish its Members for disorderly Behaviour, and, with the Concurrence of two thirds, expel a Member."[73] The reason the Constitution does not "hard-wire" the rules or procedures of the legislative process in advance is quite clearly presented by Publius: "we must bear in mind that we are not to confine our view to the present period, *but to look forward to remote futurity*. Constitutions of civil government are not to be framed upon a calculation of existing exigencies, but upon a combination of these with the probable exigencies of ages, according to the natural and tried course of human affairs" (Hamilton et al 1787/1961, 203, emphasis added). The appropriate body for determining which rules, procedures and norms best conduce to founding a legislative process with the general welfare in mind is

[71] See Whittington (2017), for an extensive, detailed and learned account of the potential vices which may befall Congress.

[72] Art. 1, Sec. 5.

[73] Art. 1, Sec. 5.

the current Congress, and specifically each Chamber thereof, as different 'ages" will require different innovations and developments in institutional maintenance.[74] Such consideration also makes it clear that each House is responsible for its own rules, and that precedent only hems them in so far as they freely choose to retain past practices.

One final point confirms the importance of rules, norms and structures for achieving the aims set out in the Preamble: Congress's virtues are not so automatic as those of the other branches, so these internal regulatory structures are much more important in the legislature. Plain historical fact and the present situation show that the Congress can relatively easily (without obviously violating any explicit textual provision) become overly (or even solely) responsive to parochial or special interests. It can likewise become representative (or even creative) of factional conflict in the wider society. It has certainly been stagnant, rather than deliberative, or behaviorally become motivated only by short term political gain in its decision-making.[75] The basic structures of Congress were surely founded in order to remediate similar flaws in the Confederation Congress, such as its lack of energy, its domination by parochial interests, and the inability for the Congress to make the short-term sacrifices necessary for long-term gain. Indeed, as this chapter has shown, the Congress was granted substantially more power, its workings

[74] Such a maxim means that a rule, norm or procedure which may be needful in one age is positively pernicious in another one. In a latter chapter it will de amply demonstrated that special rules and unorthodox lawmaking played a critical role in helping the Congress to be responsive. On the other hand, in the epilogue, I agree with contemporary scholars who think those processes destroy the possibility of deliberation.

[75] For a comprehensive treatment of alleged contemporary vices, see the previous chapter.

were directed toward majority rule, and each MC was granted some autonomy and license to align personal and political self-interest with the good of their constituents to promote these changes. Yet, some of these vices are more "natural" than the qualities that Congress ought to maximize.[76]

A substantial degree of institutional self-consciousness is needed, therefore, for Congress to instantiate the attributes of representativeness, responsiveness, and deliberation – and yield the constitutional affinities of energy, stability and republican liberty. While *The Federalist* famously explains the checks and balances needed between the three primary branches of government, Publius clearly says that such rules and procedures are needed in the subordinate organizations as well. "This policy of supplying, by opposite and rival interests, the defect of better motives, might be traced through the whole system of human affairs, private as well as public. *We see it particularly displayed in all the subordinate distributions of power*, where the constant aim is to divide and arrange the several offices in such a manner as that each may be a check on the other *that the private interest of every individual may be a sentinel over the public rights*" (Hamilton et al 1787/1961, 319, emphasis added). A member of Congress, whose constitutionally allowable internal motivation may be the single-minded pursuit of reelection (Mayhew 1987), must nonetheless be directed, through appropriate norms, rules and procedures, to do so in such a way that the general welfare may be promoted;

[76] Lee (2007), succinctly traces out the vices that naturally emerge from the geographical scheme of representation utilized to populate the Congress. The main flaw addressed therein, parochialism, is clearly but one of a number of ways that the Congress can fail to promote the general welfare.

otherwise, the central aim of the Constitution, and of its most sovereign part, has been subverted from the start. “If all members did nothing but pursue their electoral goals, Congress would decay or collapse” (Mayhew 1974, 141). The rational self-interest of MCs must be contended with at the stage of institutional design or risk the collapse of the institution.

By way of conclusion we can compare the explicit attributes developed in this chapter to the implicit standards operative in the field of congressional studies. In this chapter, it is shown that *a healthy Congress is one whose rules, structures and norms promote a representative lawmaking process, responsive to the immediate desires of the people, while simultaneously reflecting a future deliberative majority*. Recall that the implicit conception examined in the previous chapter suggested that legislative health consists of a *constitutionally-assertive, productive and majoritarian legislature, supported by institutional loyalty, and legitimated by transparent, responsible deliberation on policy.*

Such a juxtaposition reveals that several implicit standards have been rejected altogether as primary desiderata of institutional functionality: namely, productivity, transparency and constitutional self-assertion. The Constitution, failing to be a productivity enhancing device, instead suggests that popular responsiveness should be a mark of congressional health; after all a popular majority might well be more interested in the repeal of one law than in a programmatic positive platform of a dozen of laws. Productivity, especially when defined as the number of bills passed in a given Congress,

is simply not an indicator for congressional health.[77] Transparency, on the other hand, is not so much rejected as it is downgraded; certainly, much of Congress's work must be carried out in public, so that constituents may judge if their views and interests are being represented. But if Congress engages in some bargaining or deliberation out of the public eye that is hardly an indicium of dysfunction. Constitutional self-assertion is not presented as a primary attribute of health for rather different reason. The issue is that focusing on assertiveness as a primary attribute of a "good Congress" leads to the misimpression that Congress must be butting heads with the president to be successful. Maybe most perniciously, making such an attribute central to evaluating this institution suggests that Congress's status ought to be evaluated in reference to its relative status in a zero-sum power conflict with the presidency. This is not the case, as is demonstrated in the case studies. To sum up, the purpose of Congress is to promote the general welfare while taking advantage of its independent institutional vantage point and the special resources provided by the fact that Congress is a multi-member, democratically-elected, and constitutionally empowered body. In some cases, the Congress may very well find, after careful analysis, that full-cooperation with the president carries out this role better than contestation. Of course, on some occasions the Congress must assert itself, but conflict, for its own sake, ought not be presented as an attribute of congressional health.

[77] Even one of the progenitors of the contemporary scholarly debate over productivity has admitted that counting the number of bills passed in a given congress is not terribly significant. David Mayhew (2018), considering the contemporary critique of Congress, suggests that "it would be good to abandon the 'number of bills passed' yardstick."

A Welfare Oriented House Debates the First Bank of the United States

Developing an ideal account of congressional health poses important difficulties; one of the most important issues is ensuring that the standard is practicable and not unrealistically utopian. Indeed, readers of this chapter would not be initially faulted for being concerned that the account of Congress developed here represents "a Congress for boy scouts:" an institution composed entirely of selfless and purely public-interested individuals, wisely deliberating over institutional mechanisms and the policies proposed under those procedures, disagreeing without every becoming disagreeable, and fairly representing the voice of their constituents, even those not likely to vote for them at reelection time. In fact, one can easily adduce evidence to show that well-structured federal legislative institutions will operate much as described here; and that legislative institutions known for their great failures have frequently lacked these clear attributes of institutional health. While a demonstration of this evidence will occupy the next several substantive chapters, an even more heady task can be addressed immediately. While it will not strain credulity to posit the existence of Congresses which were responsive, deliberative, representative, or contained helpful internal regulating features, it will surprise many readers that the key attribute identified in this chapter, the promotion of the general welfare, was *explicitly* centered in the public debate of the very much self-interested, reelection seeking members of the United States Congress.

In the First Federal Congress MCs operated in an undiscovered country. Their attempt to grapple with the full scope of their power under the new forms inaugurated by the Constitution of 1787 was prompted not by matters of abstract principle, but the

concrete needs of resolving practical debates. Near the conclusion of the First Congress in 1791 one such question concerned whether or not the Congress had the power to charter and incorporate a national bank. Since the word "bank" does not appear in the Constitution, some worried that Congress was already beginning to exceed its delegated powers, in seeking to do just that. One MC, Representative Elbridge Gerry (MA), an arch-critic of the Constitution in the campaign for its ratification, yet a defender of the Hamiltonian Federalist vision for the government in 1789 – 91, presented a way forward. He suggested that one turn the tools of textual (legal) interpretation developed by the eminent English jurist Blackstone for assistance in penetrating this difficult issue:

> [Blackstone] is of the opinion 'that the most universal and effectual way of discovering the true meaning of a law when the words are dubious, is by considering the reason and spirit of it, or the cause which moved the legislature to enact it.' The causes which produced the constitution were imperfect union, want of public and private justice, internal commotions, a defenceless community, neglect of the public welfare and danger to our liberties. These are known to be causes not only by the preamble of the constitution, but also from our own knowledge of the history of the times that preceded the establishment of it (diGiacomantonio et al 1995, 457).

Rep. Gerry has here made several very important claims: (1) that the appropriate way to understand the Constitution is with respect to its "spirit;" (2) that one can find this "spirit" in the Preamble of the Constitution; (3) that one can locate in this Preamble a notable contrast between the conditions prevailing under the Articles of Confederation

and the intended rectification of those issues by the Constitution. If Elbridge Gerry did not use the word "positive constitution" in describing these views, he did the next best thing: his vision of constitutional interpretation started, just as this chapter did, with an explicit contrast between the Constitution and the Articles of Confederation. It is surely evident in his elaboration of this statement, where he proceeded to pose rhetorical questions:

> If these weighty causes produced the constitution, and it not only gives power for removing them, but also authorizes Congress to make all laws necessary and proper for carrying these powers into effect: shall we listen to assertions that these words have no meaning and the new constitution has not more energy than the old? … Or shall we, by a candid and liberal construction of the powers expressed in the constitution, promote the great and important objects thereof? (457).

Representative Elbridge Gerry, speaking on the floor of the House to his peers, posited that the Constitution should be understood primarily as a document that would "promote the great and important" objects stated in the Preamble. If it was necessary and proper to charter a national bank to promote the general welfare, then it was constitutional to do so.

Rep. Gerry was not alone in taking such a stand; numerous members of the House spoke to the central concerns of this chapter when they stated that the Constitution is best understood through its Preamble, that the Preamble is intimately connected to the Congress through the words used in Article I, and that the general welfare was to be the "north star" for that body. With respect to the Preamble, Rep. Laurence (NY) notably

remarked that "The principles of the government and the ends of the constitution … were expressed in the preamble, [where] it is established for the common defence and general welfare; the body of that instrument contained provisions the best adapted to the intention of those principles and attainment of those ends. To these *ends, principles, and provisions Congress was to have, he conceived, a constant eye*, and then by the sweeping clause, they were vested with the powers to carry the ends into execution" (413, emphasis added). Speaking likewise in favor of the constitutionality of the national bank bill, Rep. Boudinot (NJ), "took up the constitution, to see if this simple power was not fairly to be drawn by necessary implication from those vested by this instrument in the legislative authority of the United States. It sets out in the preamble with declaring the general purposes for which it was formed —'The insurance of domestic tranquility—provision for common defence and promotion of the general welfare.' *These are the prominent features of this instrument, and are confirmed and enlarged by the specific grants in the body of it*" (434, emphasis added). Rep. Sedgwick (MA) was blunter in stating that "The preamble of the constitution warrants this remark, that a Bank is not repugnant to the spirit and essential objects of that instrument" (397). Representatives were at pains to explain that the purpose of government was to promote the ends stated in the Preamble, and that they would not tolerate attempts to fit the Constitution with a straightjacket which would inhibit the Congress from framing laws to promote the general welfare.[78]

[78] Rep. Sedgwick (MA) was even more direct when he averred that if he "concur[ed] with [the opponents of the bank bill], I should think it my duty to go home to my constituents, and honestly declare to them, that by their jealousy of power, they had so restrained the operations of government, that we have not the means of effecting any of the great purposes for which the constitution was designed…" (399, said by Sedgwick).

The intimate connection between the Preamble and the most fundamental aim of Congress was likewise indicated in another statement of Rep. Gerry worthy of being quoted at length:

> It is remarkable, that altho' 'common defence and general welfare' are held up in the preamble amongst the primary objects of attention, they are again mentioned in the 8th section of the first article, whereby we are enjoined in levying taxes, duties, &c. particularly to regard 'the common defence and general welfare;' indeed common sense dictates the measure; for the security of our property, families, and liberty—of every thing dear to us, depends on our ability to defend them. The means, therefore, for attaining this object, we ought not to omit a year, month, or even a day, if we could avoid it, and we are never provided for defence unless prepared for sudden emergencies (454-5).

Gerry stated that special solicitude ought to be paid to the fact that the Constitution uses the phrase "general welfare" very precisely in two places, to connect the deliberations of Congress with its promotion and to ensure that necessary means of promoting it are efficaciously provided by the laws framed by that legislative body.

According to the reasoning of the members of the House speaking in favor of the bank bill, one must understand that the "general welfare" is to be constantly in the contemplation of the body, otherwise the Constitution's remediation of the flaws of the Articles have been for naught. "From the restrictions to the government contended for by the opposers of the bill, [Rep. Vining (DE)] similized the constitution to a horse finely

proportioned in every respect to the eye, and elegantly caparisoned, but deficient in one, and the most essential requisite, that of the ability to carry the owner to his journey's end; he had rather, he said, mount the old confederation, and rag on in the old way, than be amused with the appearance of a government so essentially defective" (472). Rep. Vining's statement reveals itself as another important declaration that the Congress is to comport itself very differently than the Confederation Congress, and that to do so, the Congress must keep the ends laid out in the Constitution in mind during deliberations even regarding the constitutionality of legislation, not just regarding its expedience.[79] Otherwise, the essential energy necessary to the promotion of the general welfare will be sacrificed.

Finally, members of the House contended that this "liberal construction" of the Constitution was not the same as a simple contention that the Congress could do anything it wanted so long as it used the magic incantation of "general welfare." They insisted, therefore that energy in government was not inconsistent with the demands of republican liberty. Rep. Ames (MA) stated that no one aimed to "contend for an arbitrary unlimited discretion in the government to do everything." Ames specifically, "took occasion to

[79] Rep. Sedgwick likewise stated that "The conduct of Congress had a construction on those words more rational, and consistent with common sense, and the purposes for which the government was instituted; which [Sedgwick] conceived to be, that the laws should be established on such principles and such an agency, in the known and usual means, employed in the execution of them, as to effect the ends expressed in the constitution, with the greatest possible degree of public utility." Sedgwick was not shy in stating what those ends were: "The great ends to be obtained, as means to effectuate the ultimate end—the public good, and general welfare, are capable, under general terms, of constitutional specification; but the subordinate means are so numerous, and capable of such infinite variation, as to render an enumeration impracticable, and therefore must be left to *construction, and necessary implication*" (400-1, emphasis original said by Sedgwick).

protest against such a misconception … He noticed great marks by which the construction of the Constitution, he conceived, must be guided and limited—and these, if not absolutely certain, were very far from being arbitrary or unsafe: It is for the house to judge whether the construction which denies the power of Congress, is more definite and safe" (395-6). In other words, there were clearly stated lines which the Congress should not cross, but MCs sought to prevent their colleagues from assuming that limitation of governmental power was desirable for its own sake; the plain experience of the Articles of Confederation had shown that this maxim was not reasonable. In fact, energy in government was proved to be necessary, not only for the security of liberty, but for the continued existence, vitality and stability of the regime itself.

Members of a Congress, motivated by powerful norms regarding the importance of the newly written Constitution, expressed the insights of positive constitutionalism with such force that some construed the Congress as duty bound on this issue. Rep. Smith (SC) said that "If… on solemn deliberation … [it appeared] that the measure was not prohibited by any part of the constitution, was not a violation of the rights of any state or individual, and was peculiarly necessary and proper to carry into operation certain essential powers of the government—it was then not only justifiable on the part of Congress, but it was even their *duty* to adopt such a measure" (430-1, emphasis added). It is taking little liberty with this language to say that members of the House of Representatives were advocating that Congress had positive duties to promote the general welfare, even in ways not expressly mandated in the text of the Constitution. They

located such claims in the "spirit" of the Constitution, collected from its Preamble and from its structural provisions in Article I.

Members of a healthy Congress, which the First Congress was, as will be shown in the next chapter, are capable of being redirected in such public-spirited and even frankly theoretical territory, by a combination of norms, structures and rules and their own political self-interest. It is no surprise that many of the representatives quoted above were from the financially burgeoning Northeast. Their political self-interest motivated them to advocate for the passage of a bill incorporation a national bank. In a well-functioning Congress, language of partial good is displaced by arguments for the common good of all. Searching for arguments to overcome objections, MCs came upon reasoned arguments to defend to passage of bills on subjects not expressly defined in the Constitution.[80] Able opponents of the bank bill, such as James Madison, sought to reject these arguments, but they could make no headway against the stubborn logic that the Constitution was different in kind than the old Articles. For well-more than a year previous to the bank debate the Congress has legislated on many topics not "expressly" enumerated in the Constitution, appropriating money for lighthouses, despite not a word in the Constitution describing such "internal improvements" (Bordewich 2016). Even

[80] "In the understanding of The Federalist ... the Constitution will be effective to the extent that it is able to institutionalize hypocrisy. Political self-interest is translated into action for the common good by the creation of incentives for ambitious politicians to defend their actions with publicly justifiable reasons. In this view, the injustice or prejudice of individual motives becomes politically irrelevant to the extent that politicians feel constrained to justify their actions with good reasons—through reasons that may not actually been their motivation. As long as politics trades on the plane of these public-regarding rationalizations, liberal constitutionalism would have worked" (Tulis and Mellow 2018, 139). In the First Congress, liberal constitutionalism worked quite well.

though interests may have been thought to be incommensurable on this topic, as many feared that the agricultural interior of the nation was not to equally benefit by such a bank, the arguments advanced by the proponents of the bank bill proved unanswerable; the bank bill passed by a tremendous margin in both the House and Senate (Bickford and Veit 1986). It is not for nothing that the politically-motivated reasoning of the First Congress was largely confirmed by a unanimous decision of the Supreme Court in 1819 (see McCulloch v. Maryland). In short, an ideally healthy Congress features MCs capable not just of promoting the general welfare, but of doing the constitutional interpretation necessary to conclude that this is their chief task.

Chapter Three: The First Federal Congress

The First Federal Congress convened in March of 1789 with a full agenda and high expectations.[81] It was the responsibility of the Congress, as outlined in Article I of the Constitution, to establish the executive and judicial departments of the Federal Government, to raise revenue, and to establish a national capitol.[82] Likewise, the Congress was the primary actor needed to pass the ordinary laws needed by an acquisitive, commercial republic (see Diamond 1986).[83] The legislative agenda, being bottled up by so many years of inaction in the Confederation Congress (Jillson and Wilson 1994), was long and complex. At minimum, the Congress needed to devise a national impost system, then develop a collections system to receive the revenue that resulted from this import tax. Besides these necessities, the Congress was also urged to

[81] Calling this body, the "First Federal Congress," helps to avoid a possible misunderstanding, as there was more than one First Congress. There at least two other bodies that this term might apply to, including the first Continental Congress, as well as the first Congress convened under the authority of the Articles of Confederation, which one might call the first Confederation Congress. But, for the sake of brevity, I will use the term First Congress throughout the rest of this chapter to refer only to the First Federal Congress.

[82] In Section 8 of Article I, the Constitution stipulates that "The Congress shall have power to lay and collect taxes, duties, imposts and excises, to pay the debts and provide for the common defense and general welfare of the United States…[and] To exercise exclusive legislation in all cases whatsoever, over such District (not exceeding ten miles square) as may, by cession of particular states, and the acceptance of Congress, become the seat of the government of the United States." The existence of federal executive departments is confirmed by Section 2 of Article II, as the President is granted the power to request, "the Opinion, in writing, of the principal Officer in each of the executive Departments." Intriguingly, the power of the Congress to create Executive Departments is not directly stated, but rather appears to be implied by that same section (Section 2 of Article II), which states that the President may appoint with the advice and consent of the Senate "all other officers of the United States, whose appointments are not herein otherwise provided for, and which shall be established by law: but the Congress may by law vest the appointment of such inferior officers, as they think proper, in the President alone, in the courts of law, or in the heads of departments." Since Congress is the national lawmaking body, it is evidently necessary to pass a law creating such departments.

[83] See also Tulis and Mellow (2018): "The Constitution was a political design for a large commercial republic where national power would increase dramatically over time. [Tulis and Mellow stress] that this ... understanding of the projected working of the polity designed by the Constitution—what [they] called its political logic—is the core meaning of the Constitution" (145).

establish a national bank and the post office, pass a code of national criminal law, and provide encouragement for the arts and sciences.

Given its heady mandate, forming a healthy, well-functioning Congress was critical. Fortuitously, the body was given nearly unlimited power in the Constitution to set its own rules and develop its own internal structures. The rules, procedures and norms developed by the First Congress, however, may surprise contemporary political scientists. MCs did not settle on strong central leadership, standing (permanent) committees with clear jurisdiction, conduct investigative or informational hearings, or construct any of the other contemporary expedients thought to solve "collective action problems" in lawmaking assemblies (Jillson and Wilson 1994, 5). The First Congress, did however, manage to achieve virtually everything on its lengthy agenda, passing 102 bills, out of 167 introduced (De Pauw 1972, 719-740), and the few items that it left behind were immediately turned to in the Second Congress (Bordewich 2016, 301-304).

In this chapter I thus present one iteration or instance of a functional Congress, along with the norms, rules, and structures that it developed to fulfil its difficult constitutional mandate. The method chosen is, loosely speaking, that of "analytic narrative" (cf. Bates et al. 1998, 3-10).[84] The analytic narrative carried out here is helpful in three distinct ways: (1) it provides a useful and well-fleshed out "ideal-type" for the

[84] Why loosely? This chapter does not use the models of game theory, and neither does it make casual claims. These attributes are usually associated with the "new institutionalism," but are not present in this account. Why is it still, nonetheless, an analytic narrative? Because it marries data (from the historical record) with theory (the claims made in Chapter Two) about Congress and the Constitution, in the framework of analytic political science.

conception of congressional health articulated in this study;[85] (2) it provides an empirical example of a Congress presenting coherent, reasonable and effective policymaking process, even in the absence of explicit Presidential or party leadership and (3) theoretically aids in developing and fleshing out the concrete ways in which a Congress can be representative, deliberative, and responsive to popular impulses, all the while remaining faithful to the purposes for the government articulated in the Preamble of the United States Constitution.[86]

The chapter begins with a treatment of case selection, seeking to quell any skepticism that may result from my focus on such an unrepresentative example to aide in developing an account of institutional health. After considering methodological concerns, I turn to an analytic investigation of the Congress as an institution. Simply put, the First Congress was an adeptly designed system. The First Congress (1) developed structures to channel interests in the lawmaking process, by creating a floor-centric legislative system; (2) adopted a procedure of reading and officially acting on citizen petitions to gain information about popular preferences; (3) created and then relied on a set of rules designed to encourage deliberative exchanges between equals; and (4) created

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[85] To present the First Congress as an instantiated ideal-type of a healthy, functional Congress is not to say that the First Congress is the image of legislative perfection. It was undoubtedly imperfect; although I have mentioned the convening of Congress in March of 1789, it must be said that accurately the Congress, with its incredibly full agenda, did not have a permanent presence until a quorum was assembled in the House on April 1 (De Pauw 1977, 7). In the Senate a quorum materialized on April 6 (De Pauw 1972, 7), nearly a full month late, with only the presence of only 12 Senators. How, one might ask, did 12 members constitute a quorum? North Carolina and Rhode Island had not yet adopted the Constitution, thus the 12 Senators did in fact constitute a quorum out of a total possible membership of 22.

[86] Namely, "To Establish Justice and Insure Domestic Tranquility," but preeminently to "Promote the General Welfare.

a system of interbranch cooperation which enhanced the legislative process by delegating certain responsibilities to the executive. Importantly, none of these innovations were foisted on Congress, but rather created through the action and inaction of MCs. We can thus fairly attribute the success of Congress, generally to MC behavior and the incentives provided by the constitutional logic of the new regime. To provide for a legislative process where interests had their due say, MCs utilized a structure called the Committee of the Whole House, where the general outlines of policy were proposed. After a relatively wide-ranging consensus was reached, drafting policy would then be entrusted to select (ad-hoc) committees of limited duration and small membership. This process led to the creation over 400 committees over the three sessions of the First Congress. Bringing interests into the fold, while not allowing logrolling or parochialism to flourish, MCs developed strong behavioral norms regarding the manner and quantity of deliberation necessary to create effective and representative legislation. And to ensure that these deliberations had some relation to popular impulses and views, the First Congress developed an elaborate system for receiving and presenting petitions on the floor of both the House and Senate.

To help contextualize these institutional devices and norms, one prosaic, yet representative law is investigated throughout this chapter: the enactment which established the first schedule of tariffs (imposts) that would fund the federal government. While the temptation exists to focus on the acts of constitutional statesmanship exercised by MCs in the drafting of the Bill of Rights, or the creation of the executive departments of State, War, and Treasury, centering analysis on a mundane matter helps to make the

investigation undertaken here speak to a broader array of circumstances. Even within the deliberations over the impost, attention is primarily directed to the setting of one tariff on imported molasses. Representing a contentious issue, setting the proper rate on molasses represents the kind of political issue arising in every Congress, where claims are made of a zero-sum competition between interests. Closely following the legislative history behind this conflict provides an account of the First Congress in microcosm, as an issue that would have certainly deadlocked the old Congress of the Articles was resolved successfully. The impost thus passed into law, setting the nation on the course to fiscal solvency.

Yet, the First Congress certainly did more than simply set one impost rate; therefore, one final section of the chapter is devoted to examining interbranch relations in the First Congress. Congress proved surprisingly eager to delegate the initial stage of policy formation to the executive branch, all the while remaining steadfastly jealous of its power to amend, revise and even reject proposals emanating from the Washington Administration. While it is essential that Congress guard its constitutional prerogatives, the First Congress contained statesmen who nevertheless engaged in strategic delegation.[87] Such a legislative process shows that congressional health need not be determined by a maximization of its power vis-à-vis the presidency. Following the

[87] Chamberlain (1946) goes so far as to describe Treasury Secretary Alexander Hamilton as the "prime minister" of the First Congress. While I would not go quite so far, this appellation certainly shows the extent and importance of the legislative leadership provided by executive departments in 1789 – 91.

investigation of these constitutional and interbranch questions, a final conclusion is then offered on the Congress of 1789-91.

CASE STUDY A – AN IDEAL TYPE

Prima facie, the First Congress does not appear very representative of the institution of Congress more broadly speaking. The differences, after all, are clear and striking between the First Congress and the 115th (contemporary) Congress. The First Congress did not have partisan leaders, or formal parties at all. It only had two standing committees, a House committee on elections, and a three-member joint committee to examine bills to ensure that they were typographically ready to be enrolled and sent to the President (De Pauw 1977, xxii). The 425 other committees were chosen for one subject at a time and then disbanded after reporting. It only consisted of 26 Senators and 65 Representatives, which is less than a fifth of the current size of Congress. The Senate galleries were closed to outside observers, or more accurately speaking the Senate had no galleries for spectators at all (Swift 1996, 58). The First Congress even convened at two different capitals, neither of which were Washington, D.C.[88]

As a further limitation, Congress met with an unusual occupant of the Presidency – the father of the nation, George Washington, who was elected unanimously to the position. With a singular statesman of unquestioned respect ensconced in the White House, the constitutional contestation which frequently characterizes the separation of

[88] The First Congress convened in New York City, NY for the First and Second Sessions, only to relocate to the city of Philadelphia, PA for the Third Session, because of a bargain struck in the Second Session. More on this matter will be discussed below.

powers system was very much inhibited. Thus, The First Congress did not interact with the Executive in the same way they would have had literally any other individual been President. Since the incentives offered to MC to take an independent institutional vantagepoint (and potentially clashing with other branches who do not share this constitutional place) is an important attribute of the constitutional system, this is an important limitation of examining the First Congress. Overall, given these limitations, one might pose a question: what is the purpose of examining such an unusual congress when one is attempting to develop a standard appropriate for evaluating the institution of Congress more broadly?

I would submit at least three strong rationales for closely examining the proceedings of the First Federal Congress. The first is that my general scheme of case-selection aims to select a "diverse" (see Gerring 2007, 97-8) set of cases that illustrate attributes of congressional health. The fact that many of the Senators and Representatives who attended the First Congress were framers at the Constitutional Convention (Swift 1996, 49) would be vice for a case-selection strategy that aimed to find typical or *representative* Congresses;[89] it is instead a virtue for a project that attempts to articulation the dimensions of congressional health. Indeed, as legislators and statesmen on par with the framers, the MCs of the First Congress were unusually self-

[89] One further reason the First Congress is not representative is that no other Congress has felt the need to create the institutions its rules from scratch again. This problem would be still greater if approximating the First Congress were the sole source of a standard for congressional health, as defined institutionally, as it defeats the purpose of developing an institution, if it must be created *de novo*, at the beginning of each Congress.

conscious about the institution they served in, by necessity. The members of the First Congress were literally creating the institution of Congress. They created its rules, and its norms, and they did so in the context of both the earlier failure of the Confederation Congress and the knowledge of the critical importance of their actions. In observing this process of institution creation, one can gain considerable insight what the institution looks like when framed by especially thoughtful and purposive effort. The First Congress's outlier status as a part of the Extended Founding, is thus helpful, rather than damaging.

Second, examining the First Congress allows the reader to follow a logical process that connects the theoretical material developed in Chapter Two with the concrete reality and functioning of our governing institutions. In the previous chapter I developed an account of Congress that depicted that body as an instrument of a purposive or positive model of constitutionalism (see also Ives 2018). The First Congress presents an occasion or a venue for observing a process that would otherwise be inscrutable: the process of turning legal provisions, broad language and delineations of power into a real, functional institutional government. Congress, convening in New York, was immediately faced with the real questions that a straightforward analysis of the text did not immediately resolve. Some, like the contested removal power (Alvin et al. 2013), considered the relationship of the Congress with other branches. Other issues, such as the status of bills not yet passed by both Chambers before the end of a session, concerned the inner workings of the legislature. Yet others, such as framing the Bill of Rights, and debating the power of the federal government to charter a Bank of the United States,

required reasoning and deliberations regarding both the scope and the appropriate reading of the grants of power made in the Constitution. In other words, for the words of the Constitution to be more than mere parchment, they must be discussed and examined by a deliberative Congress; in examining the First Congress we see an especially good example of this principle.

Third, the First Congress, while different from the rest of the other 114 Congresses in key ways, was nonetheless still a legislative body subject to the travails that have characterized the institution for its entire history. Setting tax and trade policy through the imposition of an impost on imported goods revealed the quality of congressional deliberation. These men, while unusually unified in achieving certain goals, were not "demigods" and their debates about the tax on molasses readily attest to this fact. Facing numerous vested interests on issues such as the impost, the bank, the assumption of state debts and the location of the nation's capital, bargaining was in strong evidence.[90] MCs faced the perceived needs and wants of their constituents, while trying to balance those desires against the need for coherent and reasonable law. The First Congress made its share of mistakes, passing no fewer than 9 laws that amending its own acts (De Pauw 1972, 719-740).[91] While our current legislators do not impress us, the

[90] For reasons of economy, this chapter omits direct consideration of many of these disputes, such as locating the capital or assuming state debts, instead presenting attributes of the First Congress which especially illustrate well-functioning institutional mechanisms.

[91] The First Congress met in three sessions, which long adjournments between each one. In many cases, the revisionary laws represented the amendment of a bill passed in an earlier session by another enactment passed in the second or third session. One such bill, HR-50, was given a particularly awkward designation: "An Act, further to suspend part of an Act, entitled, 'An Act to regulate the collection of the duties imposed by law on the tonnage of ships or vessels, and on goods, wares, and merchandizes, imported into the United

legislators of the First Congress were, by and large, very unimpressive to each other (Bordewich 2016, 37).[92] Indeed, investigating the First Congress, one sees that in spite of some of its unrepresentative features, that it certainly could serve as a very reasonable "ideal-type:" an appropriate point of orientation for Congress more broadly.

In further developing the concept of an "ideal-type," a kind of explication by similarity might be helpful. One could parallel the investigation being conducted here to the common comparisons made academically, journalistically and popularly between a given occupant of the White House (whomever he or she may be) and President George Washington. When one compares a president to Washington, one does so with the knowledge that Washington is a singular feature in the history of the United States. While predictions are dangerous, it strains credulity to imagine another unanimous Electoral College victor. Other differences between George Washington and say Donald Trump could be discoursed on, perhaps interminably. Thus, when one compares a president to President Washington, one is not suggesting that that individual could somehow become the Father of the Nation. Instead one is attempting to abstract out attributes of his character, public behavior, prudent decision-making or leadership that

States,' and to amend the said Act" (729). In another case, HR-23, the Congress altered a law they had passed, *during the same session in which the earlier had passed* (726).

[92] Bordewich reports of a letter in which Representative Fisher Ames of Massachusetts wrote the following of fellow Representative James Madison: "I see in Madison, with his great knowledge and merit, so much error, and some of it very unaccountable, and to tending to so much mischief." Overall the entire group of MCs, "fell far short of the 'demi-gods and Roman senators' [Ames] had anticipated" (Bordewich 2016, 36-37).

present a standard toward which occupants of the office ought to aspire.[93] One difference exists, however, between those types of comparisons and the method of this chapter: that is the advantage of proceeding, systematically and analytically through these comparisons. Examining the attributes of congressional health, allows one to evaluate real Congresses based on those standards, without expecting or hoping for the First Congress to materialize again.[94]

REPRESENTATION IN THE LAWMAKING PROCESS

Congress is both an assemblage of persons, 95 individuals in the First Congress, to be exact,[95] and an institution: a complex of rules, norms, and constraints that make the action of that group both legible and possible. To speak of the Congress as an institution, takes the Congress, as a whole, to be the "unit of analysis." Therefore, the focus is not on biographies of individual MCs, nor presenting a chronological narrative of the legislative, constituent service, or advertising activities of Members in the First Congress. Instead, one studies the body, generically speaking, its hierarchies (or general lack thereof), its internal subdivisions, and its self-consciously developed rules to facilitate its business and to corral wayward members back into the fold.

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[93] Also, contemporary commentaries often note, justly, that Washington was not perfect, especially in his personal and political relationship with the institution of slavery. This same caution applies to comparing the contemporary Congress with Madison's Congress.

[94] Indeed, given demographic, political and moral changes that occurred in the nineteenth and twentieth centuries, it would be quite unjust and unreasonable for a Congress composed entirely of white men, who do not formally identify with any party, to be the lawmakers of the nation in the twenty-first century.

[95] Those of quick arithmetic wit will notice that this number is not equal to the number of seats in the First Federal Congress, which was 91 (26+65), once Rhode Island and North Carolina ratified the Constitution. This is due to the fact of several resignations and deaths of MCs occurred during the years of 1789-91.

Starting the analysis at fundamentals, the chief attribute of congressional health is the institution's ability to provide a place for important views and interests, and to represent those in some rough proportion to their presence in the overall society. Meeting such a standard requires that MCs present a diversity of views *and* then develop structures to facilitate the conveyance of these views and interests into the legislative process. Since this standard pertains to both views and interests, one must survey the status of ideological and economically-interested divides in the First Congress; here ideology is examined first.

Although the First Congress did not have parties, in the formal sense as elaborated by Aldrich (1995), it certainly contained ideological factions. Three factions of unequal size existed amongst the members: the largest and predominate faction made up of nationalists, who would have been described as Federalists during the ratification campaign of 1787 and 1788; a smaller faction of opponents of a stronger central government, very nearly holdovers from among the Antifederalists; and an even smaller faction of MCs who were characterized by a favorability to mercantile interests and protectionism. The first group might be called the Pro-Administration faction; the second the Anti-Administration; and the third the Hamiltonians. Due to the lack of formal parties, determining the exact nature, extent, and membership of these factions is not easy. The most authoritative source identifies 67 (21 senators and 46 representatives) as members of the Pro-Administration faction, 17 (4 senators and 13 representatives) in the Anti-Administration category, and the remaining 11 (2 senators and 9 representatives) in the Hamiltonian (Bickford and Veit 1986, vii). Yet even this accounting is open to

question, as some MCs' views shifted over the course of the three sessions.[96] These complexities aside, the relative size and strength of the three groups does not seem up for question, as there is no doubt that the Pro-Administration, proto-Federalist group was paramount in the body.

These factions, due to the lack of formal leadership, defined platform and the like, certainly were not as disciplined as modern political parties. While the numbers recited above would lead one to believe that roll call votes inevitably featured a roll of the two smaller groups by the larger, this in fact did not occur. On many occasions, (establishing a national bank, assuming the debt of the states) the commercial, Hamiltonian faction got its way, and the voting was typically much closer than the 2/3 majority of the largest faction would suggest. The Anti-Administration group saw the Constitution amended with a Bill of Rights, but lost many votes in shaping the Bill of Rights in a manner more to their liking. Overall, "Partisanship… waxed and waned over the early period. Ordinarily it was the array of issues that defined coalition composition and members were not compelled to toe a particular, consistent party line" (Wilson 2002, 311). The numerical predominance of the Pro-Administration group and its diffuseness should be kept in mind, however, when considering the types of structures, rules, and norms chosen by the Congress as a whole, as very different ones may have been chosen in the presence of two closely-divided and homogeneous formal parties.

[96] As an example, one Senator from Pennsylvania, William Maclay, was not previously an Antifederalist and is thus not included in the authoritative listing in the Anti-Administration bloc. Nonetheless, his voting record in the First Congress revealed him to be the staunchest opponent of the Administration.

The existence of a mercantile interest, operating as an ideological faction, presages the existence of material or economic interests in the body. Largely geographic in nature, one might reasonably divide the nation across two important interest-based cleavages relevant in 1790. The first, comprised of a financial, mercantile interest, (contemporaries regionally identified this interest with "the carrying states") was centered around MCs from New England and New York; more agrarian interests predominated outside of this region. Another overlapping, but not identical split, divided areas heavily and directly dependent on plantation agriculture (Maryland, Virginia, North Carolina, South Carolina, and Georgia) from those which did not. The existence to these two different cleavages gave rise to roughly three sets of interests, which operated only occasionally coincident with the factional interests described above (see Table 3-1). In early-republican America, no single economic interest was predominant, although the mid-Atlantic areas without large populations of enslaved individuals claimed the smallest contingent of MCs.

Examining how interest-based conflict played out in a concrete political dispute can help flesh out these abstract analytic categories. Consider one conflict that will be examined throughout the remainder of the chapter: the setting of an impost (tariff) rate on molasses. In 1789, molasses was used as a sweetener for a wide variety of meals prepared in the Northeastern United States (especially as a cheaper substitute for sugar), as well as an important raw material for the creation of "country rum," an evidently inferior substitute to rum of Caribbean extraction. This led to a predictable line-up of several representatives who were resolutely opposed to molasses imposts of any kind, as they hoped that a protectionist benefit for the distillers of the Northeast would be reaped by

placing an impost on Caribbean rums. Such MCs hoped such low tariffs on Molasses would lead to a competitive advantage for the industrial exertions of their constituents.

Table 3-1: MC Count by Geographically-Concentrated Interest in the First Congress

REGION	**SENATE**		**HOUSE**	
	No. of Seats	% of Chamber	No. of Seats	% of Chamber
MERCANTILE, NON-PLANTATION	10	38%	23	35%
NON-MERCANTILE, NON-PLANTATION	6	23%	13	20%
NON-MERCANTILE, PLANTATION	10	38%	29	45%
TOTAL	26		65	

Source: The U.S. Constitution, Article I, Section II, Clause 3, for numbers of MCs

Note: The other potential overlap (mercantile and planation dependent) was a null set.

Compounding the interest in a low (or zero) tariff for MCs from the mercantile region was the fact that imported molasses made up an important article of the trade with the Caribbean. Plantations in that basin were reliant on salted fish, caught in the waters off Canada by American fishermen. It was feared that a high tariff on molasses would

disrupt this trade. Outside the mercantile states, where drinking country grain alcohol was more common than rum, and where sugar was used more predominately, there was no such compunction about setting a high tariff on rum. Further, where there was no reliance on fishing as a mercantile industry there was little direct concern for the alleged interconnection between the molasses import and American national exports (Bordewich 2016, 73-5).

Given the existence of different blocs of partisan and economic interests in the society and represented by legislators in Congress, it was very important that the lawmaking process be constructed in a way that allowed the airing of diverse views without devolving into an excessive degree of parochialism. In the case of molasses, the very real possibility existed for one interest to capture deliberations to the economic advantage of their constituents over those in the minority. Due to the sectional dynamics of regional-based economic interests, setting the tariff rates appeared to be a zero-sum operation, and, prima facie, not one lending itself to equitable deliberation. Speaking of such disputes, Publius had very presciently stated that, "The apportionment of taxes on the various descriptions of property is an act which seems to require the most exact impartiality; yet there is, perhaps, no legislative act in which greater opportunity and temptation are given to a predominant party to trample on the rules of justice. Every shilling with which they overburden the inferior number, is a shilling saved to their own pockets" (Hamilton et al 1787/1961, 74-5). Since sectional economic interests were not able to be eliminated, their presence must be accepted as permanent and hence controlled.

To control the possibility of majority faction and ensure appropriate representation of the various economic and political views prevailing in the polity at large, the First Congress opted to deliberate over bills on the floor. Not willing to entrust the development of a tariff schedule to a committee, where one interest may predominate, each Chamber created a process that produced policy proposals from the floor, acting as one body. While contemporary political scientists would anticipate that this would lead to centralized or cartelized control of the floor, the MCs were also unwilling to trust an agent for this task either. Any one empowered agent would be a member of one of blocs of interests after all, and hardly above taking advantage of their station to advance its economic welfare. Of course, these moves simply traded one set of problems for another. One reason for the creation of committees or centralized leadership, in both legislatures and in any organization, is that it is simply very unwieldly to attempt to deliberate or proceed as a large group.[97] Moreover, it wastes the potential for parallel-processing – the ability to proceed on more than one area of the agenda at one time – if the body is to work through agenda items one at a time, without centralized control. To ensure that essential representation could be had, without sacrificing the ability to effectively move through the lawmaking process, the Congress turned to two structural devices: the first, the so-called "Committee of the Whole House," was a hold-over from extant parliamentary practices; the second, what I call, "the select committee system" appears to be an innovation, as I have not seen it described in any other work or body. Examining

[97] The Congress, although small by contemporary standards, still consisted of more than two dozen Senators, and more than five dozen Representatives.

these twin-structural features of the lawmaking process in the First Congress reveals not only the way that these expedients operated, but also reveals the surprising advantages to operating in such a seemingly "ad-hoc" fashion.

The Committee of the Whole House, (or the COWH) in particular begs further analysis as it is an institutional structure self-consciously chosen by the Members to produce the leadership and agenda control lacking in the office of the Speaker. The COWH will be familiar to anyone who has read Madison's notes on the Constitutional Convention, and it operated in much the same way in the First Congress. Rather than conclusively settling matters the first time, the entire House itself would resolve itself into the COWH, to proceed more informally through marking up a bill, considering petitions, or debating what even ought to be on the agenda in the first place. Thus, when working through a bill, each Chamber would consider itself as working in committee, giving members license to consider the work done in this initial stage as tentative. For a group of politicians concerned about whether the interests of their states would be properly represented, such a step in the process was imperative.

The COWH, in fact, came in two varieties. The COWH for the State of the Union, was the agenda setting body that could consider all the issues facing the nation, and therefore the Congress, and would choose which of those issues to address, by in turn electing out committees to report back bills or reports on those topics. The COWH, when not meeting in this form, operated per the rules of the day to mark up or debate one bill, previously designated for deliberation on that calendar day. In either version, the COWH needed a chairman, who would never be the Speaker. The Speaker would actually

descend from the dais, and the chairman of the "committee" would ascend in his stead, to mark the change between the House operating formally, and as the COWH (De Pauw 1977, 15). After finishing its deliberations, the chairman needed to formally report the work of the COWH to the House for approval, before that work could be accepted as final. Allowing for chairmanship in the COWH provided for expanded leadership opportunities in the First Congress, as seven MCs served as chairman of the COWH (De Pauw 1977, xxix). Chairmanship in the COWH, thus overcame issues of collective choice and action that would usually be associated with a group with weak central leadership, without turning to the expedient of entrusting matters to one absolute legislative leader.

The First Congress's committee system, if one is to call it that, defies easy categorization. The committee system of the First Congress was certainly not institutionalized in the sense which it is spoken by Polsby (1968) and others. The two standing committees that existed (Elections and Bill Enrolling) were odd; the Congress, despite recognizing them as standing, reformed them at the beginning of each new session. The remaining 425 select and joint committees were ad-hoc, elected from the members of each chamber, and expected to disband once they had reported on the matter entrusted to them. But the word "ad-hoc" implies a certain random, or indefinite quality. This is especially evident in ad-hoc committees formed outside of legislatures, whether on the job or in a civic organization. In many cases, such committees will not even have formal recognition from the larger body of which they are a part. Such informality, however, is not in evidence in the First Congress. Indeed, the method of selecting

committees, their membership, their purpose, and even their duration was subject to certain structural regularities, both across chambers and across the three sessions. Thus, it is better to denominate the committee structure of the First Congress as "the select committee system."[98]

Since the First Congress formed 427 committees there is some natural diversity in the committees, but one can still speak about the committee system, especially with careful quantitative work. While their method of selection was covered above, the nature of the median or representative select committee remains to be developed. Here I examine select committees, which make up 392 out of the 427 committees.[99] Each select committee was committed to accomplish one task, whether to examine a report from the Executive Branch, to determine if action could be taken on a petition, or to draft a bill.[100] Committees were also formed for ceremonial tasks, such as waiting on the President to inform him of a quorum, or to present him with an official reply to the State of the Union or the Inaugural. The median select committee (of all types [legislative, oversight, constituent service, and ceremonial]) in both chambers was made up of three members.[101]

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[98] Swift (1996) also refers to these committees as "select committees" rather than ad hoc (73).

[99] Joint and conference committees make up the remainder. Very few bills went to conference in the First Congress and most joint committees were ceremonial.

[100] Very rarely, a single committee's discrete task, such examining a report from the Secretary of the Treasury on difficulties encountered in implementing the first session's Impost Act, would lead to multiple reports. That select committee, for instance, reported a Tonnage Bill, a Collection Bill, and a Coasting Bill to amend the previous session's enactments (De Pauw 1977, 266), all in response to that report from Secretary Hamilton. But this was very much the exception.

[101] To generate the quantitative data in this section, I examined the House and Senate Legislative Journals, as printed in De Pauw (1972,1977). I created a data set of all committees formed during the First Congress, categorized by type of committee, the subject of the committee, the number of members of the committee, the day it was formed and the day it reported. As indicated above the total *n* is equal to 427.

This median is unusually representative, as around two-thirds the total (261 of 392 select committees) contained exactly three members. Even so, larger committees of 5, 7 or even 9 or more, were sometimes utilized. These larger committees occurred more often in the Senate (44% of the time) than the House (27%). Although there is an exception to this general trend; in the House of Representatives there was surprisingly frequent (18 separate committees or 7% of the total) recourse to grand committees consisting of one member from each state. Overall (see Figure 3-1), a clear preference was shown for very small committees consisting of a committee chairman and two other members. These small committees were entrusted with matters of all types, from considering one citizen's petition, to drafting the Copyright Law of the United States.

There were also considerable regularities in terms of duration. Committees in the House also were of a slightly longer median duration than those of the Senate, but both were within one week: the median committee served for only 4 days in the Senate (from selection to the day of final report); the median House committee lasted around one week. The distributional pattern of committee duration partakes of a normal distribution, with the plurality of committees convening for about a week, with a nonetheless substantial number taking shorter or longer (see Figure 3-2). Some committees lasted only a day or two, while others lasted a month – or even months. This makes intuitive sense, as some committees, such as ceremonial ones, or committees to write a single amendment might only exist for a day, whereas committees empowered to draft a detailed policy-oriented bill, such as a bill regulating the Militia, might take two months or more before reporting back to the House.

Figure 3-1: Number of Members on Each Committee in the First Congress

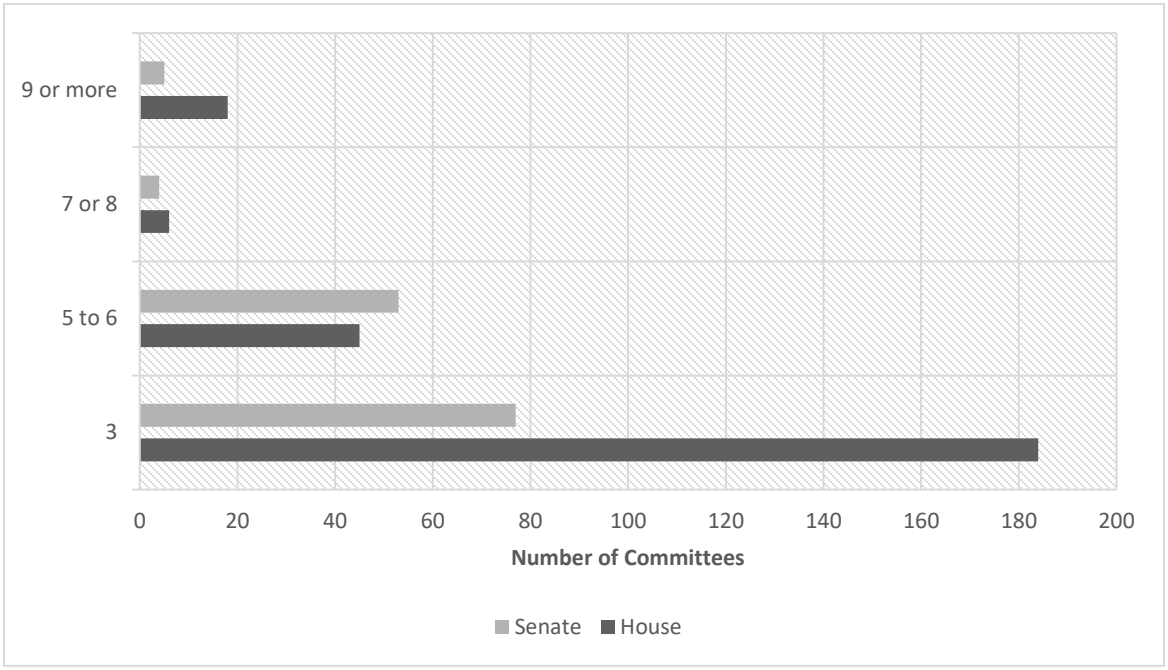
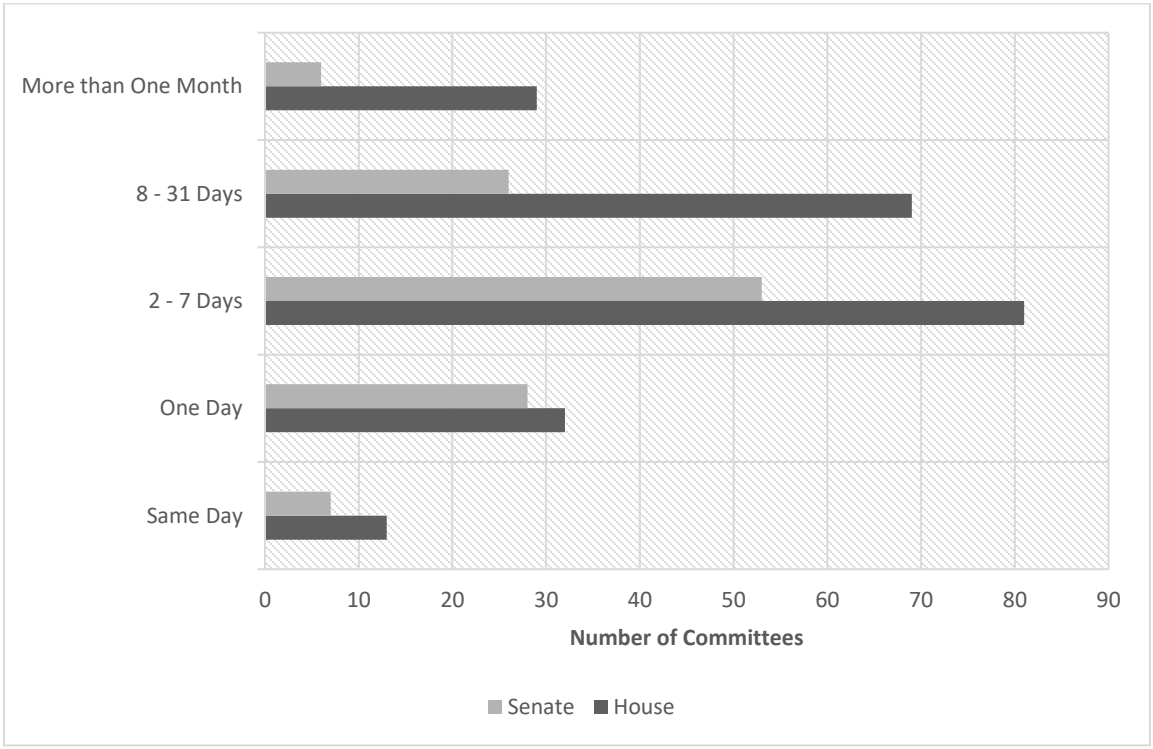


Figure 3-2: Duration of Select Committees in the First Congress



The committee instructed to draft Articles of Amendment (the Bill of Rights) in the House of Representatives was no exception. A grand committee was appointed on July 21, 1789, to draft the Bill of Rights, and reported its draft to the House on July 28, one week later.

In sum, the Select Committee System allowed the First Congress to achieve the parallel processing that so often is said to reside that body, without leading an unnecessarily large number of proposals to wither on the vine. Whereas committees are considered a potential place for bills to go to die today, the select committees convened by the First Congress were not designed with this checking purpose in mind. Instead, committees were only created with the prior approval of the chamber. A broad consensus on the need for a particular bill or report was already widely shared and expressed through the creation of a select committee in the First Congress. Since the committees were only created in response to debate on the floor, action in the COWH, or as a response to a bill passed in the other house, the committees were oriented toward proposing, rather than disposing, of legislative action. Moreover, the First Congress implemented a practice patterned off a parliamentary precedent: only advocates for the measure could be members of a select committee formed to consider it. In the First Congress, "members [were] … by and large … sympathetic to their committee's task, although they might differ how to accomplish it" (Swift 1996, 74).

Thus, the First Congress was not dominated by strong legislative leaders in the modern or formal sense, but there were numerous opportunities for leadership short of this standard. The First Congress had its constitutionally sanctioned officers – the Vice

President presiding over the Senate, and the Speaker presiding over the House – but these leaders did not have agenda setting power, the prerogative to determine committee chairs at will, nor substantial political powers (carrots or sticks to persuade members to vote one way or another). Leadership in Congress was rather exercised through committee leadership, on the floor in debate, or through informal leadership in a bargaining block.

While member behavior on the floor will be addressed directly in subsequent sections, some additional commentary on leadership in a Congress without standing committees is necessary due to the consequences for representation in healthy legislative institutions. Since these were not institutionalized committees, being a committee chairman in the First Congress was not tied to formal perquisites of agenda power, nor invested with property right status. It was, nonetheless, an important and widely accessible source of leadership in that institution. Over the course of its three sessions, there were more than 400 select and joint committees established, each one of which needed a chairman. This fact made committee chairmanships abundant, rather than a scarce resource. The chairman was, moreover, not a leader in the sense of being a free agent but was rather a leader as informed by the contemporarily defined "principal-agent" relationship (Sinclair 1999). To be a chairman for a given committee required one to win the votes of one's peers; in fact, to be on a committee at all required the votes of other MCs. The chair went to the MC, "who received the greatest number of votes, and thus

enjoyed the most support for colleagues" (Swift 1996, 75).[102] Thus, the committee chairs owed their place to their fellows, and were generally empowered to carry out a specific charge as defined by a formal resolution in either chamber.

Being a committee chairman required one to be the manager for the subject entrusted to the committee, whether that was the development of a report, responding to interbranch communications (or to petitions from the general citizenry), or the drafting of a bill. Drafting a bill was one of the primary roles of the select committee in the First Congress, as bills were not generally written by individual MCs. The role of manager also meant taking responsibility for corralling the other members of the committee, who, like members of every group have the tendency to attempt to "free ride" off the work of the others. It also entailed advocating for and presenting one's report or bill to the respective chamber from which it originated. Since there were so many committees, leadership, in terms of the act of shepherding a bill to passage, frequently included many more members than what is commonly seen in more contemporary Congresses. Instead of the Speaker, the Majority Leader and the Whip being the primary leaders, as would be the case in present Congress, this alternative system made nearly every member a leader

[102] The House differed somewhat from the Senate in this regard. The Speaker of the House, per the House Rules (De Pauw 1977, 12), had the power to appoint all committees with only 3 members. Indeed, after a change in the House Rules during the second session the Speaker was given the power to appoint all committees at will, unless otherwise directed by the House. The Speaker, did not, however, turn this perquisite into a source of institutional power, favoring political allies and advantaging his chosen agenda. The Speaker of the House in the First Congress, Frederick Muhlenberg, was likely constrained by norms that saw presiding officers as little more powerful than George Washington in the Constitutional Convention; which is to say, not very powerful at all, since Washington only spoke once in his own name during the entire convention. Muhlenberg did not even vote except in the case of ties, and this only happened 5 times in the entire First Congress. Speaker Muhlenberg had so little power that this cruel couplet made the rounds in New York City: "Fred Augustus, God bless his red nose and fat head / Has little more power than a Speaker of Lead" (Bordewich 2016, 31).

at some point. While the effort level of these committee chairs varied, Senator Maclay of Pennsylvania noted that fellow Senator Ellsworth of Connecticut, "defended one bill written by his committee, 'with the Care of a parent [including] wrath and anger … when it was meddled with'" (Swift 1996, 75). The select committee system may not have operated per property right, but it did produce in a chair the kind of identification and ownership with the bill drafted necessary to drive the bill through the chamber. This more diffuse style of leadership interested many more members in personally overseeing legislation than would have occurred with centralized leadership in the hands of factional or party leaders. The ultimate consequence of such a system is the existence of a group of leaders as diverse as the Congress as a whole.

The select committee system in the First Congress allowed the institution to handle multiple responsibilities at once, without strong or formal central leadership. By dividing labor and providing multiple venues for leadership, the First Congress achieved many of the goals sought for when current Congresses empower strong leaders, without the problems of hierarchical command and control. Select committees were always the product of the floor and responsible to the "house median," as they depended on the election of the whole house, and had no powers to prevent their reports or bills from being amended once the returned to the floor.[103] Committees were thus an important institutional feature of the First Congress, but they had little independent power of their

[103] The MCs of the First Congress did not conceive of, nor felt a strong need for, closed rules.

own, making them quite unfamiliar compared to the committee system of the twentieth (or twenty-first) century.

Yet, all these structures were just scaffolding for the single most important process in the First Congress, the lawmaking process. While the procedures, rules, norms and committee system of the First Congress dictated that the lawmaking process be decentralized and floor-centric, it was neither disorganized nor chaotic. Evidence of the lawmaking prowess of the First Congress comes in both quantitative and qualitative varieties. In the first place, the Congress succeeded in debating and enacting a remarkable number of public laws during its two-year duration. The First Congress, passed 102 bills, and none of these were private or ceremonial legislation. As a comparison, the 113th Congress, covering the first two years of President Obama's last term, passed 296 bills, of which at least 58 were merely ceremonial.[104] Even more significant was a comparison of the total number of bills enacted and signed by the President compared with those debated; in the First Congress there were 167 bills introduced. Congress thus passed just over 60% of the bills that it considered over its three sessions.[105] It appears that the First Congress's decentralized norms and procedures did not have the effect of inhibiting it

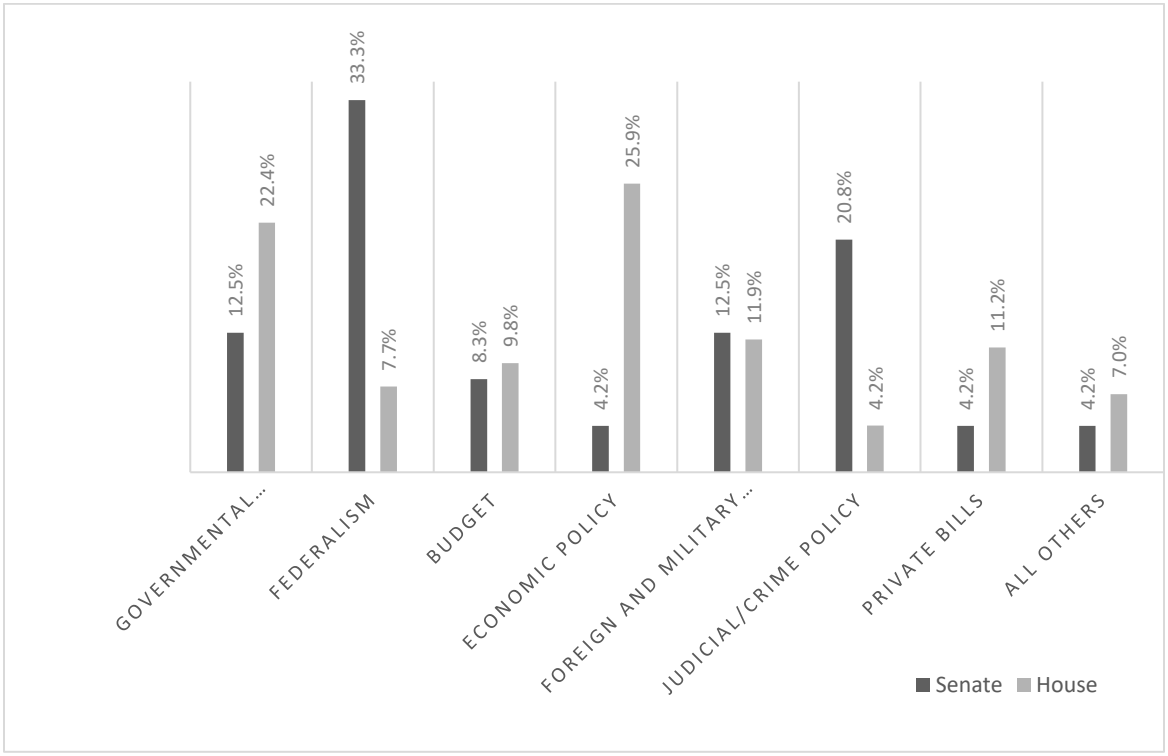
[104] I determine this by a search of all public bill titles for the word "designate," which is used to signify congressional acts that official name facilities or other landmarks after significant personages. The unfavorable comparison to the 113th Congress continues when one considers that it contained 535 MCs, compared to the 91 MCs of the First Congress, and that there were well over 10,000 bills introduced in the 113th Congress. For more information on the productivity of recent Congresses, see *GovTrack.us*, (http://www.govtrack.us/congress/bills/statistics).

[105] The best measure of productivity would consist of a proportion or ratio of the total agenda space (defined through study of period media) to the number of items on the agenda that were addressed through legislative action (cf. Binder 2003). This is not available for the First Congress, but we can infer from other evidence adduced above (the high percentage of topics from formal presidential speeches that were addressed) that Congress handled the clear majority of its lengthy and complex agenda.

from passing legislation, and in fact passing a much greater percentage of introduced legislation than do modern Congresses.

Just as importantly, the Congress developed normal operating procedures that enhanced the workflow of the lawmaking process and added regularity to what otherwise could have been a messy and uncoordinated jumble. The first regularity was that the House of Representatives served as the initiator for the vast majority of legislation considered in the First Congress. Out of 167 bills considered, only 24 (about 1 out of 7) were introduced in the Senate. The Senate was thus generally reactive to the agenda adopted in the House, preventing competing agendas from hamstringing the legislature. Secondly, the two bodies divided the overall agenda space, so that each "specialized" in issues areas (See Figure 3-3). Several of these specializations were reasonably linked to the constitutional attributes of the body, such as the Senate's disproportionate attention to federalism (whether through admitting new states, or adapting existing laws to the admittance of North Carolina and Rhode Island during the Second and Third Sessions) and its focus on judicial and crime policy (through the development of the Federal District, Appellate Courts, and the first National Criminal Code). Others appeared to concern a mere division of labor of convenience, such as the evident decision to let the House take the lead on matters pertaining to executive organization. The third regularity of the lawmaking process concerned the ordinary workflow of Congress in introducing, debating, and passing legislation.

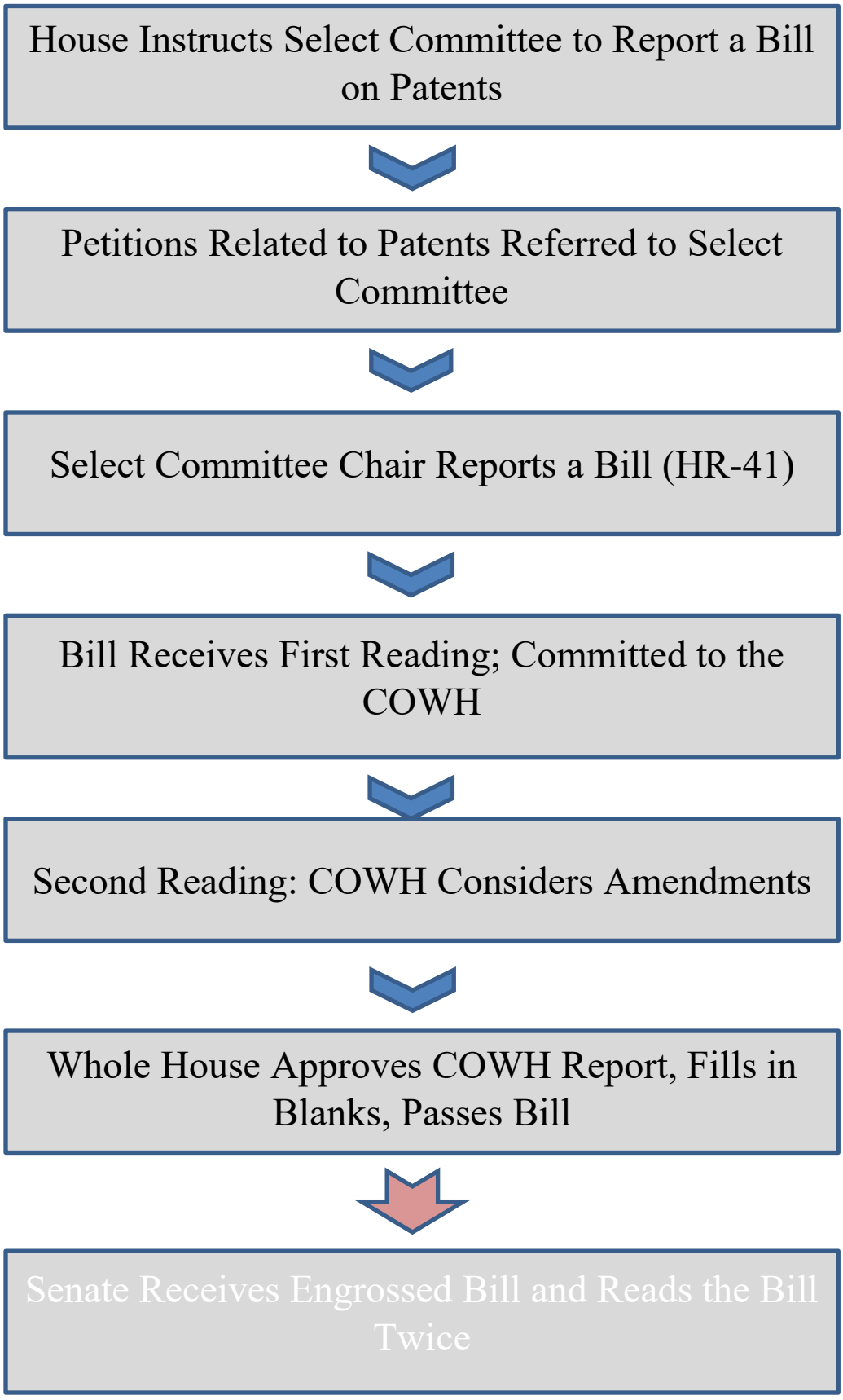
Figure 3-3: Bills Initiated by Chamber and Issue Area in the First Congress

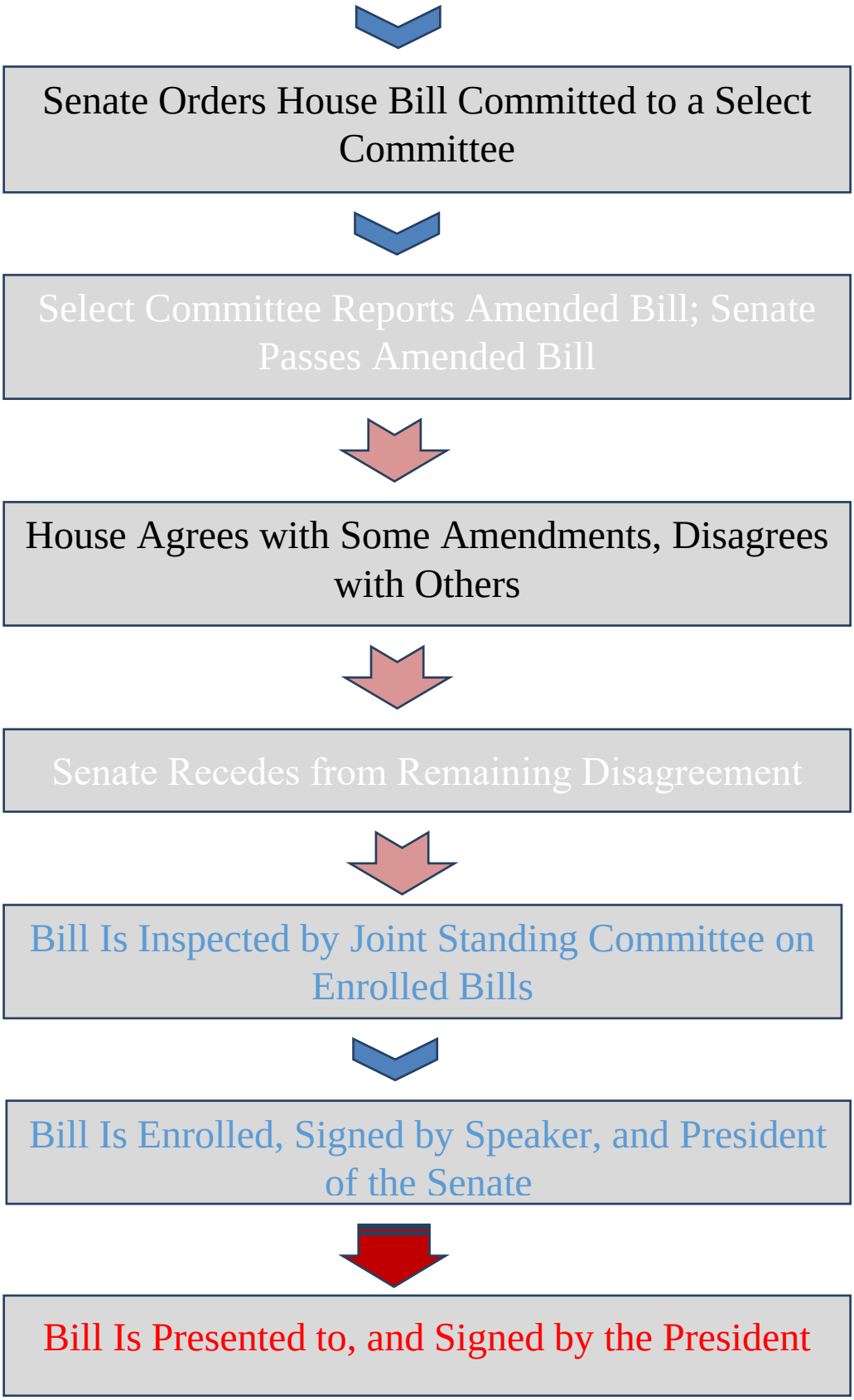


Following an example bill will help illustrate his process.[106] The sample (see Figure 3-4) concerns the Patents Act. The first step in the legislative process was the action of the whole House forming and instructing a committee to report a bill. The House then instructed the relevant select committee to consider the many petitions they were receiving on this topic. After considering the petitions, and the progress made considering this topic in the First Session, the committee was prepared to report a bill on February of 1790.

[106] In the flow-chart, the blue arrows represent action within one House, the orange arrows represent a transmission of a message from one House or the other, while the single red arrow represents presentment. A veto would have complicated matters, but none occurred in the First Congress.

Figure 3-4: Sample Lawmaking Process for HR-41 (Patents Act)




Senate Orders House Bill Committed to a Select Committee
Select Committee Reports Amended Bill; Senate Passes Amended Bill
House Agrees with Some Amendments, Disagrees with Others
Senate Recedes from Remaining Disagreement
Bill Is Inspected by Joint Standing Committee on Enrolled Bills
Bill Is Enrolled, Signed by Speaker, and President of the Senate
Bill Is Presented to, and Signed by the President

The House immediately turned to reading this bill and then committed it to mark-up by the COWH. Subsequently, the COWH recommended certain amendments to the Patents Act that were ratified by the action of the House, reconstituted in its formal capacity. At this point the bill was passed by the House, engrossed and sent to the Senate.

The Senate process for handling bills initiated by the House was rather consistent. The Senate would first read the bill for informational purposes, before moving to a Second Reading of the bill. During this Second Reading, the Senate would, characteristically, form a select committee to consider the bill and formally commit the bill to that committee, dropping the bill from floor action for the time being. It took the committee considering the Patents Act two weeks in March of 1790 to report some amendments to the House bill. The bill then returned to the floor and the Senate considered the report of the committee, approved it without change, and then sent the bill back to the House.

Unlike twentieth-century practice, the bill did not then travel to a conference committee to hash out the differences between the House and Senate Bills, but instead traveled to the House as a message containing the Senate Amendments. The House, operating formally (not in COWH) received this message and voted to accept some of the amendments while rejecting others. When this message was sent back to the Senate, the Senate approved a resolution, as it frequently did, to "recede" from the remaining disagreements between the two Houses (this meant that the Senate dropped the amendments that were not accepted by the House), and the bill was considered passed in the same form by both Houses. The remaining steps were pro forma, but important for

presentment purposes: the bill passed to the standing joint committee on enrollment procedures, and the Bill was formally enrolled into the form that would need to be signed by both the Speaker and the President of the Senate (the VP). Only then in mid-April, after two months of work, was the bill sent to President Washington for signature. The lawmaking process, although somewhat idiosyncratic, generally followed this format.[107] The only true exceptions covered Senate-initiated legislation, and these generally resulted only in an inversion of the process. The lawmaking process was thus maximally representative of the median representative and to the results of floor action, while being simultaneously efficacious enough to deliver passage of the majority of all bills considered in the First Congress.

Petitions as Guides to Popular Preferences

The representativeness of the lawmaking process is a necessary but not sufficient condition for the health of Congress: a representative Congress which is not responsive will fail to earn the trust of constituents and give lie to the theory of self-government. Whatever the Congress was designed to be in theory, the First Congress was doubtlessly responsive to at least three outside forces. In the first place, Congress responded, through the consideration and enactment of a legislative agenda, to items placed in important interbranch communications, such as the Inaugural Address, the Annual Message (now called the State of the Union) and other messages delivered to the Congress by President

[107] Some bills, passed both houses with voice votes in the same form, and thus skipped steps in the process. But this was exceptional rather than the rule. Other bills were initiated in the Senate, requiring steps in the middle of this process to be reversed. This was also rather rare, compared to the process outlined here.

Washington. As interbranch relations will be returned to in the conclusion, treatment of this type of responsiveness will be deferred. The Congress was also very responsive to the felt exigent needs of the nation: what might be called the national interest. The First Congress, without any prompting at all, responded to the issues that were not dealt with in the 1780s by the Confederation Congress. Pressing national issues such as the debt, the lack of revenue for the central government, and the lack of a judicial adjudication system for disputes were addressed through the passage of legislation. Responsiveness to felt national needs is an important aspect of congressional responsibilities, but in some sense these needs were obvious, pressing, and concerned necessities. Consequently, devoting a great deal of analysis to the perception of MCs of these issues does not add much to the generally known political history of the US in the 1780s; the nation was in crisis, and the Congress at least tried to respond to each respective dimension of the alleged impending catastrophe.

More interesting and illuminating, in the case of the First Congress at least, is an investigation of responsiveness to public opinion or wider citizen preferences. After all, the responsiveness of a national legislature in a liberal democracy might reasonably be thought to be more generally aligned with its relationship to the opinions or preferences of the wider citizenry, than to what other elites or the President of the United States indicate are important. The First Congress's attempts to respond to the public needs, as articulated in publicly expressed desires and preferences, present an institutional solution to a quite clear problem. The problem is obvious to contemporary political scientists but was not less obvious to the MCs of the First Congress: There were no opinion polls or

other measure of aggregate opinion for Congress to concern themselves when the body convened in 1789. To "measure" and determine the opinion, interests or preferences of the broader society, Congress turned to an expedient with a long transatlantic pedigree: the petition.

Indeed, Congress primarily relied on the artifice of the petition (or memorial) to inform them about the needs and preferences of citizens.[108] The first outstanding feature of the First Congress's attention to citizen petitions was the great quantity and diversity of the petitions it received. In fact, there were "more than six hundred petitions presented to the First Congress" (Bowling et al 1998, xi). Also, while it is true that petition writers were not strictly representative of the population of the nation at large, they covered a far greater degree of socioeconomic and gender diversity than the membership of the body itself. The Congress was certainly not descriptively representative in any way.

> [Petitioners, on the other hand,] cover[ed] the [socioeconomic] spectrum from apparently illiterate war veterans to members of French-Canadian landed nobility, from the frontiersmen on the fringes of settlement to an associate justice of the Supreme Court and a member of the Senate itself. The First Congress heard from aggrieved petitioners [such as] Native American … Jehoiakim McToksin, Jews such as Jacob Isaacs, women such as Mary Katherine Goddard, and even British subjects (xxv).

[108] A memorial, was "a document in the form of a petition, but differing from a petition insofar as it opposes a contemplated or proposed action and contains no prayer (plea)" (De Pauw 1977, xxiv).

The petition process was thus surprisingly open to many from different socioeconomic statuses and was even used by or on behalf of members of subaltern groups, such as women, Native Americans, and members of religious minorities. While aiming for responsiveness through the expedient of petitioning could give rise to a bias toward well-known or connected individuals,[109] the petition process allowed ordinary individuals (and even noncitizens or those not eligible to vote) to get a formal response, not only from their own representative, but often from the entire Congress.

The reception of a petition in the First Congress was a formal process. Once petition was received, norms and standing rules required the constituent's own representative to present the substance of the petition to the whole body. Petitions first needed to lie on the table, and were not to be immediately acted on. Once laying on the table for a time, petitions then were frequently referred either to an executive branch official or to a select committee in Congress to determine if more action was necessary. Even petitions offering inflammatory and unpopular views (such as Quaker advocates for abolition) were heard and often received formal response from Congress, even if the response was not always favorable. Attempts to shut down unpopular petitions, were ruled out of order, and such petitions were always heard. This behavior contrasts favorably with later Congresses that established "gag rules" on topics, such as slavery, that majorities did not wish to discuss. In fact, the sanctity of the right to petition was so

[109] The petition of Catherine Greene, revolutionary war general Nathaniel Greene's widow, received very prompt treatment, including the presence of James Madison on the committee considering he request (Bowling et al. 1998, xxi). It seems that this level of attention to prominent individuals was the norm.

complete that MCs defended these norms as constitutionally required, even before constitutional text existed that explicitly justified such claims. Indeed, "[New Jersey Representative] Elias Boudinot regarded a refusal to receive the Quakers' antislavery petitions as a violation of their constitutional rights–two years before ratification of the First Amendment" (Bowling et al. 1998, xv). Finally, citizens could travel to NYC to sit in the gallery of the House of Representatives and watch their petition be considered. Indeed, "constituents' access to the House gallery was considered at the time a milestone in the democratization of the political process" (xxiii).

In sum, the petition process allowed ordinary people (and even noncitizens) to have an opportunity for redress of their grievances. Furthermore, the reception of such a large number of petitions influenced the response of Congress. As the body received dozens of petitions or memorials in each issue area it was evident that the public felt that these were important topics that must be addressed. Responding to these citizen claims was necessary to maintain an appropriate level of responsiveness to the developing national opinion of Early Republican America. The Congress was bombarded with petitions for monopolies and other protections for inventions and writings; their frequency forced this item onto the agenda long before there was even a system of national revenue or a system of federal courts. The Congress wisely deprioritized this agenda item until the resolution of these other tasks, but then turned to the topic of patents and copyrights again in its Second Session passing a law protecting intellectual property and inventions. Bowling, a chief editor of the primary sources utilized to write this chapter, may overstate their importance, but only slightly:

> The accomplishments of the petitions submitted to the First Congress were considerable. Their impact on the legislative agenda transcended private claims, in several instances influencing legislative business of far-reaching significance; for example, the acts relating to copyrights and patents, federal revenues and their collection, the federal debt, the location of the capital, the mitigation of revenue penalties, and the land office (xxv).

The First Congress was nearly buried by the number of petitions it received, particularly for compensation or other claims arising from the Revolutionary War, but the Congress defeated numerous attempts to set up procedures to defer these claims to other bodies (either standing committees or the executive departments). Considering the time constraints facing legislators of a new government "in a wilderness without a single footstep to guide them" (Bordewich 2016, 5), why would Congress agree to hear more than 600 petitions?[110] An editorial writer of a period newspaper, *The Gazette of the United States*, has an easy reply: "Much depends on public opinion in matters relating to government. Some deference therefore should be paid to it" (Bowling et al 1998, xii). Indeed, "Americans considered [the petition and the memorial] to be among their most essential prerogatives as citizens;" (xi) Congress would ignore such an opinion only at their peril.

[110] The words are those of James Madison, expressed in a private letter to a constituent.

RULES AND NORMS TO ENCOURAGE DELIBERATION

Social scientists investigate the rules of a given organization as constraints on individuals operating within that organization. Frequently, these rules are treated as constants, operating in the background, allowing causal inference about a hypothesis in question. Additionally, social scientists consider these constraints part of the defining character of the institution in question (cf. North 1991). In this section, some of these assumptions must be revised, as the First Congress self-consciously operated to *create* these constraints, and decided to *modify* several of them over the course of their work. Standing rules, in the First Congress, were thus variable, and did not exist in any sense before being adopted – the First Congress had the constitutional prerogative to set its own rules.[111] The standing rules of each house (for each chamber had their own rules) have a different role in this study, as they are not only (or exclusively) limitations on the individuals making up the institution, but also were the creations of their combined effort. Instead of being a helpful constant to aide in causal inference, the rules are themselves one of the main arenas to be investigated to determine just what characterized the institution of the First Congress.

Taking a bird's eye view of the rules adopted by the First Congress, one thing quickly appears: these rules were designed to facilitate legislative and deliberative activity on the floor, in a decentralized manner, befitting a body of equals. Proceeding through the standing rules of Congress, this investigation will start by looking at the rules

[111] Article I, Section 5 states that, "Each House may determine the Rules of its Proceedings, punish its Members for disorderly Behaviour, and, with the Concurrence of two thirds, expel a Member."

of the House, and then canvas the rules of the Senate for any outstanding differences between the two bodies.

The standing rules of the House made the Speaker of the House the presiding officer, empowering him to uphold high standards of decorum, and rule members out of order. These standards are somewhat higher or stricter than most rules of these kind. The House insisted on having a floor that was at rapt attention to the matter under consideration by that body. To do so it prohibited the reading and shuffling of papers during bill readings, speeches, and debates. Further, the standing rules prohibited Representatives from absenting themselves from (perhaps tedious) floor work, and then arriving to take the votes. It was prohibited to vote on matters when that MC was not present to hear the motion being discussed on the floor. The rules, standing as a set, clearly emphasize decorum, and empowered the speaker to enforce a set of rules stressing this norm (De Pauw 1977, 11-13). While the House of Representatives has the reputation of being rather rowdy and passionate, especially when compared with the Senate, the First Congress's smaller numbers and strict rules strongly militated against this otherwise constant feature.

The standing rules of the House did much to structure deliberation over legislation. In the first place, it imposed a rough equality on members, in the form of rules disallowing a speaker from speaking more than twice to each bill, amendment, motion or the like under consideration (De Pauw 1977, 13).[112] This rule sought to ensure

[112] The member would not have their second opportunity to speak, until each MC wishing to speak had spoken as well.

adequate speaking time for all those wishing to speak to a motion, and preventing the filibuster-like domination of the floor by one or more individuals. Speaking of the filibuster, the House rules provided for a previous question motion to cut off debate, but it was used inconsistently and infrequently (De Pauw 1977, xxiv). The House generally devoted long periods of time for deliberation and debate, sufficient to allow all those who wanted to speak to do so, but did not give the right of unlimited speech to any MC.

Second, the standing rules structured the process of introducing and marking up legislation, providing continuity to what otherwise could have been a very confusing and chaotic process, given the lack of formal agenda leadership by any individual or party. The standing rules stipulated that a bill may only be introduced with permission of the house, or by order of the House on the report of a committee – and in either case a committee to prepare a bill was appointed (De Pauw 1977, 14). As discussed above, this feature immediately interested at least 3 Representatives in the fate of the bill, and designated a chair, or legislative leader for that bill. The standing rules further established the traditional parliamentary practice of bill reading, dictating that bills must receive 3 readings on 3 separate days (14). More than simply setting up this practice, the standing rules descended to characterize the nature of each reading. The first reading was purely informational and always ended with the question, "shall the bill be rejected?" If the bill was not rejected at this stage (and they seldom were) the bill passed to a second reading, where line by line markup, amendment, and debate were to occur. This markup could either be done by a select committee or the Committee of the Whole House. The third reading was for the integration of amendments to the whole and a vote for final

passage. The formal language of the time termed this last process, 'engrossment' (14-15). That is, the bill was reduced to a formal parchment version, in a legible script, and delivered to the Senate.

Third, the standing rules were set up by knowledgeable legislators who were familiar with the use of parliamentary procedures in a dilatory or obstructive fashion: they reflected a desire to pass adequately debated bills, rather than a checking or stopping function. As an example, the first version of the standing rules featured a rule to prevent a type of cycling. To set the stage, one must recall that once a bill was returned to the House by the Senate with amendments, the possibility for the bill to die due to lack of consent between the two bodies is ever-present. To eliminate the cycling of a proposal from one chamber to the other, bills amended by the Senate were ordered not to be committed to select committees. Instead they must be hashed out on the floor (De Pauw 1977, 15). The rule against commitment attempted to prevent a tennis-ball like bouncing of a bill back and forth between the two chambers.[113]

The final section of House rules pertained to Committee of the Whole House (COWH). The COWH was structured by rules that dictated that the standing order of the day was to begin each day with a COHW for the state of the union. The specific features of the COWH discoursed on above were in fact regulated by rule, rather than custom or

[113] The rule prevents the formation of a select committee that might amend the bill per their narrow wishes and move the bill yet further from the necessary point located somewhat between the House and Senate proposals.

norm.[114] Indeed, to ensure that the deliberations of the COWH could be sufficiently flexible and tentative, a standing rule held that, "After the report [the new marked up bill] shall again be subject to be debated and amended clause by clause before a question to engross be taken" (De Pauw 1977, 15). Rather than creating precedent by practice, the Congress preferred to decide these matters by rule. While a norm likely would have developed in the COWH for less formal debate, the House specifically provided for rules in the COWH to continue unabated, with one exception: the COWH rules relaxed speaking time restrictions (15), to allow select committee chairs managing the bill and other interested parties to speak more often to the bills that they advocated.

The Senate Rules were very similar to the House Standing Rules, but sparer in their phrasing. The Senate resolved 19 standing rules total: these rules also facilitated legislative and deliberative activity on the floor, in a decentralized manner (De Pauw 1972, 18-20). The Senate Rules were nearly identical to the House rules in the following respects: (1) they imposed a rough equality on members (by prohibiting members from speaking "more than twice in any one debate on the same day, without leave of the Senate"); (2) provided for a previous question motion to cut off debate; (3) allowed bills to be introduced only with the permission of the Senate and one day's notice; (4) required three readings on three different days, "unless the Senate unanimously direct otherwise;" (5) required that the Senate only commit a bill after the second reading; and (6) allowed the Presiding Officer (the Vice President) to punish lack of decorum by ruling a member

[114] One such rule stated that, "the Speaker shall leave his chair [in forming a COWH] and a chairman to preside in committee shall be appointed" (De Pauw 1977, 15).

out of order (18-19). The main differences in the rules dealt with the size of the assembly and the difference between the Speaker and the Vice President. The Senate allowed each Senator to speak on the bill twice per day, without the proviso allowing each speaker an opportunity to speak once, as there was less constraint on speaking time in an assembly of 26 senators, compared to 65 representatives. Also, the Vice President was not given the power to form committees at all, while the Speaker was given the opportunity, at least, to appoint committees. The Senate did not consent to giving an outsider the ability to manage their committee system. To be sure, the Senate of the First Congress was not just a body of "remote majoritarianism" (see Schickler and Wawro 2006, 280), but a body of strict majoritarian rule, as there were no privileges given to minority parties or to individuals.

Despite the minor differences between the chambers, the rules governing each was very similar. Indeed, each body was governed by a system of standing rules that empowered the majority on the floor. Furthermore, the rules proscribed central leadership or the development of hierarchies in the body. Such rules, although not identical with those of the institutionalized Congress, were nevertheless effective in structuring a robustly capacious degree of deliberation in the Congress.[115] For further evidence of this

[115] The Standing Rules were adopted in the very beginning stages of the First Session, on April 7, 1789, in the House and April 16 in the Senate; as a sign of their general effectiveness only very few of these were revised after experience. One standing rule of the House held that the Speaker, when he heard opposition to a motion, was supposed to order those in the affirmative to move to the right and those opposed to move to the left (De Pauw 1977, 12). Besides being confusing (should the MCs move to their left or the speaker's left?), this rule must have anticipated only a very small number of disagreements per day, otherwise this method would require considerable delays as 65 members (of various ages) move around the room. This obviously cumbersome method was changed only two months later, with the more sensible provision that those in the affirmative would stand, while those opposed would remain seating (85). Senate rule changes

claim, let us turn to deliberation in the First Congress regarding that familiar standby: molasses.

Examining democratic deliberation on a most narrow and seemingly parochial issue, the appropriate level of an import duty to be placed on molasses, is a good test case for congressional health. This topic, prima-facie, seems the least favorable to high-quality and substantive deliberation. The question to be resolved by Congress, after all, seemingly is just the appropriate number of cents per gallon that molasses ought to be taxed. Appearances, however, can be deceiving. I submit that in a healthy legislative body, one ordered for deliberation of maximal quality, politicians proceed outwards from the narrow parochial (or technical) question immediately at hand so that all members of the body, including those without a parochial interest (or technical expertise) in the matter, can discuss and deliberate over the merits of the proposal. While this seems an overly idealized manner of deliberation, evidence exists in the debates of the First Congress of just such behavior among the MCs, and even at the self-conscious level. See, for instance, the way Representative Thatcher (MA) introduced his remarks to the House, when debating the molasses impost: "I did not intend to rise on this occasion, because commerce is a subject with which I cannot pretend to be well acquainted; yet as

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were also rare, as only two appeared to occur during the First Congress. One important informal change occurred regarding the status of standing rules, and their suspension: on last day of the Second Session, the Senate was pressed for time, and an enterprising senator called for the rules to be suspended to more rapidly progress through the three readings of an appropriations bill than the calendar would allow (489). The Senate upheld this suspension of the rules, unanimously, giving precedential value to the concept that the rules could be suspended with the unanimous consent of all senators, a practice remaining with the body to this day. Stepping back, one can see that the number of rule changes, throughout the three sessions, was very small, and the rules adopted in the first weeks after producing a quorum for the first time served to bind the MCs for the entire First Congress.

the interest of my constituents are at stake, and the impolicy of the measure is so glaring as not to require any very deep researches–I may venture to give my opinion without being deemed presumptuous" (Bickford et al 1992, 368). In this manner, parochial, technical or narrow questions are converted into political questions – both 'higher' ones addressing the ends of the government, the legitimate reach of its laws, and 'lower' ones addressing the distribution of benefits and costs in society, as well as those concerning the effectiveness of the means proposed in the policy. I further contend that this attribute of the First Congress speaks most clearly to today's Congress: the political questions (and capacities necessary for resolving them) arising from parochial matters like molasses duties will nonetheless seem quite familiar to students of Congress – even if the parochial issues of yesterday and the technical issues of today are quite different. In short, in healthy Congresses, MCs develop tools and techniques of deliberation that provide each topic with the appropriate level of debate, and the greatest chance of being resolved successfully (from the point of view of effectiveness, representativeness and responsiveness).

Molasses, while just one of the dozens of items which were to be taxed under the new scheme of import duties, was seemingly pivotal to those representatives, and many days in April and May 1787 were spent discussing this duty. While the interests that MCs represented were canvased above, it is important to note that MCs needed to defend the interest of their constituents in terms answerable to representatives outside of their section of the nation if they were to be successful in advocating for them. The first move many MCs made was toward wider regime level questions about the purpose of

legislation. Indeed, upon considering the question of the appropriate level for the molasses impost, representatives immediately spun out important normative and political questions that might be hidden at first under the seemingly banal nature of the question.

The first question that emerged in debate was whether the impost on molasses was an attempt to indirectly tax rum, and to discourage its drinking. MCs thus moved to consider whether the Congress would be in the business of establishing the political morality of the nation and imposing costs on immoral acts and incentivizing moral ones. Representative Ames (MA), for one, despaired of the power for legislation to touch the morality of its citizens and preferred the Congress to focus on commercial matters. He held it, "good policy to avail ourselves of [a duty on rum] to procure a revenue [and] to talk of the political interest committed to our charge… If gentlemen conceive, that a law will direct the taste of people from spirituous to malt liquors, they must have more romantic notions of legislative influence than experience justifies" (377). Others supposed that the alleged pernicious nature of imbibing intoxicating drink was poorly defined. Representative Wadsworth (CT) thought that, "the arguments respecting the morals and health of people are not well grounded–the fisherman and seamen belonging to the eastern states are the principal consumers of country rum, they drink more of it perhaps than any other class of people, yet they are a healthy robust set of men; and as for their morals, I believe they will not suffer from a comparison with their neighbors" (367). Faced with the prospect of directly insulting the constituents of their colleagues, advocates of the high molasses impost demurred from rejoinders to this argument.

Supporters of the impost instead turned to the fact that the impost would be legitimated by popular opinion, thereby avoiding the question of "legislating morality." While raising a tax of any kind is generally not thought to be popular, Representative Sherman (CT) proposed a more refined account of popular opinion in a long speech meant to lower the tensions aroused by the weeks-long debate over this topic.[116] Sherman stated that:

> Gentlemen have had recourse to popular opinion in support of their arguments. Popular opinion is founded in justice, and the only way to know if the popular opinion is in favour of a measure, is to examine whether the measure is just and right in itself… The people wish that the government derive respect from the justice of its measures… I believe the popular opinion is in favour of raising a revenue to pay our debts (580).

Sherman converted the zero-sum debate over the level of the tariff, into a positive-sum, consensus account: all were in favor of paying the debt and the impost on molasses was a means to this unanimously acclaimed end. Sherman further barbed his opponents, who claimed to know on good authority that hundreds of thousands of their constituents resolutely opposed this impost: "When gentlemen have recourse to public opinion to support their arguments, they generally find means to accommodate it to their own…" (581). Whatever the merits of the question respecting an attempt to legislative morality,

[116] Roughly one-hundred of the pages of the debates of the House of Representatives concern the molasses impost, out of a total of 794 covering the two months when this impost was debated.

Rep. Sherman suggested that the MCs were sent to Congress to ensure the United States would be solvent, and thus authorized them to (fairly) tax the nation's imports.

The question of taxing imports also raised important economic questions about the ends of legislation, and whether the impost should be devoted solely to revenue, or whether industrial protectionism was a legitimate usage of the taxing power. After hearing a week of arguments on the merits of the industry relying on molasses importation,[117] and the various ways it benefited all manner of Northeastern mercantile interests some had heard enough. Representative Bland (VA) complained that the Congress had "Lost sight entirely–that was the purpose of raising revenue. We spent several days now–instead of pursuing that end, we are now extending our view to the encouragement of commerce" (208). Representative Ames (MA) differed, however, holding that, "The two subjects are so connected that [I] don't see how we can separate them" (208). He suggested that all he aimed for, "was to lay such a duty as should protect the manufacture" (104). Ames, seemed to get the better of the argument, as subsequent speakers seemed to accept the interconnectedness of import duties and the promotion of American industry; there were few doctrinaire free-traders in the First Congress.

The political questions bearing on the morality and ends of lawmaking were not the only ones addressed; MCs also ferreted out important questions regarding the

[117] Northeastern representatives argued that molasses imports formed an important link in the industries of the region; they argued that molasses was imported from the West Indies and that fish caught by Massachusetts fishermen were in turn sold to the Caribbean islands. Too high of an impost, they suggested, would decimate this trade.

distributive nature of the policy, as well as potential roadblocks that would stand in the way of the efficacy of the impost. In many ways these questions were the most pivotal ones facing the House as they debated the impost, as there seemed little question that there would be an impost, despite the protest of the Northeastern mercantile representatives. The question instead was whether the tariff on molasses should be low (2 or 3 cents per gallon) or high (5 or 6 cents per gallon). In terms of distributive impact, there was a heated debate over how the costs and benefits of the impost would be borne by a nation with diverse economic interests and industries. Representative Fitzsimmons (PA) argued that the impost of molasses did seem too high, until one considered other decisions already made with respect to duties laid on other goods:

> [Molasses] has been mentioned as a necessary of life – the fact is admitted, but shall it be inferred from thence, that no duty ought to be collected from molasses, while you impose one on sugar, which is equally a necessary of life, among the middle and southward states; although the remark has been made already, I must repeat it, and beg the committee to bear in mind, that *whenever a tax on a particular article, seems to bear harder on one state than another, we must endeavor to equalize it by laying some other to restore an equilibrium to the system* (98, emphasis added).

Some opponents of the impost were unmoved. Ames (MA) remarked that the distributional cost of the impost was not the only problem with the proposed level of the impost. He held that it would be "scarcely possible to maintain our fisheries with

advantage, if the commerce for summer fish is injured, which I conceive it would be very materially, if a high duty is imposed on [molasses], nay it would carry devastation throughout all the New-England states, it would ultimately affect all throughout the union" (101). Nearly every representative from Massachusetts reiterated this argument throughout the debates, all the while trying to insist that the claims they were making based on the needs of their constituents were ultimately tied to the common good of the nation.

The response of those favoring a higher level of impost to this direct argument from interest was revealing of an important attribute of debate in the First Congress. In an important sense, it was necessary to publicly to disclaim direct sectional interest as the reason for favoring or disfavoring a bill. Responding directly to Ames, Rep. Fitzsimmons reminded his colleagues of his profession: he was a merchant. And yet, "as a member of this body, [I] consider it proper to forego a pertinacious adhesion to [the mercantile] system when its interest came in competition with the *general welfare*" (103, emphasis added). The arguments made by Ames and the other Massachusetts representatives were met with a kind of withering fire by other members of the House. Representative Boudinot (NJ) stated that he was, "very sorry… to hear any thing that sounds like attachment to particular states, when we are laying a general duty on the whole. For my part, I consider myself as much a representative of Massachusetts as of New-Jersey, and nothing shall prevail on me to injure the interest of one more than the other" (370). Representative Madison (VA) reiterated the idea of a balance or equilibrium that must hold, or the entire edifice of the impost system would unravel.

While it was true that, "parts of this system … bear harder upon some states than others," this was not the appropriate way to deliberate on the policy. Instead, one should examine the whole impact of all the duties that the Congress was proposing. Analyzing the proposition in this fashion, one should "take the whole together," indeed seen in this light, "the duties will not be unequal" (375). While not strictly ruled out of order, the norms of debate encouraged MCs to make arguments for their interests that would reach out beyond the needs of their constituents and *make plausible cases for the advancement of the general welfare of the nation*.

The point of emphasizing this norm is not to claim that MCs in the First Congress were in some sense superior by nature to contemporary MCs. In fact, they were not: it is clear from deliberation that the incentives operating on MCs were very similar to those that would exist in a contemporary House debate. Namely, self-interested members sought to protect the interests of their constituents. Much like today's MCs they were sometimes wont to launch into hyperbole or launch specious arguments. Representative Ames was the chief purveyor of such arguments in the debate over molasses. On April 28, the molasses impost was still set at 6 cents, despite his efforts to get it reduced. Grasping for new arguments Rep. Ames came up with some rather exaggerated and dubious rhetoric. One particularly heated exchange included a claim that setting the molasses duty too high would lead to disunion, as Ames stated to his opponents, "I conceive, sir, that the present constitution was dictated by commercial necessity more than any other cause…If the duty which we contend against is found to defeat [the manufacturing interests], I am convinced the representatives of the people will give [the

Constitution] up" (375). Unwilling to leave the matter at that, Ames doubled down insisting that the loss of faith in government would be multi-generational: "Mothers will tell their children when they solicit their daily and accustomed nutriment, that the new laws forbid them the use of it, and they will grow up in a detestation of the hand which proscribes their innocent food [changing] the favorable opinion now entertained [towards the government] to dislike and clamour" (380). The chain of reasoning connecting a tax on molasses to children not receiving molasses-derived candy to the ultimate conclusion of revolution seems a bit of a stretch.

The norm against clearly particularistic arguments was strong; even though Ames had struck a perhaps low blow, counterattacks in kind were not mounted. Instead proponents of the higher amount stuck to the considerations they had already offered: that the tax was equitable when compared to the duties leveled elsewhere in the system, such as a tariff on sugar, and that the duties were necessary for paying down the national debt. Overall, the deliberation on this topic allowed the representatives who favored a lower tariff to indicate the *intensity* of their preferences, and provide arguments as to why the lowering the tariff would benefit the general welfare. The House hearing these debates, lowered the tariff from the 6 cents proposed by Madison to 5 cents.

Deliberation in the House does not end the story of the molasses impost. As was treated in detail above, petitions served an important purpose in the First Congress, notifying MCs of issues where particularly strong interests were being affected. Indeed, petitions were received from citizens regarding the impost bill, a goodly portion of which concerned molasses. These petitions informed the Congress that the merchants and

traders of Portland, Massachusetts (now Maine) considered the duty on molasses "astonishingly" high, and asked for it to be made "intirely [sic] free from all imposts and duties" (Bickford and Veit 1986, 969). A second petition from distillers in Pennsylvania made a more moderate request: they proposed the Congress increase the difference between the duties on rum and molasses, suggesting that this would operate to the benefit of their business and hence the "true interest and prosperity of the United States" (971). They deferred to Congress whether this could be most efficaciously done by reducing the molasses duty or increasing the duty on rum. The Senate, receiving the bill from the House, chose the former. The final amount, settled upon by the Senate, was thus lower (2 ½ cents), as the petitions verified the claims of the Representatives from Massachusetts; they were not wrong about the public opinion of their constituents. Senators were uninterested in testing to find out whether a lesser version of Ames threats would come to pass and lowered the tariff accordingly.

CONCLUSION: DELEGATION IN COOPERATIVE SEPARATION OF FUNCTIONS

The First Congress, of course, did a lot more than simply create the nation's first revenue act; it also was the first Congress to deal with the pressures of our separation of powers system. This institution did not, however, hew to the belief that its role or legitimacy came from obstructing or fighting with the president. There was, by most meaningful measures, more conflict within the bicameral structure of the legislative branch than between the branches in the First Congress. Even ceremonial matters generated conflict within the legislature. One prominent example concerned the great

consternation in the first months of the First Session on the question as to whether to annex additional honorific titles on the President of the United States. In the Senate, chiefly instigated by Vice President Adams, there was intense preference for additional titles, while the House persisted in the belief that to be called President itself was an honor. It took many weeks for the Senate to capitulate, being "desirous of preserving harmony with the House of Representatives… think it proper … to act in conformity with the practice of that House," addressing the chief executive as President of the United States (De Pauw 1972, 45). Inter-branch relations, on the other hand, appeared much less conflictual due in large part to the personage of George Washington.[118] President Washington vetoed (and threatened to veto) exactly zero bills during the First Congress (De Pauw 1977, xxii). Congress was generally deferential to presidential nominations, although there was an exception that will be explored below. The Congress was very, although not universally, responsive to formal communication from the Executive Branch or the President.

In fact, Congress utilized its relationships with the Presidency and the Executive branch to cooperatively facilitate its lawmaking and representative functions. The First Congress featured more cooperative separation of functions, than competitive separation of powers. The Congress fully occupied itself with policymaking and representing the American people, calling upon the President and the newly-minted Executive

[118] In fact, many factions within Congress engaged in contestation, not with Washington, but rather with each other to gain the favor of the President. This applied to the Executive as well, where different factions of the cabinet "battled" one another to gain favor with Pres. Washington. While not strictly speaking a history, the musical "Hamilton" has made this feature of politics in 1789 into something of common knowledge.

Departments to provide expertise, and direction to aid them in the completion of their duties. The First Congress featured MCs who freely admitted that they were not experts in finance. Nevertheless, they did not therefore abdicate or defer the final decision-making to those who were. When relevant, the Congress itself called upon experts, such as Treasury Secretary Hamilton, to prepare policy, but they expected the reports to be presented to them for deliberation. Although MCs chose not to initiate finance policy, they were (and considered themselves) qualified to sharply debate the propositions within any executive branch proposal. MCs who were inexpert in matters of high finance were nonetheless prepared to consider the policy and determine if it was consistent with the interests of the nation and their constituents.

Congress, both the House and the Senate, were very responsive to Executive Branch communications. Congress prepared formal responses to both the state of the union and inaugural addresses (De Pauw 1972, 33 and 218). The process, inevitably, was commenced in committee. Each chamber formed a select committee to draft a response to the President when he communicated with the Congress. The formal addresses developed by these committees, and approved by the plenary body after debate, allowed the Congress to orient themselves toward fulfilling their mandate: to be responsive toward the needs of the union more broadly, and "promote the general welfare." One might wonder if mere words, even composed in a formal speech, could accomplish this weighty goal: in fact, the formal response of each house also corresponded to the actual agenda of Congress. Thus, Congress ended up responding, through legislation, to virtually all the topics expressed in President Washington's Inaugural and his first Annual

Address (now called a State of the Union address). Every action proposed to Congress in those addresses were at least debated in at least one of the houses of Congress, save one. Washington had a stellar 'batting average' in getting his agenda items considered, except for his proposal for the Congress to consider founding a national university or funding the already existing universities to promote "science and literature" (Washington 1790).[119] This finding inverts the contemporary situation of Congress responding to only a small number of items placed in a State of the Union or Inaugural Address. The President fully took advantage of his powers listed in Article II, Section 3, to "give the Congress information on the State of Union." Congress, for their part, certainly considered "such measures that [Washington judged] necessary and expedient." Washington, of course, did not provide modern forms of presidential leadership (such as "going public" [Kernell 1986]) to support those efforts, but in the absence of formal agenda setting powers in any single hand in Congress, these speeches were no doubt useful in focusing the body on a smaller set of topics.

Congress and the Executive Branch relations went beyond what would be suggested by a clause-bound understanding of interbranch affairs. Even though there was no specific clause or article of the Constitution directing them to do so, Congress utilized the executive branch as a source of expertise that could ensure that the bills they

[119] George Washington saw the national patronage of education and the diffusion of knowledge to be important tasks. He specified that Congress to could be trusted to determine, "Whether this desirable object will be best promoted by affording aids to seminaries of learning already established, by the institution of a national university, or by any other expedients will be well worthy of a place in the deliberations of the legislature" (1790). The Congress did not take him up on this request.

proposed reflected coherent and well-reasoned policy.[120] Furthermore, the Congress turned to the Executive Branch when it wanted to revise laws on the basis of the Treasury Department's experience in administering them. Even at a time long before the rise of the administrative state, the Congress used its relationship with the newly established Executive Branch Departments to provide the information necessary for the provision of effective and efficient policymaking.

One way to do so was straightforward: The House of Representatives simply asked the Executive Departments for reports that would help them be responsive to both the exigent needs of the nation, and properly handle requests for constituency service. One relatively minor, but useful function of interbranch relations was thus the development of a division of labor. The House, as explained above, received hundreds of petitions, most of which pertained to the Revolutionary War. Congress, after officially hearing such petitions would generally refer those to the Secretary Henry Knox in the newly created War Department. The War Department, they trusted, could ascertain if the claims for relief were credible. Instead of investigating each claim on their own, the Congress (and especially the House) delegated the determination of these matters to a former military officer of the Continental Army, Knox, and his secretaries. This delegation allowed the House to continue developing policy devoted to national aims, all the while providing a helpful service for their constituents.

[120] "Congress could not resist the potent combination of information and concrete proposal which has ever been the special advantage of the executive" (Chamberlain 1946, 11).

Similar degrees of delegation even occurred in salient political conflict. Indeed, near the end of the First Session, in September 1789, the House of Representatives formally requested the Treasury department prepare a report and a plan to provide for "an adequate provision for the support of the public credit" (De Pauw 1977, 220). This request represented the genesis of Hamilton's famous "First Report on the Public Credit."[121] Congress, in the case of Hamilton's debt relief plan, delegated the formation of policy and the position as prime legislative mover to him. This was not delegation in the modern form, where the Congress passes a bill and leaves "filling out the details" to the regulatory capacity of the Executive Departments. Instead, the bill the Congress itself drafted was responsive, and largely duplicative, of his report. Even though Treasury Secretary Alexander Hamilton possessed a greater degree of expertise on matters of high finance than any individual in Congress (Bordewich 2016, 160),[122] the Congress certainly did not take his proposal on faith. Instead, Congress trusted that it had structured the Treasury Department properly, and chose the right individual to lead it. Allowing a piece of legislation to be initiated by the Executive at all was a large step, but the Congress, and especially the House, saw the need to exhaustively debate this plan – the debate was so extensive and divisive it nearly led to the loss of the plan (Bordewich 2016).

[121] The broader fame of this debt plan would be questionable, if not for its important place in "Cabinet Battle #1," a song from the hit musical *Hamilton*. No longer is this plan famous only with scholars of the Early Republic.

[122] George Washington was inclined to offer the job of Treasury Secretary to his friend, Senator Robert Morris. Morris declined, saying of Hamilton, "he knows everything sir" (Chernow 2004, 286).

Yet, it is important to note that this request for information was not a one-time request. The House also asked the Treasury Department to report back on its progress in implementing three national laws: the impost act, setting the national duties; the collection act, setting up a bureaucratic system to receive the revenue from the impost; and the coasting act, which established regulations on American vessels that engaged in trade along the Atlantic seaboard. All these laws were written in the First Session of Congress; the Congress, and the House in particular, wanted to inquire into the implementation of those laws, thus it asked the Treasury to discover if there were "any difficulties which may have occurred in the execution of the several laws for collecting duties…" (De Pauw 1977, 267). This cooperative relationship between administrative and legislative capacities of the government resulted in a report form Secretary Hamilton, and the creation of a select committee to respond to this report; this select committee was rare for having remained in existence after its first report, as it reported back revisions to each of the national laws listed above, to overcome the difficulties pointed out by Secretary Hamilton.

The First Congress was therefore not in an adversarial relation with the new Executive Branch Departments or the President himself. Yet, the First Congress had not abdicated its role. The Senate in particular, behaved in a very similar manner to Justice Marshall in *Marbury v. Madison*, as it exercised its prerogatives in a manner as inoffensively as possible to its rival. Even though the vast majority of the President's appointees were accepted, and with very little debate, the Senate did peremptorily reject one of Washington's selections for a federal naval officer – "a new federal post… created

in accordance with the revenue acts" (Bordewich 2016, 132). This action, which was actually carried out by one senator because the nominee had caused him a personal slight, nonetheless reaffirmed the constitutional ability of the Senate to refuse consent of an appointee, for their own reasons, and not accountable to the Presidency for an explanation thereof (133).[123]

That Congress failed to act in opposition to the President did not necessarily provide evidence of a wholesale deference. Consider the controversy concerning advice and consent concerned the "contested removal power" (cf. Alvis et al. 2013). While the Constitution explicitly stated that the Senate ought to have a say on nominees (through the "advice and consent" provision), it was silent on which branch or individual ought have say in firing a member of the executive branch. When the Departments of War, Treasury and State (originally called Foreign Affairs) were created, Congress realized it needed to resolve this question. Four possible ways of reading the Constitution were proposed: 1) that impeachment is the only way to remove executive branch officials; 2) that officials ought to be removed the same way they were approved, through the advice and consent of both president and Senate; 3) that Congress had the power to delegate this power to whom they wished; 4) that the president has this power, naturally from his Article II powers (Alvis et al. 2013, 7). Eventually, Congress (led by Representative

[123] President Washington actually came in person to the Senate chambers to try to change the senators' minds. He discovered that the President does not gain any voting privileges by stepping across the threshold, and his nominee remained rejected, even after strenuous objection (Bordewich 2016, 133).

Madison) settled on the last answer, which could be called "executive power theory" (24).

If one analyzes this position from the basis of pure-power relations, it appears that the Congress chose the most deferential option, when designing the executive branch. Yet, viewing the choice in this manner downplays the significance of the fact that it was *Congress* that had this grand debate, and the House, in particular, that was the initiator of it. Subsequent experience has shown that it would have been possible for the Congress to simply establish the Departments, leaving it to the Courts to determine the appropriate answer to this question. The First Congress, was not satisfied with such a course of action, if only because there were advocates for each of the constitutional options *in the Congress*. In fact, if any of the other viewpoints had prevailed the removal power would have been vested in Congress rather than in the President. This fact meant that even advocates of executive power had to submit, in a sense, to the decision being made by Congress; Congress, in the end, decided to favor a construction of the Constitution that enhanced executive power. Thus, this construction was decided on by the Congress, rather than just imposed on the polity by Courts or by the president himself. The First Congress, then exercised its constitutional prerogatives, paradoxically, even while renouncing or declining to assign power to itself.

A final evaluation of the First Federal Congress requires a return to a consideration of what had come before: The Confederation Congress. The First Congress ultimately resolved many of the debates that were roiling the nation throughout the 1780s. The questions in many cases were identical. The Confederation Congress had, in

fact, considered and deadlocked three of the most important questions settled by the First Congress: the former failed to 1) determine a site for a national capital; 2) ascertain whether to assuming the debts of the states to place the nation on a firmer fiscal foundation; and 3) establish a national revenue system. The similarity of agenda was not the only "constant," the personnel inhabiting the Articles Congress were in many cases also MCs in the First Federal Congress.[124] What could account for such salient differences in the legislative outcomes of the two bodies?

There were three outstanding differences. First, and necessary for the success of the Congress, the *constitutional context* had changed.[125] The old unicameral body structured by bloc voting by state was thrown out, and a bicameral legislature voting by individual legislator replaced it. Further, the structure of the new Constitution lent credibility to the efficacy of the measures adopted by the Congress. Lawmaking (devising policy, developing coalitions through bargaining or persuasion, protecting the policy from hostile amendments, etc.) is a difficult and costly endeavor for politicians; they clearly will not do it if the costs are unlikely to turn benefits. The prospect of an active administration carrying out the body's policies (and even helping to draft them) certainly increased the prospects for institution-maintaining and facilitative behaviors. MCs of the First Congress felt comfortable making sacrifices of time, energy or political capital, to carry out the legislative process, since the system could conceivably generate political

[124] 12 MCs in the First Federal Congress were also in the Articles Congress in 1783, the last time many of these issues were seriously addressed (Wilson 2002, 307).

[125] This change in the constitutional situation of the polity was necessary for congressional health to develop in the First Congress, but not sufficient condition by itself.

benefits to themselves and welfare benefits to their constituents. It is important to note that this difference was outside of the control of the MCs, however, as the quality of the Constitution (and the extent of its success in encouraging these actions) was dependent on the actions of the framers of 1787, not their determinations in 1789.

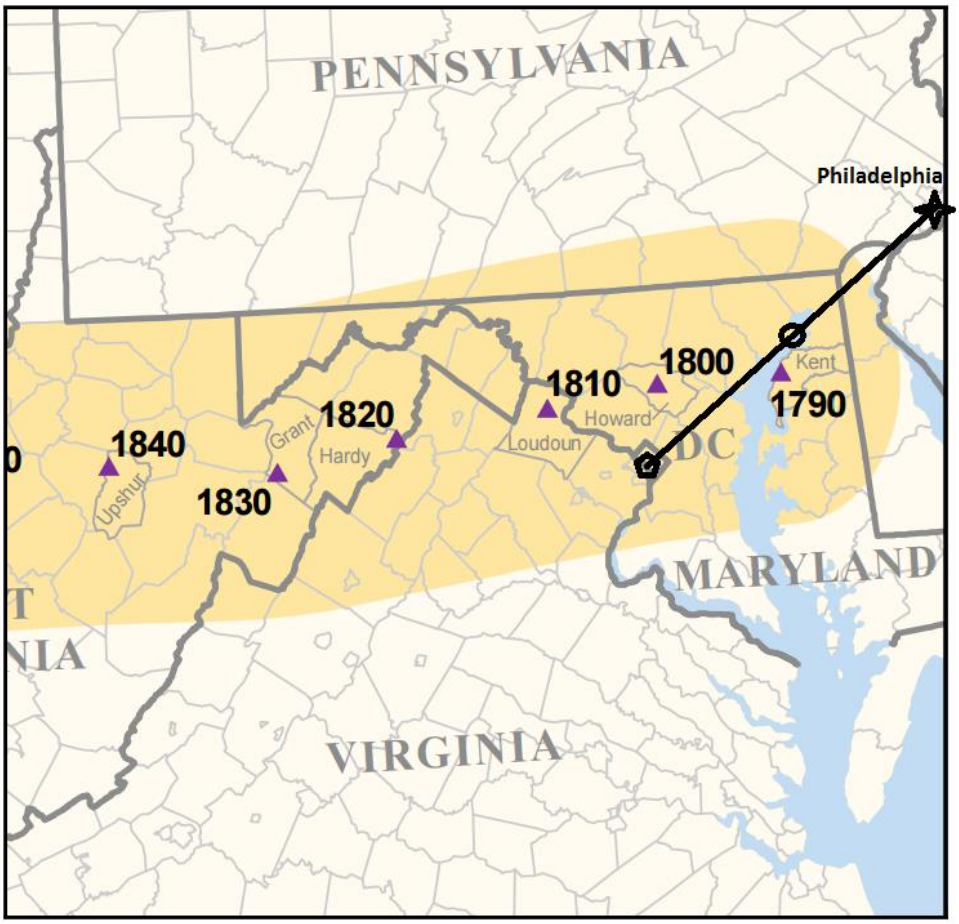
The Members of the First Federal Congress were, however, directly responsible for the other two distinctions: they chose the rules that ordered the body, and their actions set the norms that would guide the body's deliberations and processes. Cogent work on the Confederation Congress shows that the rules chosen by that body were well known to be dysfunctional by nearly all involved (Jillson and Wilson 1994), but delegates were unwilling to bear the costs involved in devising better rules. MCs of the First Congress devoted considerable effort to adopting rules and procedures that generated a consistent workflow, and tried to control the deficiencies that would naturally emerge in the decentralized lawmaking process that they constructed. A major problem in the Confederation Congress concerned committees that stretched on interminably, did work that duplicated the work of other committees or failed to report (Jillson and Wilson 1994). At the beginning of the Second Session, the House spent time creating a committee to examine the Journal to determine all the unfinished business of committees formed in the First Session that had not yet reported (De Pauw 1977, 256-257). This committee ensured that the House was aware of which agenda items would have otherwise fallen through the cracks, so to speak, and ensured that the choice of which items to work on was a deliberate one of the body, not a result of a lack of oversight. This

self-conscious attitude of the body toward its internal regulation has been richly documented above.

The final difference concerned the issue of norms. It seems clear from the results of Congress that a certain more pervaded the actions of the body – a firm determination to resolve the questions before it. While the difference in constitutional context and procedures explain much, but not all, of the difference between the spectacularly unsuccessful Articles and the prodigiously productive First Congress, this norm was pivotal in allowing the body to successfully address its agenda. Given state equality in the Senate, there is no reason deductively to expect that body to resolve a question like the location of the capital, especially absent central leadership or strong parties. All the ingredients for collective choice instability are present; absent this norm it is certainly possible to imagine each state delegation voting for a capital within its boundaries, and only for that proposition. Knowing that the body is working toward a decision, and that one will be made, meant that few contended for a capital in New Hampshire or Georgia. Once New York City's dreams of permanently hosting Congress were dashed (Bordewich 2016, 248), only relatively central locations remained in the running. Members were looking to bargain and were open to resolving the debate through the expedient eventually chosen: there would be two capitals, one temporary and the other permanent. As indicated in the figure (see Figure 3-5), the capital was placed just as near to the "center" of the nation as was possible. This same dynamic played out on many other topics. If each state had resolutely set about to protect one significant import from tariff, it is scarcely possible to imagine the way the Congress could have successfully set

an impost schedule capable of raising the revenue. In the end, the First Congress achieved its goals because of a constitutional context outside of its direct control (providence), its self-consciously devised internal procedures (laws), and its operative norms (mores).[126]

Figure 3-5: Location of Temporary and Permanent Capitals of the United States



Source: ***U.S. Census Bureau***

[126] Cf. Tocqueville (1840/2004, 319) for a similar accounting of the success of the polity overall.

Chapter Four: The Antebellum (33rd) Congress

At the opening of the 33rd Congress in December 1853, the political world was calm. President Franklin Pierce (1853) confirmed, in his annual written message to Congress, that the nation was "not only at peace with all foreign countries," but also, "exempt from any cause of serious disquietude in our domestic relation" (24). Pierce was especially heartened by the end of the sectional conflict over territorial policy. The President thus lauded the peace between the sections of the nation prevailing after the Compromise of 1850, which had ostensibly pushed the topic of slavery off the congressional agenda for good.[127] "The controversies which have agitated the country," Pierce confidently declared, "are passing away with the causes which produced them" (24). Not only did he pronounce the controversy over, he stated that the subject had been, "set at rest by the deliberate judgment of the people" (34). Pierce nevertheless lingered over this issue returning to it several times in his message. His final word on the matter was a solemn (if-awkwardly worded) pledge: "That this repose is to suffer no shock during my official term, if I have power to avert it, those who placed me here may be assured" (34).

[127] Pierce's recapitulation of the situation of 1850 is worth recounting: "A successful war had just terminated. Peace brought with it a vast augmentation of territory. Disturbing questions arose, bearing upon the domestic institutions of one portion of the confederacy, and involving the constitutional rights of the States. But, notwithstanding differences of opinion and sentiment, which then existed in relation to details and specific provisions, the acquiescence of distinguished citizens, whose devotion to the Union can never be doubted, has given renewed vigor to our institutions, and restored a sense of repose and security to the public mind throughout the confederacy" (1853, 34).

The 33rd Congress was nevertheless determined to place the President in contradiction with these words. Congressional leaders and members chose to organize the territories of the American West, even with abundant foreknowledge that doing so could reopen the issue of slavery (Eyal 1998).[128] It was well known, at the time, that the Compromise of 1850 posed certain ambiguities. The earlier Missouri Compromise had created a literal line of latitude (36°30') past which slavery could not spread in the Louisiana Purchase north and west of Missouri. The Compromise of 1850, while fixing the border of Texas, placed no such lines on the national map, and instead relied on the principle of popular sovereignty (Potter 1976, 157).[129] The Compromise of 1850 raised a question: did the line demarcated in the Missouri Compromise still prevent the growth of the institution of slavery into the area of present day Kansas and Nebraska?

The 33rd Congress sprang into action to resolve this ambiguity by abrogating the Missouri Compromise line. The Congress, which persuaded President Pierce to agree, made the triumph of popular sovereignty throughout the unorganized territory of the United States the essential plank in the Democratic Party platform. The Congress enacted

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[128] Eyal (1998, 212) states the matter very clearly: "much of the nation understood with remarkable sophistication what perils lay ahead should Congress enact the Kansas-Nebraska legislation. For some observers, this awareness merely translated into a vague premonition that 'agitation' loomed on the horizon, while for others it assumed a specific and precise form: predictions of violence in Kansas and of … political turmoil within the nation's two major party organizations."

[129] "Popular sovereignty" was the principle that the local inhabitants of a territory ought to choose and regulate their own "domestic institutions." This latter phrase was, of course, a pseudonym for the institution of slavery. The choice popular sovereignty referred to, therefore, was whether to prescribe or proscribe slavery in each territory. Popular sovereignty gave rise to important and difficult legal questions, such as when exactly a locality would choose: either in the territorial stage or when they first presented a state constitution to be ratified by Congress.

this position into law, thereby annulling the earlier Missouri Compromise, by passing, "An Act to Organize the Territories of Nebraska and Kansas." Canonically referred to as the Kansas-Nebraska Act, a century and a half of historiography has confirmed that it was among the most important and catastrophic enactments of American history (Malavasic 2014, Rensink 2008, Wolff 1977).[130] Historians note the conflict spurred by the act was unprecedented in intensity and consequence: "The struggle over this piece of legislation ruined the Whig Party, severely crippled [the Democratic Party], and produced a higher level of bitterness between Northerners and Southerners than anything that came before it" (Wolff 1977, 47). If that were not enough, historical consensus also places this enactment at the beginning of a chain of consequences that led to both the bloodshed in Kansas and the greater tragedy of the Civil War (Freehling 1990, Freehling 2007, Nichols 1956, Potter 1976, Wolf 1977, Wunder and Ross 2008).[131]

The Kansas-Nebraska Act thus pushed the ship of state, otherwise stable, and facing no major domestic or international crises, into troubled waters. As a law, its origin is clear, and its consequences are reasonably attributed to the institution that framed it.

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[130] Rensink provides a clear statement: "The Kansas-Nebraska Act of 1854, in large part an ordinary document, nevertheless had a catastrophic impact on its nation's history—leading to turmoil, division, and national crisis without precedent" (2008, 63). Malavasic is blunter still, "it was one of the most destructive pieces of legislation in United States history. It destroyed the second American political party system, stripped Native Americans of their land in Kansas and Nebraska territories, started internecine warfare in the Kansas territory, and ultimately led to the American Civil War" (2014, 270).

[131] Indeed, in the debate surrounding the Kansas-Nebraska Act, "the southern members of Congress for the first time organized and presented a well-nigh solid political front and among them traditional party divisions were largely laid aside. It was but a few steps onward to secession, the Confederacy, and the Solid South (Nichols 1956, 212). Debate generally only concerns where the event is in chain of causes and how pivotal is was, not whether it was a long-run cause of bloodshed. Freehling (2007), for instance, suggests the actions of Border Ruffians subsequent to the bill was more important than the bill itself (63).

The Congress is designed chiefly as a lawmaking institution. Its laws ought to be dedicated to Preambular ends: in promoting the general welfare amidst national tranquility. In passing the Kansas-Nebraska Act, Congress pursued a course of action leading in the opposite direction: toward sectional aims and into domestic turmoil. The case of the antebellum Congress shows, profoundly and clearly, why a healthy national legislature is necessary in our constitutional regime. While extreme, this example illustrates just how costly the consequences of rampant legislative dysfunction can be – such failures can lead to a chain of consequences imperiling even the existence of our body politic.

In the chapter that follows, I present the case of a failed Congress, one lacking nearly all attributes of congressional health. I demonstrate that it is possible for Congress to configure its norms, rules, and structures in a way so damaging as to be reasonably termed a failure. To prepare the ground for this argument one needs important methodological and historical background regarding this case study. A methodological preface is needed because of the problems posed by investigating the antebellum period. While conflicts related to slavery powerfully reverberate through American history, I show that the standards I elaborated in Chapter Two are flexible enough to handle these issues. Then, to aid in the development of my analysis, I present stylized historical facts regarding the nature of sectionalism in American society circa 1854.

After this preface, I move to the key argument of this chapter: that the action of Congress in passing such a damaging, ill-considered, and unresponsive measure was not merely an idiosyncratic failure, but rather the foreseeable and direct result of a

dysfunctional institutional makeup. The 33rd Congress was plagued by (1) unrepresentative standing committee membership and leadership, leading to sectional cartels; (2) failures of democratic responsiveness attributable to excessive party loyalty; (3) expressive debate which ultimately crowded out deliberation on the merits of policy; (4) partisan choices to abdicate clear constitutional powers enumerated in the Constitution. Importantly, none of these problems were foisted on Congress, but rather created through the action and inaction of MCs. These individuals were not coerced to frame such a poor-quality policymaking process; instead they did so acting through an institution structured by their choices. In the end, the electoral connection alone could have been sufficient to prevent the adoption of the Kansas-Nebraska Act, but even this salutary version of self-interest was overthrown by enough of the MCs in the House of Representatives to lead to passage of a massively unpopular bill. Altogether, these problems led not just to a dysfunctional Congress, one that has difficulty achieving its essential tasks, but rather to a failed Congress. I define a failed Congress as an institution that literally adds to the problems faced by the polity in a damaging way, without ministering to the general welfare. The 33rd Congress epitomizes such a flawed institutional state.

CASE STUDY A – THE NADIR

In this dissertation, case studies are utilized to concretely illustrate the theoretical and normative concept of congressional health. As a reminder, the cases selected aim to treat a "diverse" set, rather than a typical configuration of Congress. This chapter, like the

previous one, treats an "extreme" case. Only this time I investigate Congress when it was configured in the manner very unlikely to achieve its institutional ends. In short, the aim for the current chapter is to identify and explicate an institutional configuration that can serve as the opposite of the "ideal-type" presented by the First Congress. In selecting such a case, one searches for something more analytically precise than a Congress that produced legislative outcomes that the researcher disfavors. Moreover, the goal is to exclude those Congresses that produced bad outcomes for the nation due to idiosyncratic factors, or ones that are otherwise unaccountable. To find such a case one must identify and select a Congress that was institutionally was predisposed to failure due to its lack of institutional structures aligned with responsiveness, deliberativeness and representativeness. When searching for failure, additional signs can be sought out as well. A substantive failure in lawmaking is an important tell-tale marker of institutional dysfunction. That the Kansas-Nebraska Act is such a failure is not open to doubt. But to say something about institutional realities rather than just historical happenstance requires more than a reiteration of this historical consensus. Thus, the remainder of this chapter provides the argument that the 33rd Congress was a failed institution by analytically decomposing its norms, rules and structures. I thereby demonstrate that the 33rd Congress lacked the primary elements identified as essential to congressional health.

Nevertheless, important problems are raised by turning to the antebellum era for an archetype of failure. The most obvious concern raised by the selection of this case is important historiographical and constitutional controversies can get in the way of an *institutional* analysis of politics in that period. While several such problems potentially

exist, the two most powerful objections to examining the antebellum Congress might be respectively classified as historiographical and theoretical. Indeed, a powerful *historiographical* objection to selecting this case might be made as follows: "You choose the 33rd Congress as your example of failure because its status as the progenitor of the Kansas-Nebraska Act, but your claim that the institutional makeup of Congress caused this failure is implausible. It is simply not credible that the institutional rules, norms, procedures and structures of Congress truly caused the Civil War." The second and more profound *theoretical* objection might be stated as follows: "You analyze the Congress, but the problems of the 33rd Congress were caused by the institution of slavery, which had deep roots in the polity and was sanctioned by the Constitution. It is instead either the existence of slavery, the Constitution, or both that caused the problems facing the 33rd Congress. Your analysis is therefore flawed, as it places responsibility where it does not belong."

Responding to each of these concerns requires a reiteration and explication of the analytic framework undergirding the concept of congressional health. As a reminder, to be healthy a Congress need not be perfect, *and in fact will not be perfect*. No ideal institutional design could possibly guide the national legislature to design perfectly responsive laws, in a fully representative deliberative body, with perfect efficaciousness. Instead, congressional health refers to the aspects or attributes of institutional design, formation, or maintenance that *maximize the probability that the substantive aims of*

Congress will be met.[132] Congress will be unhealthy to the extent that its structures, norms, and procedures *minimize* this same probability. In an extreme case, the one to be presented here, the Congress failed as an institution; as its structures, norms, rules and procedures served aims other than those that Congress was designed to attain, rendering it extremely improbable that the substantive aims of Congress will be achieved. Since these aims are so critical for the continued functioning of the regime, the failure of Congress, as conceived here, is likely (although not guaranteed) to have extremely detrimental consequences for the polity.

The relation of this analytic framework to the *historiographic* problem is clear: while I am arguing that the 33rd Congress is such a failed Congress, I need not *and do not* argue that the radically dysfunctional attributes of that institution *caused* the Civil War. Neither do I need to show that a counterfactual "healthy Congress" would have prevented the Civil War or led to the peaceful abolition of slavery. In short, it is important to not over-read or over-interpret the simple claim of this chapter. My argument is descriptive, rather than casual in orientation. To be descriptive rather than causal does not imperil my claims, however. The argument of this chapter is clear, bold and subject to empirical falsification.[133] To repeat, I argue here that the institutional makeup of 33rd Congress

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[132] This probabilistic treatment has several corollaries. One is that even a maximally healthy institution can conceivably make mistakes; likewise, an unhealthy institution could accidently give rise to positive outcomes for the polity as a whole.

[133] Falsification in this context is possible, but more complex than typical scientific falsification. I assert, for instance, that the deliberation in the 33rd Congress was of poor quality and quantity. Falsification of this claim would consist of evidence or arguments adduced to show that either (a) my conception of deliberation is improperly framed or defined (b) that I have undercounted or undervalued actions that should count as deliberative (c) that the standard I am holding congress to is objectively unreasonable

contributed to its substantive failure. I demonstrate throughout this chapter that it was an institution *exceptionally unlikely to achieve the goals for which it was designed*. In fact, it was so deficient that its general tendency would have been (and was) to make laws that failed to represent the nation, that would disregard the fundamental capacities of the Congress, that would fail to discover potential problems of conception or constitutionality in bills, and that would fail to respond to citizen input.

The theoretical objection respecting slavery is likewise mostly obviated by this framework, although a substantial concession to this point is necessary. Anticipating and responding to this objection is indeed important as it is critical to offer a balanced and analytically precise critique of the 33rd Congress if my claims regarding its failure will be credible. Therefore, several caveats are in order. Although many Northerners perceived the Kansas-Nebraska Act as the act of an aggressive "slave power conspiracy" (Douglass 1854/1950, 323; Lincoln 1854/1953), several Southern MCs opposed the principles embedded in the Kansas-Nebraska Act because they were not favorable enough to slavery! The existence of MCs *accurately* representing the unjust and extreme views and interests of their constituents (i.e. faithfully representing the perspective of a slaveholder) posed a critical problem for the polity from the Founding onward. Moreover, the Constitution, by allowing states to have equal representation in the Senate, far over-represented the views of slaveholders in the polity. By 1854, when the 33rd Congress

(which is to say that no Congress has every deliberated at that level) or perhaps (d) all of the above. Thinking about the falsifiability of descriptive and interpretative claims is helpful to ensuring that these tasks are carried out at the highest degree of rigor possible.

met, the free states made up over 60% of the population of the nation, but had about the same number of senators as did the so-called slave states. These facts are important for proper evaluation. The Congress, as an institution, cannot be held responsible for the existence of views that would be difficult to compromise with, or for the political support provided by the Constitution to slavery.[134] In short, I concede that it was supremely difficult for any Congress to deal with the problem of slavery.

But the Congress, as an institution, can and should be held responsible for aligning its deliberations and decisions with its purpose as described in the Preamble and authoritative commentary on the Constitution – to refine and enlarge the views of constituents to seek the general welfare. In the 33rd Congress, the purpose of Congress was submerged beneath the needs of sectionalism and partisan demands. While neither of those demands are obviously illegitimate, responsiveness to those forces should not be paramount for Congress as an institution. Contrariwise, the politicians of 1853-4 detected considerable factionalism within their respective political parties – and acted as if resolving this internal factionalism was the chief role of Congress. Indeed, "This insecurity produced a tendency among politicians to grasp any possible advantage which might arise from current interests and to push it to extreme length. It was above all else a

[134] This is an understatement, but it is important not to let the reasonable feelings of moral aversion and animus toward the positions, speeches and actions of slaveholders in the 33rd Congress unduly affect the terminology used by the political analyst. In this chapter, I contend that a healthy Congress could have succeeded in checking slaveholding factionalism in proportion or even in advance of the majority opinion against "slave power" in the society at large. The 33rd Congress, on the other hand, magnified the voice of the slave-holding bloc, as two factions traded favors at the expense of the general welfare. More will be said about this in the following two sections.

period of political expediency and sometimes of desperate expedients" (Nichols 1956, 197).[135] Placing other goals before the common good, as defined in terms of a consensus of the interests of even a majority of the nation, the Congress seriously erred.

The errors made by the 33rd Congress are rendered clear by contrast with the relative success of earlier Congresses in dealing with slavery-related issues. The Congress had faced crises dealing with the problem of slavery several times in its history – and only in 1854 did it produce a "settlement" adverse to the interests of the popular majority of the nation.[136] Responding rather to a majority of the majority party in Congress, the partisan 33rd Congress managed to destroy the party system reigning at the time. The destruction of the party system was assured when the minority party and a substantial minority in the majority party (together making up a popular majority of the nation) was virtually ignored in the "deliberations" of both the House and Senate. While this chapter should not be read as attributing full responsibility for the breakdown of the antebellum polity to the Congress, it is entirely fair to adjudge the 33rd Congress failed, especially when one can be secure in the knowledge that other Congresses had managed this decisively difficult matter with more care, finesse, and ultimately efficaciousness.

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[135] This scholarly analysis is not a one-off or idiosyncratic. Regarding the MCs of the 33rd Congress other historians concur. One clear statement runs as follows: "The Kansas-Nebraska Act was one of the most fateful measures ever approved by Congress… Seldom was the irresponsibility of politicians more glaring than in their reckless agitation of this issue, heedless of long-term national consequences, for personal and factional advantages" (Gienapp 1987, 81-82).

[136] Several previous settlements, such as the "stricter" Fugitive Slave Law of 1850, were directly averse to the interests of the enslaved and free Blacks, who were obviously not consulted for these compromise measures. The Kansas-Nebraska Act broke new ground, however, in being averse to the interests of the popular majority of the nation, alongside its clear injustice to the black population of the United States.

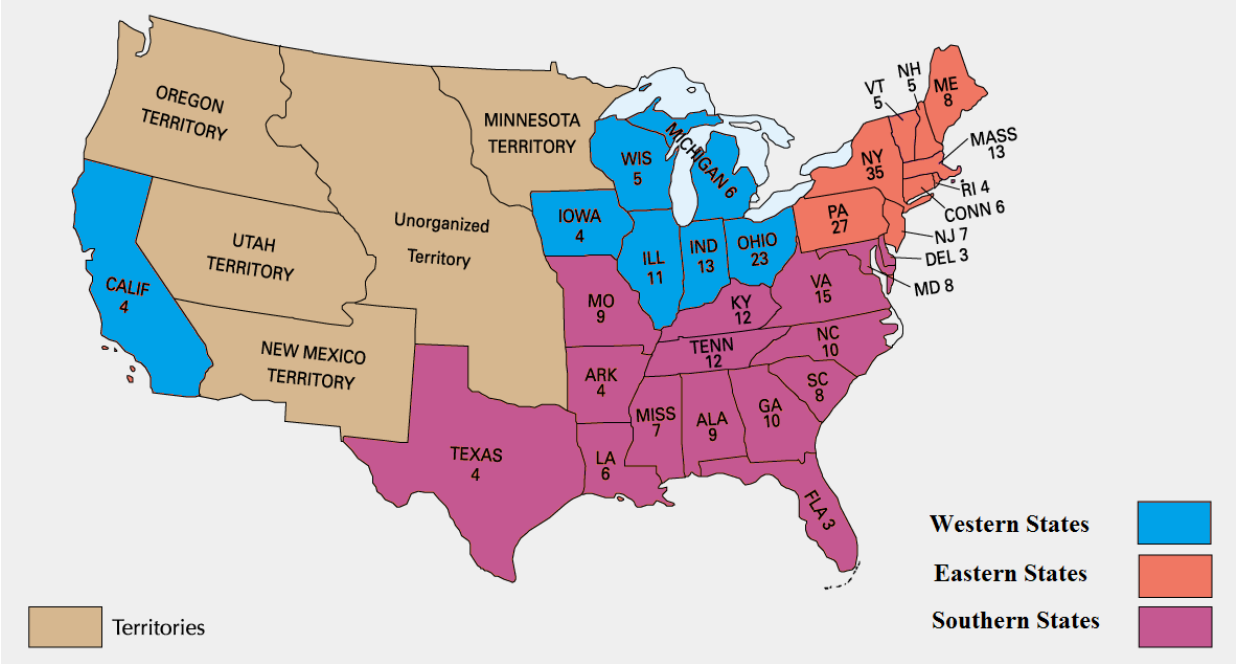
HISTORICAL BACKGROUND: SECTIONALISM IN AMERICA CIRCA 1854

Before analyzing Congress at the institutional level, it is important to clarify just what sectional interests were particularly relevant to the Kansas-Nebraska Act. Fortunately, historians have richly mined the sectional realities of American politics in the antebellum period. The stylized facts I extract from this rich literature act as useful aids to the reader by providing a parsimonious picture of the assumptions I make regarding MCs and the interests they represented in the Congress from 1853-55.[137] Starting with the easy case of the southern United States is reasonable. It is all too apparent that slaveholding made up the most prominent and frequently referenced southern interest in Congress, especially in the debates regarding the Kansas-Nebraska Act. Protecting the "property rights" of slaveholders and protecting the institution from disparagement or infringement by abolitionists consisted of a powerful interest for southern MCs. Some MCs even expressed a sense that all other interests paled in comparison with this one. One southern (border-state) MC, Senator Archibald Dixon (KY), said that "'Upon the question of slavery, [he knew] no Whiggery, And [knew] no Democracy…' He was, instead, 'a pro-slavery man' who sought to maintain the 'rights' of his 'slaveholding constituency'" (Holt 1999, 808). While it is true that other interests characterized the South, including an interest in gaining federal funds for internal improvements in the Deep South, and securing at least one southern route of the

[137] These stylized facts distinguish my analytic account, with certain generalization being necessary, from a fully comprehensive historical account. Within each section of the nation to be canvased below, there was substantial diversity of partisanship, local and state factions within parties as well as interests (cf. Holt 1999).

transcontinental railroad, their pivotal interest is clear (Potter 1976, 152 – 153). *I therefore posit that southern MCs had to represent one interest above all else; they must ensure that "slave property" was secured.*

Figure 4-1: The United States in 1854



Source: Author created modification of an image from a public domain work of the U.S. Federal Government, *The National Atlas of the United States (1970)*, 145. Numbers on the map represent the total number of electoral votes for each state in the Electoral College.

Operating from the frame of the present, and with foreknowledge that the United States would soon split into "Union" and "Confederacy" it is common to read these distinctions into the past. Calling the remainder of the nation the "free states," however, in contradistinction to the enslaved South, is a mistake regarding the interests in play in the 33rd Congress. Of course, "free states" did share salient interests, including protecting

and encouraging "free labor." The problem in lumping the entire free North together is that it conceals important differences in their interests relevant to the Kansas-Nebraska Act. *Given differences, to be articulated below, I posit the existence of two sections within the free states, the "eastern states" and the "western states."*

In the eastern states, including all those free states part of the Union when it was founded plus Maine and Vermont, the primary sectional interests were manufacturing, trade and internal improvements. The main economic interests sought to find markets for the products of a newly industrializing economy and a diversified system of agriculture (Potter 1976, 32). *Thus, I posit that the fundamental interest to be served by eastern MCs is the economic growth of their region, secured either through protective tariffs, internal improvements or direct federal subsidy to railroad or finance interests.* In the western states -- the free states not part of the original Union of 1787 -- political interests diverged from their eastern kin. Not nearly as industrialized as the East, the West focused on the continued expansion and development of America. Although it initially seems out of place in this list of primarily economic interests, one of the primary aims sought by the west was the organization of the territories of the American frontier (Hodder 1913, Potter 1976). MCs accurately representing constituents, saw territorial organization as an instrument to satisfy their preferences: the desire of constituents to continue the westward march of Manifest Destiny, as well as to improve the material prosperity of western states, which would see economic growth as their cities developed into entrepôts of trade with the frontier. *The major boon aimed at by citizens in the West, and thus represented*

by their MCs, was the creation of a transcontinental railroad, to link the west with California and the Pacific trading world.[138]

Alongside these sectional interests, a clear and overwhelming majority of citizens of every region in favor of a continuation of the national union in 1854. The compromise measures of 1850 and 1820 (and the initial founding of the union in 1787) depended on a shared interest in preserving the union, because narrow sectional interest alone would often mean defecting against compromise. Indeed, sectionalism nearly triumphed in 1850, when MCs did defect against compromise when the measure was arrayed as an omnibus measure, but accepted it piecemeal, (after significant tactical changes suggested by Senator Stephen Douglas [D-IL]). MCs generally voted for the parts of the compromise that benefited their section, while generally voting opposed to ones that were perceived as harming it (Theriault and Weingast 2002). *I thus posit one additional interest held by all MCs, an interest in favor of continuing the union and avoiding unnecessarily threatening the tenuous national piece recently established in 1850.*

[138] While one might wonder if MCs at the time recognized any such distinction between eastern and western free states. But, in fact, prominent legislative leaders did recognize such a distinction! Trying to mollify his southern allies, Sen. Cass of Michigan insisted that he did not share in the free-soil tendencies of his eastern colleagues. Sen. Cass said that such voices did not "speak for the North," and "as a western man [he disavowed their] authority in toto" (*Congressional Globe Appendix* 1854, 292). Here is an MC from Michigan describing himself as a *westerner*. While this is strange to contemporary ears, this is accurate regarding the views of Sen. Cass and the perceived interests of his constituents. He simply did not share the interests (or principles) of many eastern MCs.

Table 4-1: MC Count by Region in the 33rd Congress

REGION	SENATE		HOUSE	
	No. of Seats	% of Chamber	No. of Seats	% of Chamber
EAST	18	29%	92	39%
WEST	14	23%	52	22%
SOUTH	30	48%	90	38%
TOTAL	62		234	

Source: The National Atlas of the United States (1970), 145.

While the intensity of these interests certainly varied even within sections,[139] clear evidence for of validity of these proposed cleavages emerges from differential voting by section on the Kansas-Nebraska Act in both the House and Senate. On the rollcall votes for final passage, there was a clear and distinct difference between voting in the eastern states, the western states, and the southern states. MCs from eastern states were strongly opposed to the measure while those from western states were mixed. The southern states, moreover, were more uniformly in favor of the Kansas-Nebraska Act than the East was opposed (see Table 4-2). One additional element speaking to the cogency of dividing the nation in this manner is that the voting differential holds up even when you control for

[139] The slaveholding interest was stronger in the Deep South than in the Border States (and even stronger in the Black Belt of these states than other less enslaved areas) and the railroad interest was significantly more intense in the states bordering the unorganized territories as well as Illinois, which hoped to be the eastern terminus of the transcontinental railroad.

the potentially confounding variables of party and chamber. Just examining Democrats in the House, southern representatives broke 55-3 in favor of the bill, while most western representatives supported it 19-14. Eastern Democrats in the House, meanwhile, were narrowly opposed to the measure, 26-27. One can thus say with a fair level of confidence that United States of 1854 can be divided into western, eastern, and southern sections.[140]

Table 4-2: Vote on the Kansas-Nebraska Act by Region

REGION	**SENATE**			**HOUSE**		
	Yea	Nay	% Support	Yea	Nay	% Support
EAST	5	8	38%	26	63	29%
WEST	9	4	69%	19	27	41%
SOUTH	23	2	92%	68	10	87%
TOTAL	37	14		113	100	

Source: *Senate Journal*. 33rd Cong., 1st sess., 3 March 1790, 235. U.S. *House Journal*, 33rd Cong., 1st sess., 22 May 1854, 923-924.

[140] The regional distinctiveness of the cleavage is stronger in the Senate than in the House. As indicated in the table above, a bit more than a third of eastern senators supported the Kansas-Nebraska Act, while more than two thirds of western and nine out of every ten southern senators supported the Act. The distinction between the eastern and western section is less stark in the House, although the same general relation obtains (i.e. support grows as you move from East, to West, and finally, to the South.

UNREPRESENTATIVE COMMITTEE MEMBERSHIP AND LEADERSHIP

The three sections of the United States did not find their interests equally or proportionally protected in the 33rd Congress. Instead, the sectional interests important to eastern MCs were imperiled by unrepresentative structures within Congress. To talk of unrepresentative structures requires something to be said about *representation*. In the context of the conception of congressional health developed in this dissertation representation need not be (and frequently ought not to be) descriptive to be legitimate. If defined descriptively, the Congress, its committees, and its committee leaders would need to be a mirror to the population of the United States. As explained in Chapter Two, the Constitution does not generate or mandate such a reality. Congress is designed instead to accurately represent interests substantively. Representation in Congress is pluralistic: the ideal is for all legitimate interests in society to have the best arguments on their behalf aired in a deliberative body. A type of rough approximation of the weight in society of these interests is provided by the fact that many different MCs may share an interest: they represent the same interest on account of their separate constituencies' shared interests.[141] Legitimate and numerous interests are then reinforced.

The practical and concrete upshot of this theoretical matter is that we should not evaluate a Congress based on a standard of literal and direct proportionality. Instead we should evaluate Congress as unrepresentative only if certain interests cannot be heard at all in the legislative process, or if the weight of interests in the Congress is

[141] In the 33rd Congress, sectional interests provided the glue that connected multiple MCs in natural coalitions. These coalitions of interest were intersected (sometimes orthogonally) by political interests provided by party.

disproportionate to their weight in society. To show that the 33rd Congress possessed unrepresentative committee leadership and membership then is not demonstrated through a simple statistical test. Instead, one engages in a more comprehensive historical analysis of the interests at play in the Congress. Given the stylized facts presented in the previous section, one then gauges the relative success or failure of those interests in gaining a seat at the table in the institutional structures of the legislature that count, like committees.

Quantitative analysis of the committee system of the 33rd Congress shows that the interests of the slaveholding states (the south) and the states of the old northwest (the west) were weighted heavily at the expense of the free states of the eastern seaboard. Committees in the Senate and House were largely dominated by MCs from the southern and western regions of the nation. The memberships of several important committees were similarly cartelized, with some committees possessing absolute southern majorities, in the face of the fact that the southern MCs only made up 40% of the House. While partisan representation and the dominance of Democrats in the 33rd Congress explains some of this malapportionment, it hardly explains it all. *With its important leadership and committee positions dominated by a cartel within the majority party, the Congress was not able to predict the outcry which would emerge from the Northern and Western states over the repeal of the Missouri Compromise countenanced by the Kansas-Nebraska Act.*

The disproportion of power of the South within the committee system mattered, as the 33rd Congress possessed institutional characteristics speaking to the importance of committees, such as a standing committee system with settled jurisdictions. In the 33rd Congress, committees were utilized extensively to draft legislation, to evaluate the

contents of petitions for individual relief, carrying out very much the same tasks described in Chapter Three, only in standing form. These committees were not, however, fully institutionalized. These committees did not subdivide formally into sub-committees, lacked a permanent attached staff, had no formal hearings or other forms of deliberation (Deering and Smith 1997, 26 – 28). Immediate inspection of the lists of committee membership reveals that the committee assignments were set up in a similar proportion to the partisan make-up of each body. Analyzing these lists in terms of their sectional make-up, however, reveals the degree to which committee leaderships had been cartelized by the southern and western states. While the partisan makeup and leadership of committee was reasonable (although not likely ideal for deliberation) the total lockout of eastern representatives from leadership is startling.

Table 4-3: Committee Chairs by Region

REGION	**SENATE**			**HOUSE**		
	No. of Chairs	% of Chairs	Senate Share	No. of Chairs	% of Chairs	House Share
EAST	6	22%	29%	10	27%	39%
WEST	9	33%	22%	10	27%	22%
SOUTH	12	44%	48%	17	46%	38%
TOTAL	27			37		

Source: *Senate Journal*. 33rd Cong., 1st sess., 12 December 1854, 31. *U.S. House Journal*, 33rd Cong., 1st sess., 12 December 1854, 55.

Even a cursory inspection of the data provides evidence of significant cartelization of the committee system by the south and west. Whereas the eastern part of the nation had around 40% of the total seats in the House of Representative, only about a quarter of committees were led by eastern representatives. To check if eastern interests would be disadvantaged by this proportional underrepresentation, additional investigation is necessary. To supplement the initial quantitative analysis, I clarify the matter by presenting a narrower list of familiar major committees, supplemented by the addition of the Senate and House Committees on Territories, which was doubtlessly seen as important in the 33rd Congress.[142] Not one eastern senator or representative was a chairperson of an important committee (see Table 4-4). Simply put, differential partisan composition of the sections does not excuse or justify this. In the House, the Democratic caucus was 157 strong. Out of that number 54 were eastern. Yet not one of these representatives received a pivotal chairmanship.[143] While their constituents no doubt were pleased with the fact that their MC chaired the Committees on Manufactures or

[142] To determine which committees should be classified as "important" I turned to the list given by a Senator of the 33rd Congress, Hannibal Hamlin of Maine. Hamlin, speaking in the 35th Congress, stated that the Foreign Relations, Military Affairs, Naval Affairs and Judiciary committees were "the principal committees, that reflect the Government, [and] establish its policy abroad and at home" (*Congressional Globe* 1857, 39). To this list, I added the Finance and Territories Committees, due to the broad important of authorization and appropriation in every Congress and the obvious topical focus of the latter. For the House, I list that chambers analogues to those listed by Sen. Hamlin, with one addition; the Committee on Elections, which managed disputed elections, a common occurrence in the nineteenth century.

[143] In the Senate, committees were formed after unanimous consent was given to a suspend a rule formally requiring committees to be chosen by ballot. Instead one slate was accepted without debate, presumably with informal input from the party caucuses (*Congressional Globe* 1853, 23). In the House, the Speaker announced the list of committee assignments, without the necessity of a vote to approve the slate.

Patents,[144] these committees were not pivotal in the same way as the Committee on Territories. Further demonstrating the disproportion, the memberships of many important committees were just as skewed toward the west and east as leadership. Table 4-5 presents several committee profiles for illustrative purposes.

Once again, it is not reasonable to call the committee membership of the 33rd Congress unrepresentative just because one committee over represents one interest, one time. Disproportional influence in the 33rd Congress was much starker than this.

Table 4-4: Major Committee Chairs by Region

REGION	**SENATE**			**HOUSE**		
	No. of Chairs	% of Chairs	Senate Share	No. of Chairs	% of Chairs	House Share
EAST	0	0%	29%	0	0%	39%
WEST	3	50%	22%	1	14%	22%
SOUTH	3	50%	48%	6	86%	38%
TOTAL	6			7		

Note: Major Senate Committees: Judiciary, Finance, Military Affairs, Naval Affairs, Foreign Relations, and Territories. Major House Committees: Elections, Ways and Means, Judiciary, Military Affairs, Naval Affairs, Foreign Affairs and Territories.

[144] The jurisdiction of these committees no doubt served the sectional interests of the eastern region of the nation.

The House Committee on Roads and Canals could hardly be thought to be a sectional bailiwick of any one region, yet it too was disproportionately favorable to westerners and southerners. The nation relatively uniformly required internal improvements (or funding for the maintenance of existing ones). Nevertheless, a western Democrat was the chair of the committee with a plurality of the members being from the south. And this was not the worst culprit in terms of lack of representation. The House Committee on Territories was in fact chaired by a western Democrat with an absolute majority of seats occupied by southern representatives. Despite the foreknowledge that the peace and stability of the nation had been threatened by difficulty of setting territory and state admission policies, the (southern) Speaker and members of the 33rd Congress set up a committee structure guaranteeing that one section would be less well-represented than their number of seats in the Congress would suggest.

The consequences for this internal structure should not be overstated, but they were not beneficial for the 33rd Congress.[145] One of the most important consequences of setting up the committee system in the way undertaken by Congress in 1854 was the creation of a leadership in both chambers that is disproportionately representative of pro-slaveholding interests far more than the degree encouraged by the Constitution or by partisan realities. Given the sectional composition of the Senate Committee on Territories

[145] Committees, as mentioned above, were important in the 33rd Congress, but lacking many of the structural features of the institutionalized 20th Century Congress. Thus, one should not over read my claims. The House or Senate Committees on Territories did not, for instance, have the right to submit bills under a closed rule, which could super-empower the preference outlying MCs who were members of this committee. One might calibrate this position as follows: the unrepresentative nature of the committee system was detrimental to the health of Congress and the soundness of the lawmaking process, but it did not automatically render the institution a failure.

it is no surprise that the legislation reported out from Douglas's committee on territories catered almost exclusively to Southern and Western interests. Additional troubling features of the committee system in the 33rd Congress compound, rather than alleviate this tendency. The committees were set up with relatively small memberships; the Senate Committee on Territories, for instance, only had six members. During the stages where the Kansas-Nebraska bill was drafted, a pro-compromise Whig, Sen. Bell (TX) was not in Washington (Holt 1999, 807). His absence removed one of the few advocates for the Missouri Compromise from deliberations at the pivotal moment when informal deliberation was occurring among the members of this committee.

Table 4-5: Selected Standing Committee Membership

Committee	**Committee Chair**	**Membership Profile**
House Territories	Western Democrat	Southern Majority
House Ways and Means	Southern Democrat	Southern Majority
House Manufactures	Eastern Democrat	Eastern Majority
House Roads and Canals	Western Democrat	Southern Plurality
Senate Territories	Western Democrat	Western Plurality
Senate Finance	Southern Democrat	Southern Majority
Senate Military Affairs	Southern Democrat	Southern Majority
Senate Judiciary	Southern Democrat	Southern Majority

Source: *Senate Journal*. 33rd Cong., 1st sess., 12 December 1854, 31. U.S. *House Journal*, 33rd Cong., 1st sess., 12 December 1854, 55.

In the 33rd Congress none of the committees to which the bill could be referred would be incentivized or structured to discover the ways that the proposed bill might put eastern Democrats in a tough spot politically. The Kansas-Nebraska Bill did nothing to advance the interests of eastern Democrats. Beyond this, it symbolically went after their constituents as well, especially when the bill was amended to clearly indicate that it was meant to render the Missouri Compromise inoperative. Closer contact with and leadership provided by eastern Democrats may have alerted party leaders to this fact much earlier in the process.

Furthermore, the systematic nature of the problem across both chambers and many committees means there was little that could be done to rectify the problems of the bill once they emerged. When the Kansas-Nebraska Bill was passed in the Senate, there was no way to have the committee on territories work on the bill in the House to see if anything can be done regarding the Missouri compromise. The House Committee on Territories, for instance, was completely dominated by allies of Douglas and southerners. It was therefore broadly unrepresentative of the chamber which the final vote shows was much more narrowly split. The House Committees on Territories in particular was thus definitionally a preference-outlier (cf. Krehbiel 1990, Shepsle and Weingast 1987), as its median member was a southerner, strongly in favor of the repeal of the Missouri Compromise. Rather than be checked by their chamber median, however, this tendency was inappropriately policed by each chamber and even augmented by the overall tendency of the 33rd Congress to empower the preference-outliers of the majority party.

While the sectional and partisan interests represented in the Senate guaranteed consideration of a territorial organization bill complaisant to southern interests, nothing about the unrepresentative committee structure of the Senate or House made the final result necessary or inevitable. In Chapter 3 it was explained that in the First Congress Houses and Senates frequently appointed "grand committees" composed of an MC from each state when it was deliberating over policies likely to affect the interests of states qua states. While perhaps Congress had grown too large for a literal one per state representation, intense sectional interests (based on the geographic, demographic, and economic attributes of states) had only grown more intense in the years subsequent to the First Congress. The need for testing the potential partisan and sectional ramifications of policy proposals had only grown more acute in the Antebellum Congress, while the institutional means for handling these sectional conflicts withered in the face of sectional cartels, and the partisan cartels to be discussed next.

RESPONSIVENESS TO PARTY RATHER THAN TO CONSTITUENTS

In some cases, a given Congress may find itself hampered by one dysfunctional practice, norm, or procedure, but with compensating advantages elsewhere. The 33rd Congress, by contrast, exhibited multiple interlocking failures. Along with the structural advantage given to western and southern interests in its internal workings, the 33rd Congress was simply not responsive to a popular majority or in fact any other kind of popular pressure. The second institutional failure (of four) was thus one of behavioral norms rather than rules or structures. *Norms of MC behavior in the 33rd Congress were*

dominated by intense responsiveness to perceived partisan needs, rather than the concerns, ideas and grievances of their constituents and state leaders.

The 33rd Congress was informed of intense citizen opposition to its plan to organize Kansas and Nebraska early in the legislative process but did not alter the proposal at all in the face of this opposition. Indeed, the Congress continued to receive and review citizen petitions to inform them of exigent and popular needs. The petitioning system thus continued to function as a transmission belt of popular ideas into Congress, just as described in Chapter 3. Yet, the behavioral response of MCs to the information provided by this process seemed defective. In the time since the First Congress, partisan establishments were developed, and in the 33rd Congress these partisan loyalties swelled to an unsustainable level, especially among Democrats who were in the majority. While one is hesitant to reach such a conclusion, considering the evidence marshalled, it is clear that many MCs of the Democratic Party acted with blithe disregard for the preferences of their constituents, dramatically misreading the intense preferences of their voters.

It should be remarked that the failure to appropriately respond to citizen input is one of the gravest deficits a legislature can face. Making laws responsive to the will of a popular majority is an important role for Congress. While the legislative branch must oversee or aid other national institutions in their attempts to implement policy, scrutinize the

constitutionality of enactments, and protect the nation from external threats, only through Congress is a popular majority able to translate its will into law.[146]

With its fundamental task in sight (acknowledging that this role cannot be played by any other actor) a healthy Congress aligns its deliberations with measures than have the conceivable support of a popular majority of the nation at large. This is not to say, however, that MCs ought to simply parrot or reduplicate the public opinion of their constituents. Especially in a democratic age it is worth nothing that the genuine preferences of citizens can often be dramatically uninformed (Bartels 1996, Campbell et al 1960, Converse 1964, Delli Carpini and Keeter 1996). Alternatively, even informed and responsible citizens may be incompletely informed about the remote consequences of laws under consideration.[147] But the limitations of the populace do not grant Congress a license to blatantly disregard durable and broad public opinion, that which is expressed strongly, across multiple constituencies, and over a large stretch of time. A bare minimum of responsiveness requires Congress to respond – that is take substantive action to remedy legitimate citizen grievances – when a clear majority of the nation is activated in opposition to either a measure under debate or an already existing law.

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[146] Congress must oversee the executive departments and agencies, attend to constitutional questions if it hopes for its laws to be upheld, and appropriate funds for national defense, but other institutions are chiefly concerned with these other roles. While democratic deliberation is important and crucially legislative in nature, it is certainly the case that other institutions do deliberate as well. Only Congress has a conceivable claim to being representative; only Congress has the diverse sources of information that could ensure that our nation's laws reflect those which might be reasonable consented to by its citizens.

[147] These caveats are certainly a key part of the insights provided by the most important figures in American political thought, with Madison, Hamilton, and Tocqueville all pursuing the consequences of the limitations of direct and unrefined representation of citizen preferences.

So far from passing a law consonant with general desires of the majority, the 33rd Congress "succeeded" in *repealing* a policy intensely *supported* by an overwhelming majority of both the eastern and western sections of the nation. The policy which the Kansas-Nebraska Act repealed was the Missouri Compromise, the provision of the 1820 law which had allowed Missouri into the union with the stipulation that "in all territory ceded by France…which lies north of the thirty-six degrees and thirty minutes north latitude … slavery…shall be, and is hereby, forever prohibited."[148] Given the word "forever" in the Missouri Compromise, it was perhaps unsurprising that citizens of the east (was well as significant parts of the west) exploded in protest. They were, simply put, outraged at potentially expanding the institution of slavery into the areas north of the Missouri Compromise line. The sheer number of petitions and petitioners in favor of the Missouri Compromise and opposed to the Kansas-Nebraska bill would have been apparent to MCs in both houses. Examining the petitions presented on just one day in the Senate provides a clear look at citizen reaction to the bill.

On February 20, 1854, several weeks deep in Senate deliberations, the Senate opened its session with the presentation of petitions. Senators Seward (NY), Wade (OH), Everett (MA), Fish (NY), Foot (VT), Chase (OH), Broadhead (PA), Sumer (MA) all presented petitions from their constituents "remonstrating against the passage of the bill, in its present form, to organize the territory of Nebraska" (*Congressional Globe* 1854,

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148 *An Act to authorize the people of the Missouri territory to form a constitution and state government, and for the admission of such state into the Union on an equal footing with the original states, and to prohibit slavery in the territories*, Sec. 8. Act of March 4, 1820, ch. 22, 4 *Stat.* 545.

447). These petitions, while largely coming from eastern states, also included western petitioners as well. Several senators presented more than one petition, so that in total 34 petitions against the bill were read to the Senate. Those senators even introduced petitions on the behalf of voters outside their states, including New Jersey and New Hampshire. The petitions came from groups of electors, citizens, religious leaders, and at least one petition designed to cut across partisan lines signed by the "citizens of the town of Webster, Massachusetts, without distinction of party, remonstrating against the passage of the bill to organize the Territory of Nebraska" (*Congressional Globe* 1854, 446). Against this array of nearly three dozen petitions, signed by well more than a thousand individuals, was a sole petition presented by Sen. Dodge (IA), in favor the bill. This petition was signed by one individual, "the Delegate from the Territory of Nebraska," who approved of repealing the Compromise. This petition is itself of questionable provenance, as one wonders how the senator came to call this individual a "Delegate" from an unorganized territory. Regardless of this oddity, the weight of opinion expressed by citizen petitions on February 20 in the Senate, and indeed throughout the deliberations more broadly, would not be exaggerated at 1000-1 opposed.[149]

The weight and intensity opposed to the bill overcomes potential defenses of MC behavior, and even imperils a key substantive argument made on behalf of the bill. In attempting to align itself with a bill responsive to majority input, the Congress may

[149] If opinion polling had existed in the 1850s, in no way would opinion have been 1000 or even 10-1, but I take this overwhelming margin in terms of petitioning as a good indication of the *intensity* of preferences on this issue.

occasionally find itself bombarded with the sentiments of an intense minority, in the face of a relatively quiescent majority. If the majority is truly indifferent to a measure, but intensely approved or disapproved by a small number of citizens, responding to that intensity of preferences may be reasonable. In the 33rd Congress, on the other hand, it was demonstrated through days after days of petitions similar to those presented on February 20, that an overwhelming majority of eastern citizens opposed the bill, with little to no organized activity by southern or western citizens in favor of the bill. Thus, even if MCs misapprehended the nature of the opposition to the Kansas-Nebraska bill, they had to be aware of the lack of interest expressed by citizens and organized constituencies in favor of the bill.

The mere fact of extensive, vociferous and durable protest rendered one substantive argument in favor of the bill problematic. On February 20, Sen. Pettit (IN), on the same day which had seen so much petition activity directed toward the bill, audaciously told his colleagues to "pass this bill…and banish [the question of slavery] from these Halls; and bequeath to our successors a peace and tranquility which we have never known here, and never shall know until we pass this bill" (*Congressional Globe Appendix* 1854, 218). The only way to accomplish such a comprehensive peace would have been to pass a policy that was in acceptable *in principle and in fact* to the various parties and sections of the nation. The actions of ordinary citizens showed MCs in both chambers that this bill was most certainly not such a measure, but eastern and western Democrats seemed averse to admitting this fact.

The lack of responsiveness is even more glaring in the context of the unusual ire directed by states at their senators and representatives. The legislature of one state, Connecticut, even went so far as to censure one of its own, Sen. Isaac Toucey, because he voted for the bill after the state had already sent a memorial opposing its enactment.[150] More typical but just as strongly worded was the joint resolution of the House and Senate of New York, which declared the Kansas-Nebraska bill, "an unjust and unworthy violation of good faith, and an indignity to the free States of the Union" (*Congressional Globe* 1854, 442). The state legislature thus requested that their MCs strongly oppose that measure. Hearing almost uniform tumult from back home and having been requested to vote against the measure by their state legislature the behavior of MCs from New York would be unaccountable, if not for the perils of partisanship. While both of New York's senators voted against the bill (as they were Northern Whigs), over one third of New York representatives voted in favor. Even more favorable were New York Democrats, who voted for and against the measure about evenly.[151] The margin of final passage was so close – thirteen votes – that had these NY representatives followed the revealed preferences of their constituents and the recommendations of their state legislature the bill would not have passed.

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[150] Sen. Toucey, for his part reasonably contended that he had a free choice in voting his conscience on bills in Congress as part of "the duty which the sovereign people of the State… had imposed upon [him]" (*Congressional Globe* 1854, 1615). Toucey, a Democrat, added that he was uninterested in the will of a legislature governed by the fusion of two parties (the Whigs and the newly forming Republicans) who differed from completely. This partisan discounting would be reduplicated in the House with serious consequences for eastern and western Democrats.

[151] Not one NY representative who voted for the bill was returned to the 34th Congress.

Table 4-6: Final Vote on Kansas-Nebraska Act in the House by Region and Party

Region		**Eastern**	**Western**	**Southern**
		Votes Yea / Votes Nay (Percentage Voting in Favor)		
Party	Democratic	26 / 53 (49%)	19 / 33 (58%)	55 / 58 (95%)
	Whig and Free Soil	0 / 33 (0%)	0 / 11 (0%)	13 / 20 (65%)

Source: U.S. *House Journal*, 33rd Cong., 1st sess., 22 May 1854, 923-924.

Across the east and west, a similar pattern to New York played out. Even though easterners or westerners who were not part of the Democratic Party voted against the bill, eastern and western Democrats split evenly for the measure or were even narrowly in favor (see Table 4-6). The Democratic Party leadership, including the president, included the Kansas-Nebraska Act in the official party platform and subjected dissenters to pressure and promises of patronage if they stuck with the party line (Nichols 1956, 210 – 211). Faced with the choice of responsiveness to their party leaders or their constituents, a (narrow) majority western and eastern Democrats favored their party over their voters. Given the fact that voters were so engaged, mobilized over this affectively charged issue, this decision was ultimately costly electorally for eastern and western Democrats. Overall, only 12 Democratic representatives from the east or west returned to the 34th Congress, out of a caucus of 94. In the entire Congress the swing against the Democrats

amounted to a net loss of 72 seats, an amazingly high number in a House of Representatives with only 234 seats. The Kansas-Nebraska Act wrecked the Whig Party, which split over the issue of slavery, but also decimated the Democratic Party in the east and west.

In the 33rd Congress the prospective duty to propose, deliberate and vote on legislation in a manner responsive to popular (majoritarian) preferences broke down under the pressure of sectional and partisan forces. The short terms allotted to representatives were designed as a structure to align self-interest with the benefits of responsiveness. This electoral connection ought to discourage MCs from passing legislation opposed by mobilized majorities in their constituencies. But in some cases, MCs partisan behavior becomes so strong and pronounced that the prospective electoral connection all but disappeared. The majority of northern and eastern Democrats in the 33rd Congress certainly exhibited behavior consistent with a belief that party trumps popular sentiment. In the elections of the 1850s, only a retrospective version of the electoral connection was in evidence, with the remarkable turning out of the Democrats from power after they failed to heed the warnings of their angry constituents.

While this retrospective voting did enforce sanctions against MCs of a party deemed out of step with their constituents, several reasons explain why this version of responsiveness does not salvage the antebellum Congress from opprobrium. In the first place, retrospective voting in a "wave election" is a blunt instrument, ill-suited for appropriately rewarding and sanctioning MCs for voting behavior. Many free state Democrats who voted against the bill nonetheless were defeated. Out of the 14 western

Democrats who voted against the bill only 2 were reelected as Democrats,[152] with the other 12 seats being lost to opposition parties in the confusing multi-party midterm elections of 1854. Breaking with their party to favor the position of their constituents did not result in reward.

Second and more important, some congressional action, when done, is very difficult or practically impossible to undo. The Senate was strongly in favor of the Kansas-Nebraska Act. Since the House failed to veto this proposal – and gave their support to the bill even though it lacked popular support among many of its constituencies – voters would be (and were) powerless to overturn it by the next election. Selecting opposition MCs in the House elections did not change the massive majority in favor of the enactment in the Senate. To be effective in ensuring the responsiveness of national policymaking to majority preferences the electoral connection cannot be totally retrospective. Simply put, it is easy (in a mechanical sense) for a popular majority to block a bill in the House, but it is more difficult for subsequent majorities to repeal a law. The House of Representatives as an institution is the only aspect of the constitutional edifice of the nation were majority rule is even likely (and it is not guaranteed even there). To win repeal of a bill enacted without a mandate (or even against a clear majority of the engaged public), subsequent majorities must not only win the House, but also the Senate and the presidency to overturn a contentious bill. Even though angry voters turned the Democrats out of the House, it was not until 1860 that unified opposition control was

[152] Two addition representatives gained reelection, but only by switching parties!

established, leaving a fateful 6-year gap between policy action out of step with national majorities and the ability to countermand their actions.

DEBATE AS EXPRESSIVE RATHER THAN DELIBERATIVE

The 33rd Congress was constituted in a dysfunctional manner. While a lack of representativeness and responsiveness imperiled policymaking, the legislature was afflicted by a compounding difficulty; its norms and rules inhibited "deliberative debate," while incentivizing "expressive speech."[153] The MCs of the mid-1850s did a lot of talking on the floor (most assuredly more than today's MCs), but by and large their discourses were not deliberative. Close examination of the *Congressional Globe* (the mid-nineteenth century precursor to the *Congressional Record*) shows that floor speech was largely expressive rather than deliberative. MCs spoke out regarding the concerns of their constituents and articulated their values in speeches on the floor of the Senate and the House, while engaging in very little give and take with each other over the merits of the policy under discussion. And even this large volume of expressive speech was of uneven quality.

Although the mythic image of the Congresses of the nineteenth century (and especially the Senate) is one of great statesmen addressing each other (and their

[153] While contemporary political science might label this latter term "position taking," I think this may not be the best terminology to describe this legislative behavior. I will describe expressive speech, differentiating it from deliberative debate, in the following paragraph.

arguments) on the floor (see Tocqueville 1840/2004),[154] one finds little evidence of such deliberation in the 33rd Congress. Confirming and expanding upon recent analysis of this era (see Wirls 2007), I find this low-quality deliberation to be evidence in both chambers, but with different root sources of the deliberative deficit.[155] The Senate's rules and norms encouraged long disquisitions on the governing philosophies and principles of the participants on the floor. These discussions, while sometimes sophisticated, occurred to the detriment of substantive exchanges or replies to the arguments of other senators. The House's rules, norms, and size similarly inhibited deliberative debate, by placing a premium on parliamentary procedures over responding to the substantive positions of argumentative adversaries. Combined with a more informal committee structure than Congresses of the twentieth century, this lack of deliberation on the floor meant that there was very little public deliberation occurring anywhere in the 33rd Congress. This lack of deliberation imperiled the policy products of that institution.

Clearly and precisely stated, expressive speech, a wholly necessary and valuable legislative behavior, crowded out deliberation in 1854, exactly when debate on the merits of policy was most needed. But more must be said about the distinction between these two sorts of speech. What makes some speech expressive rather than deliberative? "Expressive speech" consists of remarks given by MCs to justify their conduct to their

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[154] Tocqueville says, of the Senate, "Every word uttered in this assembly would do honor to Europe's greatest parliamentary debates" (1840/2004, 229).

[155] Wirls argues that deliberation in the Senate and the House occurs with relatively similar quality and quantity in what is reputed to be the "Golden Age" of the Senate. My analysis goes further, suggesting that for the 33rd Congress this similitude consists of a low quality and low quantity of deliberation in each Chamber.

district (or state) thereby showing that they share the same values as their constituents. High quality expressive address is thus valuable in Congress. It can guide civil society and can transmit important signals to voters. Expressive speech helps voters determine whether to retain the services of their representatives at re-election time, thereby increasing the meaningful responsibility of MCs to their constituents. Such utterances can also prove to be powerful cultural objects shaping worldviews for the party, section, or interest at stake in the speech. Expressive speech can also be characterized by its intended audience. Regardless of whom they are formally addressed to, such speech seems largely aimed at audiences outside Congress. Indeed, it seems especially likely that MCs of a minority party would be incentivized to make such speeches. Commonsensically, minority party MCs may aim to talk to citizens at large, rather than their colleagues, because of fears that they may not respond in good faith to their arguments. But all MCs use at least some of their time on the floor to make expressive speeches.

Deliberative speech, on the other hand, concerns a debate on the merits of public policy with one's fellow MCs. "Deliberative debate" is directed to materially improving the proposition under discussion. For legislatures, an important addendum is necessary to this formula. Deliberation in legislatures is "democratic deliberation," that which occurs in public, between equals. The publicity and transparency of democratic deliberation ensures that arguments are being made which the MC is willing to stand behind at election time. Equality is essential in democratic deliberation, as a simulation and

aspiration toward a fully rational debate where the best ideas triumph.[156] While this ideal is not as frequently attained in the hurly-burly of practical politics, the equality of speakers is an important norm which reinforces the idea that arguments ought to be investigated for their merit, not for the identity, power or prestige of their proponents (see Hamilton et al. 1787/1960, 30). Ideal deliberative debate in legislatures thus proceeds through MCs raising constitutional, distributive, normative, or pragmatic arguments for or against a given proposition.

In a healthy Congress, deliberation will proceed down these multiple avenues. In most controversial cases, constitutional deliberation will be required. The necessity of this kind of deliberation arises from the fact that laws passed by Congress must be justified as falling within the confines of the Constitution,[157] or risk the Court ruling them unconstitutional. Ideal deliberation also occurs across all important cleavages (sections, parties, and factions) within the Congress, otherwise the equality of all members of the debate would be undermined. Moreover, disproportionate voice given to certain MCs in deliberation will likely lead to policymaking incompletely representative of the needs of the entire nation.[158] MCs must likewise respond to arguments that a given law under

[156] In the ideal, even the mathematics of voting becomes linked to deliberative reasons. If each vote can be said to comprehensively speak as a reason, then the winning side in a roll call vote becomes, literally, the position with more reasons on its side than the other (see Waldron 1999).

[157] Even viewed as a positive instrument, the document still has limits.

[158] In the 33rd Congress, the informal bargaining and deliberation that occurred off the floor frequently contained skewed samples of MCs, very much like those presented in the section on unrepresentative committees. It is unsurprising that a "working group" of Senators Douglas and the F Street Mess (all southern slaveholders) failed to understand the political costs to eastern Democrats that would be posed by their bill, since they failed to include any eastern members in their informal meetings (Malavasic 2014).

consideration is unethical, impermissibly regulates morality, or other similar moral concerns. While "economism" is sometimes expressed in Congress,[159] failing to consider issues of normative or ethical valence is incredibly problematic. Congress must consider the justice of the bills it proposes, because law poses serious moral obligations – citizens must obey the law or face penalty. Finally, MCs proposing a bill must respond to critiques that the law is inexpedient or inefficient, because no matter how laudable the goal, an ineffective law is a bad one. Defining deliberation in this manner has important consequences, the foremost of which is that speech acts are potentially deliberative only when addressed to equals – and become "deliberation," in turn, if and only if those equals respond. Deliberation is thus a kind of a conversation, requiring, at minimum, the give and take of two equally-situated individuals.

Expressive speech and deliberative debate are not mutually exclusive. Instead each are differentiated by their qualities or affinities as different types of speech acts. The most famous debate in American history, the Lincoln-Douglas debates, certainly consisted of both expressive and deliberative components. Lincoln and Douglas famously addressed each other in their equality as candidates for the Senate,[160] traded arguments regarding the wisdom, constitutionality, and morality of popular sovereignty, and

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[159] Even in the First Congress, some MCs sought to evade moral questions. Rep. Ames (MA) said that MCs ought, "not to consider ourselves while here [in Congress] at church or school, to listen to the harangues of speculative piety; we are to talk to the political interest committed to our charge" (Bickford et al 1992, 377). While it is true that Congress is not a church, a school, or an Oxford Union debate, in a health legislature MCs would talk of more than the mere political interests committed to their charge.

[160] In 1858, Lincoln and Douglas were in fact not equals, as Douglas was a sitting senator and the leading candidate for President at the next election. But their debates were staged *as if they were equals*, where each speaker received the same amount of time, and Douglas received no special rights based on his status as Senator.

provided substantive and sophisticated declarations on behalf of important values they expected their constituents to share. It is not always possible, however, to combine expressive speech with deliberative debate, as certain expressive appeals effectively militate against true deliberation over arguments, rather than mutual recrimination. If one alleges that one's opponents are criminals, agitators, or disloyal enemies of the common good, one's opponents are unlikely to respond in good faith to those arguments.[161] While deliberation will likely contain expressive components (for instance a declaration by an MC that their constitutional claim is not only sound, but also just and valued by his constituents), it is easy to see that expressive speech will often have no deliberative component at all.

Another consequence of conceptualizing deliberation as involving a conversation is that speech delivered in a manner conducive to deliberation may instead remain merely expressive if the equal to whom one addresses one's argument does not respond to it. Expressive speech can be done by any individual in a society, and indeed it need not occur in Congress at all. Deliberative debate, on the other hand, requires multiple participants. *The democratic version of deliberation is in fact best housed in Congress, out of all possible venues in political or civil society.* In our national lawmaking institution equality is enforced (to the maximum extent possible) through an equality of voting power. Unlike in the society at large, equality is rather strictly enforced.

[161] Potter argues that the opponents of the Kansas-Nebraska Act were especially likely to make such claims, "attacking the defenders of slavery not on the merits or demerits of their position, but on the grounds that they were vicious, dishonest, and evil" (1976, 163 – 164).

Representatives of rich district and poor districts, as well as senators of large and small states, possess equal voting power in their respective houses. This equality is sometimes even enhanced further, as it is in the modern Senate, with requirements for unanimous consent to proceed.

The upshot of this abstract distinction bears on institutional design: A healthy congress will structure rules, enforce norms, and provide rules that maximize the opportunity for democratic deliberation in Congress. In some sense, Congress need not concern itself with expressive speech. The modern political science literature on "position-taking" well articulates the existence of incentives guaranteeing the existence of this type of speech (see Mayhew 1987, 23). Deliberation, on the other hand, requires MCs to respond to rivals in Congress whom they may find distasteful or even repugnant, and to respond substantively to their arguments. This difference necessitates the construction of structures or norms to incentivize deliberative speech, while discouraging (or at least not overtly encouraging) speech addressed exclusively to outside actors.

Unfortunately, the 33rd Congress saw most opportunities for deliberative debate lost through a structuring of debate around rules, norms and practices that *discouraged* exchange of ideas. While it is true that some speeches debating the Kansas and Nebraska Act were of a generally high-toned quality (and perhaps more sophisticated than contemporary legislative address), these disquisitions were largely delivered and received

as expressive speeches.[162] Deliberation occurred with relative infrequency and with considerable pathologies, leading to antagonistic and ad hominem attacks on rival MCs. When MCs did engage in deliberation with each other, they frequently began deliberating over a value, or more frequently their interlocutor's betrayal of a value, sidestepping debate on the merits of the concrete proposal under investigation.

The structure of the debate in the Senate nearly guaranteed a disproportionate amount of pure self-expression from senators. From January 30 to March 3, 1854, the debate on the Senate floor was structured by giving each senator unlimited time to debate the Kansas-Nebraska Act. The functional result of this structure was not, however, unconstrained and free-wheeling debate. Instead, unlimited speaking time paired with a limited number of hours on the floor per day devoted to the bill resulted in a de facto limit on speaking time. Senators were limited to speaking for around three hours, because most speeches were interrupted by the end of the legislative day. Indeed, the time of day became an issue since the Senate continued working on other issues throughout the time it was debating the Kansas and Nebraska Act. The Senate would turn to the Kansas-Nebraska Act only at the end of a relatively long day of floor activity. Giving each senator unlimited time to "debate" thus ensured, in many cases, that one multi-hour speech was delivered by a senator on the floor, with little or no response from opponents.

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[162] The expressive remarks are indeed impressive rhetorically. Sen. Douglas, for instance, provided a formal statement of the Democratic Party platform as it was slated to apply to the Kansas-Nebraska Act. "That principle to which the Democracy are pledged, not merely by the Baltimore platform, but by a higher and a more solemn obligation, to which they are pledged by the love and affection which they have for that great fundamental principle of Democracy and free institutions which lies at the basis of our creed, and gives every political community the right to govern itself in obedience to the Constitution of the country" (*Congressional Globe* 1854, 280).

Systematically combing *The Congressional Globe* (and its *Appendix*), it is evident that expressive rather than deliberative speech dominated the debates over the Kansas-Nebraska Act (see Table 4-7).

Table 4-7: Senate Deliberations on Kansas-Nebraska Act, January 30 – March 3, 1854

Summary Statistic	***No. of Speakers***	***No. of Speeches***	***Substantive Interactions***
Median	5	1	0
Mode	5	3	0
Average	7.1	2.6	2
Average for Jan 30 – Mar 1	6	1.3	0.6
Average for Mar 2 – March 3	15	15	15
Total	N/A[163]	55	41

Source: *Cong. Globe,* 33rd Cong., 1st Sess. 275-532. (1854). Data collection scheme given in text.

Given the definition promulgated above, institutional health on the dimension of deliberation ought to be evaluated both quantitatively and qualitatively. One can certainly count the number of speakers who discoursed on the Kansas-Nebraska Act, the number

[163] A sum of all speakers would lead to significant double-counting. It appears that all senators who wished to speak on the bill could do so. This was likely the only area in which the Senate achieved ideal democratic deliberation.

of speeches (whether prepared or impromptu) given, and the number of substantive interactions between MCs on each day of debate. A speech is defined as a set of remarks of any quality that treats the Kansas Nebraska Act while taking up at least one column in the *Globe*. Each column of the *Globe* has around 80 – 85 lines with 7 or eight words a line, for around 600 words. Such a length likely corresponded to a speaking time of five to seven minutes. A substantive interaction is defined as a response from one MC to another refuting or supporting an argument given by another speaker. Personal attacks ("that MC is lying or is defaming me," etc.) are not counted as substantive interactions, as deliberation is focused on arguments not persons. Systematic analysis also allows a binary categorization of each day: were opposing views on the merits of the Kansas-Nebraska Act exchanged on that day of deliberation or not?

The results of quantitative investigation are not auspicious for the quality debate in the "world's greatest deliberative body." In the Senate, only one third of the days devoted to debate (7 out of 21) saw an exchange of views on the merits of the Kansas-Nebraska Act. The most typical pattern, by far, was the Senate moving to set aside their current work and hear debate on the question of the territories bill, having the president of the Senate recognize a speaker for (or against) the bill, and then the presentation of a long discourse on the bill. At the end of this discourse several senators would move for the Senate to adjourn, and this motion would generally be successful. One interesting feature of the debate is that for the first 19 days of "deliberation" there was very little democratic deliberation. Sustained, substantive deliberation only occurred on the last two days of debate.

Given the sparseness of deliberation, as compared to mere speech, it is unsurprising that that short burst of deliberation did not fully (or even partially) address the substantive difficulties found in the bill. Qualitative analysis of the legislative floor speeches of the last two days reveals that pathologies of deliberation continued, even as the Senate floor could finally be characterized as a site of debate. Turning to qualitative investigation of only two-day span is useful because it aids in economy of presentation. If even the most intense days of debate included many exchanges on subjects other than the merits of the policy, surely the other days were likely to include the same or lower quality deliberation.

The *Congressional Globe* (and its *Appendix*) shows clear evidence of deliberative debate during the last two days, but it was not sustained. This scattershot, and often low-quality debate, mostly exhibited a style of discourse emphasizing honor, scoring quibbling points, and debating high rhetorical subjects, rather than matters of potential constitutionality, efficacy, or the merit of the bill under consideration. Indeed, one common way that deliberative exchanges were sidetracked was through the overdeveloped sense of self-respect that seemed to compel speakers to exercise a kind of "right of reply" when words had been spoken that they felt unduly insulted their honor. Amid what was becoming a very substantive discussion regarding the legal consequences of the repeal of the Missouri Compromise,[164] a southern senator took great umbrage to

[164] The specific matter under discussion was whether repealing the Missouri Compromise would immediately put French laws in favor of slavery back into force in the territory (*Congressional Globe Appendix* 1854, 290 – 291).

"threats" made against slaveholding interests. Sen. Butler (SC) expressed outrage at claims that northerners may stop enforcing the fugitive slave clause because of the repeal of the Missouri Compromise, stating that his blood boiled at the attempts made to humiliate the south (*Congressional Globe Appendix* 1854, 292). The angry set of denunciations expressed by Sen. Butler, led his interlocutor, Sen. Walker of Wisconsin, to request an apology, which he did not receive. Shortly thereafter, the two senators commenced arguing about whether one had impugned the honor of the other, drawing the discussion far away from the bill at hand. This digression took up five full columns of the Globe, likely taking nearly half an hour (292-293).

Personal replies were not the only aspects of debate that led senators away from a high-quality investigation of the merits of the bill. As noted above, constitutional deliberation is one type of necessary discourse for MCs debating controversial bills. During a constitutional debate over the power of Congress to regulate slavery in the territories, a key topic, senators revealed a preference for needling and quibbling with one another rather than responding in good faith to the claims made by interlocutors. While one certainly would not expect senators to renounce a chance to win a debate, their interactions evinced a lack of argumentative good faith. The main speaker on this question on the final of debate was Sen. Fessenden, who argued that Congress clearly possessed the power to regulate (and prohibit) slavery in the territory. He referenced the clause in the Constitution which stated that "the Congress shall have power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States" (Art. I, Sec. 3). Speaking about this clause Sen.

Fessenden spoke of the power to regulate the territories, and two senators interrupted him at three different occasions to insist that the Constitution only speaks of territory, not territories. On the other hand, they did not answer Sen. Fessenden at all when he asked them, "What does the expressions mean 'to make all needful rules and regulations?'" (*Congressional Globe Appendix* 1854, 322). By quibbling over plural versus singular nouns, not explaining the significance of why this should matter, and refusing to respond to clearly expressed questions in debate, Sen. Fessenden's interlocutors showed an interest in poking fun of a speaker for allegedly making mistakes, rather than substantively persuading him to their view of the Constitution.

Finally, many of the debates of the last two days failed to turn on questions regarding the merits of the bill at all, instead turning primarily on the meaning of the Declaration of Independence and the proper historical interpretation of past events. These debates were matters of interest, but given the importance in determining whether the Kansas-Nebraska Act would function to successfully organize the territory and resolve standing sectional grievances, this retrospective rather than prospective focus was somewhat questionable. On the final day of debate, senators took time to debate the history of the territories of the United States, in general terms seemingly disconnected from the question of what to do about Kansas or Nebraska (*Congressional Globe Appendix* 1854, 315).

More perplexing (but simultaneously illuminating) was the debate on this same day regarding the literal truth of the Declaration of Independence. Sen. Wade (OH) was discoursing on individual rights and the incompatibility of slavery with individual rights

when he was interrupted by two other senators. Sen. Butler (SC) quizzed him over whether the terms of the Declaration meant that "a negro [was] equal to a white man" in Ohio (311). This inquiry was put to embarrass the Senator from Ohio, as the record confirms that laughter broke out in the chamber at the putting of that question.

The Senator from South Carolina was not the only person interrupting the Senator from Ohio. He was stopped by another interlocutor, who wished to debate the meaning and significance of the Declaration. Sen. Pettit, rose to argue with Sen. Wade, saying that he took issue with the claim that "all men are created equal… with certain inalienable rights." Instead, Petit suggested that all rights are alienable, and that there was no human or governmental duty to protect equality under the law or otherwise (311).[165] Even as matters of substantive debate, these points of inquiry were not designed to enlighten. Sen. Pettit, said that "would have no quarrel with anyone on the subject, if the language had been that all men ought to have been born equal," but then proceeded to quarrel with Sen. Wade when he said he could accept that construction of the Declaration. Sen. Petit, explaining his continued contrariety said, "I mean to say what I think" (311).

The informal norms of the Senate gave rise to such debate, that which lacked a substantive relationship to the Kansas-Nebraska Act, not necessarily because they led to a lack of comity or civility, but instead because of an explicitly stated contention that the purpose of debate was expression. Indeed, Senate leaders made clear that the purpose of

[165] Pettit said, instead, that he must leave the task of making men equal "to the Almighty. I cannot do that" (311). This comment was only following up on a previous speech where he said, without contradiction by other senators, that he held the Declaration, "to be a self-evident lie" (214).

the debate was primarily expressive, when they affirmatively expressed the view that the point of debate was to let "enemies of the bill" air grievances before final passage of the bill. While allowing opponents to express themselves is superior to the complete closing of debate (or a gag rule), norms such as these foreclosed the possibility, in advance, that the opponents of the bill might have good arguments against the bill's constitutionality, efficacy or morality. Senator Douglas (IL), who was unquestionably the Kansas-Nebraska Act's manager, spoke explicitly to this norm during his "opening statement," explaining how he would run debate:

> I am in favor of giving every enemy of the bill the most ample time. *Let us hear them all patiently, and then take the vote and pass the bill*. We who are in favor of it know that the principle on which it is based is right. Why then should we gratify the Abolition party in their effort to get up another political tornado of fanaticism, and put the country again in peril, merely for the purpose of electing a few agitators to the Congress of the United States (*Congressional Globe* 1854, 280, emphasis added).

The Senator of Illinois's words spoke volumes about the attitude expressed toward debate in the 33rd Congress. The bill would be the subject of no deliberative debate at all. Instead the proponents of the bill would patiently suffer the "Abolition party" and then go on to pass a bill which they know unquestionably is right. The structuring of debate, whereby most speech was not even responded to, shows clear evidence of conforming to this stated norm. And while one can understand the conviction of senators who already had strong value commitments and were unlikely to be swayed by arguments that those

principles were wrong or immoral, it seems quite culpable to foreclose in advance the possibility that a bill would, on its own principles, prove to be disastrous and wrong-headed.

The low quality and quantity of deliberation in the Senate could not be rectified in the House. Given its size at well over two hundred members, House rules prioritized limiting the length of speeches to ensure the ability for more speakers to speak. Also, debates in the House (true to its twentieth and twenty-first century image), featured parliamentary wrangling over rules, rather than substantive debate. Other than ensuring that speakers where given an opportunity, no attempt was made to order the one-hour speeches into deliberative debate. It was not uncommon in the House debate to hear the same side of a speech redoubled or even tripled. On April 26, 3 speeches in a row were given against the Kansas-Nebraska Act with virtually no feedback from other MCs (*Congressional Globe* 1854, 1002 – 1003). Many members in the House spoke, but their debates raged regarding the rules of debate and policing speakers' time.

One prominent example of this phenomena was the address given by Missouri Representative Thomas Hart Benton. Presenting a rich and layered speech on the constitutional status of the Kansas-Nebraska Act, he suggested that there was something unmanly about that enactment's abdication of congressional responsibilities. Rep. Benton brought to light many of the substantive constitutional arguments that are addressed in the final section of this chapter. Yet, Benton's colleagues not benefit from this speech, at least not in their deliberative capacities. Rep. Benton, channeling his memory of his days in the Senate, prepared a speech that was longer than could be given in the allotted time.

Once he reached the end of his time, the next speaker, Rep. Wentworth (IL) sought to yield some of his time to the Rep. Benton so that he might finish. Benton's transgression and Wentworth's action produced a scene of disorder as many of the bill's allies rose to object to allowing Benton to break House rules (They also were certainly not eager to grant Benton more time to expound his cogent arguments against the bill). The speaker on Benton's side in debate was able, after some searching, to find a parliamentary rule in his favor; one which dictated that a new speakers list was created when an amendment to an amendment was made. He thus created a meaningless amendment to the bill to create the opportunity for Benton to talk. The opponents of Benton strenuously objected to this artifice, but Wentworth was persistent and was upheld by the chair (*Congressional Globe* 1854, 988-9). Rep. Benton thus took the floor again and finished his address. But the debate over the yielding of additional time to the Representative had proceeded across more than six columns of the globe, no doubt taking more than thirty minutes. After Benton finished speaking, the House adjourned. With adjournment, and no one picking up where Benton left off on the succeeding day, what might have been the first address in a fine deliberative exchange was converted to mere expressive speech. The history books received Rep. Benton's perspicacious speech, but it was not the subject of debate in the House.

In sum, the rules and norms on the floor of Congress (in both chambers) restricted the possibility of deliberative exchange and inhibited the revelation of important problems of constitutionality and efficacy in the bill. As Rep. Benton's speech showed, these flaws did not require the hindsight of history to discover. The rules, structures, and

norms seemed to be set up to maximize the chance of each member of Congress to have their say, rather than to the maximize the deliberative capacities of the body. While this is initially understandable from a standpoint of an MC who is literal single-minded seeker of reelection (see Mayhew 1987), it was ultimately hurtful even when viewed in terms of the narrow self-interest of MCs. Members were denied access to information that would properly apprise them of the quality of the bill they were debating, and the likelihood that passing said bill would make their own reelection a truly perilous prospect. The reelection chances of Senator Pettit (as well many of his fellow Democrats) were not well served by the passage of this bill, no matter how open the floor was to self-expression, as his (and their) incumbency came to a sudden end with the election of 1854.

CONCLUSION: AN ABDICATION OF CONSTITUTIONAL RESPONSIBILITIES

In the 33rd Congress the rules and norms governing debate, unrepresentative organizational structures and partisan behavioral norms all placed the legislature in a dangerous position: one which maximized the chance of experiencing the substantive failure. This hazardous condition was not noted, however, by proponents of the Kansas-Nebraska Act. They contended that it was in fact the institution of Congress that caused or exacerbated political conflict over the problem of slavery. The strategy suggested by this premise was the doctrine of congressional noninterference in the territories (also known as popular sovereignty). By permanently removing the topic of slavery from the halls of Congress, thereby delegating it to the inhabitants of the territories (and future states), the hope was that sectional strife could be avoided. While the principle of non-

interference was a pleasing one from the perspective of reelection-seeking politicians,[166] Congress failed when it passed a law formed on a flawed and unconstitutional prospective principle, by focusing its efforts on a clear attempt to avoid responsibility for decision-making, and pursuing a policy which, viewed even on its own terms, was self-defeating. Ultimately, the Kansas-Nebraska Act was inimical to the spirit and the letter of the existing U.S. Constitution, was thus founded on an act of abdication, and it even failed to be effectual as it was predictably unsuccessful in removing such agitation from the congressional agenda.

The Constitution of the United States, by both its letter and spirit, was inconsistent with the doctrine of congressional noninterference. By passing the Kansas-Nebraska Act, proponents of the bill said that they sought to show neutrality, holding that this doctrine did "not mean to put slavery in or out of any State or Territory" (*Congressional Globe Appendix* 1854, 559 – 560). The bill's detractors were unmoved. "To that polite abnegation," Rep. Benton replied that, "it is an abdication of constitutional power and duty; it being the right of Congress to legislate upon slavery in the territories, and its duty to do so when there is occasion for it—as in 1787 and 1820" (559 – 560).[167] The Constitution explicitly gave Congress plenary control over the territories of the United States, when it declared that "the Congress shall have power to dispose of and

[166] One campaign-oriented benefit of the principle was that it placed their opponents in the position of defending Congress and congressional interference, a prospect never greatly desired by an MC.

[167] Rep. Benton elaborated this view as follows: "The States in Congress are the guardians of the Territories, and are bound to exercise guardianship; and cannot abdicate it without a breach of trust and dereliction of duty. Territorial sovereignty is a monstrosity, born of timidity and ambition…" (559).

make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States" (Art. I, Sec. 3). Furthermore, the theory of the "extended republic" (Hamilton et al. 1787/1960, 76 and 322) on which the Constitution was founded, suggested the straightforward results of trying to delegate this power to the inhabitants of the territories. Simply put, localities and smaller political bodies are more likely to resolve conflict in a factious manner than the entire polity, because of the smaller number of interests comprehended within their limited "sphere." The 33rd Congress disregarded this principle, provoking political and armed conflict in Kansas.

Such a constitutional abdication also had important secondary characteristics, especially an abdication of constitutional responsibilities promoted by the President and party operatives, leading to attacks on the institution of Congress. An operative principle of our constitutional order is the presumption that political actors will zealously guard their power against diminishment by actors outside their institution (cf. Hamilton et al. 1787/1960, 319). This assumption is especially important role in Congress, as that institution will face numerous critics in society, as its laws and partisan operation will inevitably grate against some large portion of the citizenry. If the majority of MCs join others in Congress-bashing, this can lead to a decay in the institution's capabilities. When Congress delegates its power to others, no similarly situated institution is left in the society to defend its place. Rep. Benton warned that, "This House will have fallen far below its constitutional mission, if it suffers itself to be governed by authority [The President], or dragooned by its own hirelings [party papers and operatives]" (*Congressional Globe Appendix* 1854, 557). Benton argued that the role of an MC was

instead to "vindicate [Congress's] privileges, protect its respectability, and maintain it in the high place for which it was intended—the master branch of American government" (557).[168] The Congress did not follow Benton's request; to recall, it failed to even discuss it. Rather it delegated national policy setting powers to the territorial inhabitants of Kansas and Nebraska.

The final problem for the advocates of congressional noninterference was the self-defeating nature of that proposition. Since Congress would ultimately accept state constitutions or reject them, the problem of slavery would arise again, in all controversial cases, as soon as the question of statehood arose. In only a few short years, proslavery forces in Lecompton, Kansas would support and send a state constitution to the Congress for approval, requiring Congress to act affirmatively to accept or reject a new slave state into the union (Stampp 1990, 290). Hindsight was not required to note this problem. Rep. Benton pointed out that the, "principle of non-intervention is but the principle of contention—a bone given to the people to quarrel and fight over every election, and at every meeting of their Legislature, until they become a State government. Then, and then only, can they settle the question" (560).

The ability to reject the principle as untenable on its own merits is important. MCs from the south, and important leaders from the west such as Senators Douglas and

[168] Rep. Benton also objected to the manner in which the Missouri Compromise was repealed, through the declaration that it was to be henceforth "inoperative and void," rather than straight-forwardly saying it was repealed. While this terminology was written to appeal to MCs who held that the original Compromise was unconstitutional and those who viewed it as superseded by the Compromise of 1850, it was certainly indirect. Benton objected, "to this shilly-shally, willy-won'ty, don'ty-can'ty style of legislation. It is not legislative. It is not parliamentary. It is not manly. It is not womanly. No woman would talk that way… It is one thing or the other with them; and what they say they stick to" (560).

Cass, were confident that the reading of the Constitution described above is wrong. Their reasoning suggested that such a reading unjustly removed the power of local self-governance from territorial inhabitants. But it would and should have been possible to persuade MCs to see that congressional non-interference could not be successfully upheld, at least not within the frame of the Kansas-Nebraska Act. The Constitutional abdication of the majority of the 33rd Congress (and thus the Congress as an institution) set the precedent for further abdication in deferring to the President in matters related to the territories later in the decade, and in the doleful attempt to have the Supreme Court resolve the problem (Stampp 1990, 87).[169] While maximally representative committees, significantly more robust deliberation, and responsiveness to citizen preferences would not have guaranteed successful resolution of this issue, it would have at least given a chance for ideas such as those of Benton (a Missourian, who was no radical abolitionist) to positively improve the bill. Alas, no substantive response to Benton's speech in the House was made. Instead a debate raged over whether he ought to be allowed to talk for 75 rather than 60 minutes. This substitution of procedural wrangling for substantive debate starkly illuminates the Congress's failure to deliberate.

In labeling the 33rd Congress a failure it is important to remember that its chief product, the Kansas-Nebraska Act was worse than futile, as it "accomplished nothing that

[169] The attempt to get the Supreme Court to settle the problem of slavery was surely foredoomed to failure based on the even more unrepresentative nature of the Court relative to the views of political society at large (i.e. it was even more pro-slavery than the already skewed Senate). The Supreme Court in the *Dred Scott* case consisted of "five proslavery southern Democrats, two northern Democrats, one northern Whig, and one northern Republican" (Stampp 1990, 86).

anyone intended and a great deal that no one intended" (Potter 1976, 173, 176). While the bill was ostensibly intended to provide for sectional peace, sectional tensions were inflamed by its debate and passage. One chief aim of its proponents was to swiftly generate the groundwork for a transcontinental railroad, but none could be built until sectional animosity abated. And most importantly, while the bill was designed to remove the topic of slavery from the halls of Congress, slavery and then civil rights for the freedmen dominated the agenda of Congress for the next twenty years. With respect to the last goal, contemporary observers and participants were incredulous. Rep. Benton stated that, "we are told [that the aim of the bill] it is to keep the question of slavery out of Congress! To keep slavery out of Congress! Great God! It was out of Congress! … The question was settled, and done with. There was not an inch square of territory in the Union on which it could be raised without a breach of compromise." (*Congressional Globe Appendix* 1854, 560). While abolitionists would certainly not agree with the idea that the issue of slavery was settled, his narrow claim with respect to the legal status of the territories seems simply correct.

The mere fact that ruling factions within Congress even aimed to promote such ends through such questionable means reflected a disordered approach to lawmaking. Citizen response to the proposal immediately showed that sectional peace could not be achieved by the Kansas-Nebraska Act; its second aim, if meant to be achieved by the bill, was certainly not present within the text of the enactment, and therefore did not come to pass. Unchastened, proponents sought to "keep slavery out of Congress," an end certainly ill-considered with respect to promoting the general welfare. The Congress, as venue of

democratic deliberation, is designed to pose, debate and resolve the conflicts roiling our society. The intentional choice to delegate national policymaking power to local institutions and communities not yet even formed had the regrettable but predictable effect of encouraging strife and bloodshed in Kansas. A healthy national legislature would have been much less likely to establish such a policy. A healthy Congress would have been responsive to the outcry of citizens opposed to such an eventuality, open to deliberation over the very questionable merits of "congressional noninterference," and well-structured to develop representative accounts of the potential political fallout of such a policy. In fairness, even a healthy Congress likely would have struggled to conquer the scourge of slavery; but the 33rd Congress was nothing of the sort.

Chapter Five: The New Deal (73rd) Congress of the First Hundred Days

At the opening of the 73rd Congress, meeting in March 1933, conditions prevailing in the nation were grim. Virtually every bank in the nation was closed. Deflation in the price of agricultural and industrial products was combined with decreasing wages, hurting producer and consumer alike.[170] "Government of all kinds … faced … serious curtailment of income; the means of exchange [were] frozen in the currents of trade; the withered leaves of industrial enterprise [lay] on every side; farmers [could] find no markets for their produce; the savings of many years in thousands of families [were wiped out]" (Roosevelt 1933, 5). Further and more importantly, "a host of unemployed citizens [were faced] with the grim problem of existence, and an equally great number [toiled] with little return. Only a foolish optimist [could] deny the dark realities of [that] moment" (5). In a comprehensive sense, the Great Depression saw the worst conditions prevailing in the United States since the years of the Civil War.

No mere stress test of the American polity alone, the Depression placed a tremendous strain on nations across the globe. With the fall of the Weimar Republic in 1933 marking an unabating world-wide economic and political crisis, social commentators suggested that liberal democracy was itself to blame. Liberal democracies, it was said, "were too pusillanimous to challenge … dictatorships, too effete to mobilize their citizens, and too enthralled with free markets to manage a modern economy [and its

[170] Statistical measures of economic health were poor, both in the United States and across the industrialized world. In the United States GDP had declined by nearly 26 percent from 1929 levels, while aggregate stock market prices had declined around 70 percent. Deflation in wholesale prices, based on a weighted average of 17 industrialized nations, led to price level of 71.7 (with 100 pegged at prices in 1929) (Crafts and Fearon 2013, 1-2).

business cycles] successfully" (Katznelson 2013, 7). No less figure than Il Duce, Italian Dictator Benito Mussolini (1935, 10), claimed that constitutional democracy was being "deserted by the people who feel [it is leading] the world to ruin." President Roosevelt (1933, 6) gave yet more credence to the notion of world-wide crisis in his inaugural address when he labeled the United States: "a stricken Nation in the midst of a stricken world".

While Franklin Delano Roosevelt and the executive branch exerted tremendous effort in responding to this challenge, "The legislature remained an effective center of political life" (Katznelson 2013, 20). In the chapter that follows, I show that that legislative norms, rules and procedures helped Congress of the Hundred Days to promote the general welfare, even in the gravest crisis to face modernity.[171] Though contemporary works such as *Relic* and *The Executive Unbound* contend that the Congress is too parochial, slow, or partisan to respond to the emergencies that typify modernity, the New Deal Congress stands out as a glaring refutation of this thesis. In the 73rd Congress, MCs responded to an energetic and expressed popular consensus in favor of emergency measures to combat the Great Depression. Further, the Senate operated as designed, closely examining and proposing amendments to the plan of action adopted by the House at the urging of the President. At critical moments the Congress even moved beyond (or against) what was requested by the President. The New Deal Congress was generally

[171] My argument buttresses Katznelson's contention that one of the New Deals achievements was "the demonstration that liberal democracy, a political system with a legislature at is heart, could effectively govern in the face of great danger" (2013, 6).

successful in framing policy that was representative of the increasingly disparate interests of labor, industry, finance, and farmers. Even so, its full representativeness was compromised by a continuing failure to minister to the welfare of black Americans and an over-reliance on the views of individual expert legislators.

Canvasing the success of the 73rd Congress in structuring a responsive and deliberative, and (somewhat) representative lawmaking process is the task of this chapter. Before doing so, I defend the selection of the Congress of 1933 for analysis in the context of the overall purpose of this study: developing an account of congressional health relevant across the course of American political development. After this preamble, I show that MCs and congressional leaders, especially of the majority party in the House, greatly streamlined ordinary legislative procedures to *respond* to exigent crisis, marking an important use of Congress's constitutional authorization to set its own rules. Continuing to investigate attributes of the lawmaking process, I demonstrate that streamlining occurred only to a point; the Senate nevertheless continued to uphold the norm that the Congress be *deliberative*. In its deliberations over the measures needed to prevent a reoccurrence of the Great Depression, for instance, MCs settled on deposit insurance as a critical measure to ensure that a bank-run would never again threaten the nation's economy (Chamberlain 1946). Congressional experts on banking, Sen. Glass (D-VA) and Rep. Steagall (D-AL), pushed this enactment through in the absence of presidential support, illustrating the importance (as well as the limitations of) individual legislative leadership in Congress. Finally, the 73rd Congress's attempts to structure a representative lawmaking process are surveyed, leading to a mixed evaluation of Congress as striving

to, but incompletely meeting its responsibility to broadly bring to bear the views and interests of important sectors of American society. Congress sought to bring diverse economic interests into the fold when deliberating over pivotal bills such as NIRA, while measures such as a federal anti-lynching bill continued to fall short of even being considered on the floor of either Chamber. In spite of its general obligation to enforce and uphold the 14th Amendment, the Congress remained unmoved, solidly overrepresenting Southern minority interests (Katznelson 2013, 166).

CASE STUDY C – THE TEST OF MODERNITY AMIDST CRISIS

Understanding the institution of Congress (and developing standards that are applicable to Congress over its entire history) requires one to move beyond the eighteenth and nineteenth centuries. Publius claimed the United States Constitution was designed not only for the needs of 1787, but also to meet the challenges of remote futurity. It is incumbent upon the analyst to take this possibility seriously but not credulously. Considering the Constitution and its fundamental institutions, like Congress, in this light requires testing it against some degree of empirical reality.[172] Congress must then be examined in an epoch when it faces an agenda far different from that of the 1790s. Prima facie, it seems logical to assume that modern conditions, technology, and the expanded agenda caused by industrialization, urbanization, and globalization may affect the quality of congressional health or functionality. Intuition suggests that the potential effects of

[172] One must also remain open to the hypothesis that the Constitution was not successful in meeting responding to the needs of remote futurity. That task, after all, is a difficult one.

modernity might be negative, whether a growing agenda overwhelming the parallel processing capabilities of the institution, or technology reducing the distance between constituent and MC to detriment of deliberation, or any number of other hypothesized effects.

These intuitions drive one to seek cases in the twentieth century; if instances of congressional functionality exist in modernity, such cases could aid in the development of standards of congressional health tremendously. Given the complexity of the agenda and the likely increased difficulty of the task, any example of health is more probative: those Congresses are clearly robust in a way that is indicative of institutional health. Further, when casting about for such cases, one might test conception of congressional health advanced in this work by "loading the dice" yet further against congressional success. One can do so by looking at one of the crises or emergencies which seem increasingly typical in modernity. If the Congress is able, by exhibiting the characteristics of congressional health highlighted here, to serve as the key actor in meeting the emergency, so much more should we expect a healthy Congress to be able to handle the more ordinary conditions of contemporary political life.

For these reasons an examination of the Congress of the Hundred Days (of 1933) seems especially useful for illustrating and evaluating Congress under the conditions of modernity. Especially due to its common reputation, even among scholars (see Rossiter 1960, Schlesinger 1958), as a rubberstamp Congress which added little to emergency measures proposed by President Roosevelt, closely studying this institution holds great promise. If all that Congress added to FDR's plan of action were delay, disruption, or

incoherent compromises, then it might well be the case that the standards arising from the Constitution would be relevant only to an earlier and simpler age. While such phrasing appears strident, one ought to keep in mind that it was not an unreasonable to fear the obsolescence of the Constitution and the Congress which it structures. President Roosevelt himself worried about his fellows in Congress. In his inaugural address he remarked that he would take action on his own if Congress failed to act promptly (Katznelson 2013, 121). Such a promise (or threat) takes very seriously the possibility of congressional failure.

In our time, considering the possibility of inherent congressional inefficacy is yet more significant. Indeed, several contemporary works (Howell and Moe 2016, Posner and Vermeule 2010, Mayer and Canon 1999) present the thesis that the modern Congress is constitutionally incapable of promoting a national, general interest.[173] The reputed causes for congressional failure in the present are legion, including its lack of dispatch, its parochial nature, its decentralized and reputedly irresponsible internal processes, or factional wrangling. These concerns must be factored in to any conception of congressional health that attempts to evaluate contemporary Congresses, rather than just judge those from the eighteenth and nineteenth centuries.

Consider one argument in particular: In their book *Relic,* William Howell and Terry Moe argue that Congress is simply not capable of delivering the coherent and

[173] The general scope of each argument is different, although the conclusion is the same. Howell and Moe argue that the Constitution was always ill-structured to produce good public policy, while Posner and Vermeule imply that this is a problem primarily emerging in modernity. Mayer and Canon present an account, based on a rational choice model, that the incentives operating on Congress make it permanently dysfunctional.

responsible policy necessary to meet the challenges of modernity. Summarizing their view, the authors say that:

> The founders crafted a government some 225 years ago for a simple agrarian society of four million people. Government wasn't expected to do much, and they purposely designed a byzantine government that couldn't do much. Compounding matters, they put Congress right at the center of the lawmaking process, and their design ensured that legislators would be tied to their states and districts and responsive to special interests. Congress is not wired to solve national problems in the national interest. It is wired to allow parochial legislators to promote their own political welfare through special-interest politics. As a problem solver, Congress is inexcusably bad (Howell and Moe 2017, e85).

While the idea that the Constitution founds an intentionally inefficient Congress was strongly rebutted in earlier chapters in this work, Moe and Howell make an empirical and historical argument as well as a theoretical argument. Their empirical claims cannot be empirically refuted by constitutional theory or the existence of a healthy First Congress. Efficacious problem-solving in an "agrarian society" will not fully counter Howell and Moe. Pushing back against their view requires showing that Congress can forge effective policy under the conditions of modernity that Moe and Howell highlight. Simply put, the case under investigation in this chapter is exceedingly useful in *examining and refuting* these claims. Close study of the 73rd Congress shows that Congress is capable of responsive, nimble action in the face of crisis, and is capable of delivering well-crafted

policy, advancing the national interest (i.e. promoting the general welfare) in advance of the alternatives provided by "executive leadership."

Considering the overlapping crises characterizing the contemporary political scene in the United States (mass migration, terrorism, nuclear proliferation, climate change, exploding deficits, horrific mass violence and shootings), examining the New Deal Congress is useful beyond the task of scholarly refutation. The subject of this case study is important in its own right. In modern conditions of increased government mandate, state capacity, and complexity, the 73rd Congress found the capacity to deal with a problem bedeviling not only the US, but the broader world. In the gravest crisis since 1861–5, the Congress strove to make liberal democracy consistent with the changes in domestic and international political economy that occurred in the late nineteenth and twentieth centuries.

Thus, beyond responding to *Relic*, this case study demonstrates several attractive (and a couple unattractive) features of congressional life in the twentieth century, further illustrating the attributes of congressional health. Such a modern case also has potential use for aiding in the reconstruction of a healthy Congress in the present. One of the most important considerations is that the institutional norms, rules and structures adopted by the New Deal Congress to tackle crisis of the Great Depression were all within the grasp of ordinary politics. Since the Constitution need not be changed to generate these efficacious practices, contemporary readers (or even partisans or activists) can especially take heart in the fact that the Constitution is more or less as President Roosevelt (1933, 6) said in his inaugural address. The impending crisis could be faced because, "Action … to

this end is feasible under the form of government which we have inherited from our ancestors. Our Constitution is so simple and practical that it is possible always to meet extraordinary needs…" The Constitution, and its creation of a polity with a legislature at its center, is no mere agrarian relic destined to failure; its structures are flexible and resilient, even under great strain. *Showing that a set of structures, norms and rules can help a modern Congress meet its constitutional obligations is the aim of this chapter.*

RESPONSIVENESS AND ENERGY IN THE FIRST HUNDRED DAYS

The Constitution is premised on the principle that energy (or effective authority) in government is essential. Yet, the Constitution is often explicated as if energy is the sole possession of the executive branch.[174] While it is true that the (theoretical) unity of the executive branch conduces to its energetic nature, Congress must participate in energetic government to some degree if laws are to be drafted, debated and passed to promote the general welfare, especially when these actions must be done with dispatch in a time of crisis. Indeed, one of the most characteristic aspects of United States politics in the twentieth and twenty-first century is the ubiquity of crisis. If the Congress is constitutionally incapable of acting effectively in the face of crisis, it would surely

[174] *The Federalist* itself might conduce to such misunderstandings when it complements the statement that "energy in government is essential," (Hamilton et al 1787/1961, 223), with a later claim that "energy in the executive is a leading character in the definition of good government" (421). To understand why the former statement is importantly not equivalent with the latter, imagine a government with an executive equipped with the exact same powers as those granted by our Constitution was appended to the Articles of Confederation Congress. This government would have an energetic executive, but the energy of the entire edifice would be sapped by a Congress which is not empowered to raise money to actually pay for the army which the President will command. While energy comes mainly from the executive, it cannot be thought to come *exclusively* from the executive.

deserve to be shunted aside in favor of a governmental structure which could. As it turns out, Congress need not be replaced or displaced.

In FDR's First Hundred Days the 73rd Congress showed flexibility, responsiveness and independence characteristic of a responsive national legislature. The Congress did not act alone of course, but it remained a critical actor in responding to the Great Depression. Indeed, in a profound crisis like the Great Depression it is important for Congress to generate a lawmaking process which can resolve the crisis. To do so it faces twin tasks; promoting the general welfare, while ameliorating the vices facing the lawmaking process under "ordinary" conditions. The 73rd Congress engaged in procedural innovation to overcome the legislative vice of sluggish irresolution. By yoking their lawmaking process to the presidential agenda of their popular co-partisan FDR, the House, and its Democratic caucus in particular, succeeded in passing a remarkable number of bills responsive to the prevailing emergency. House Democrats utilized special closed legislative rules for this purpose, successfully bringing every proposed piece of legislation to a vote. *Pivotally, legislative dispatch did not come at any obvious cost for responsiveness to popular preferences*; when FDR's proposed solutions for the crisis appeared rational they were facilitated by Congress to the maximum extent possible, due in no small part to overwhelming popular pressure to do so; when FDR's agenda pressed too hard on veterans and ignored the revealed preferences of constituents the Congress snapped back into a more independent posture toward FDR and pushed policy in the manner requested by their constituents.

It bears remarking that as Congress met in March of 1933 several factors outside the control of Congress affected its ability to responsively meet the needs of the hour and the preferences of its constituents. On the side of enhancements for prompt action, the Democratic majority in the House was very large (312 to 117 [with 5 Farmer-Laborites]). The size of this majority was an important consideration in explaining swift action in the House (Herring 1934, 65); without a close partisan division the Democrats could push items onto the floor without even needing a unanimous caucus. Moreover, the Republican members of Congress were somewhat demoralized by their poor election performance and their small numbers rendered reflexive opposition rather ineffective. Crucially the situation encouraged effective response; "The critical economic conditions made it essential that the House be organized for … united action and that it respond to the leaders" (68). On the other side of the ledger, "the presence of over 150 new members, bringing novel proposals for national salvation and knowing little of legislative problems, complicated the situation." (Herring 1934, 68). The number of freshman members of the House was enormous: well over a third of all representatives were new to Washington. If the first several months of the session consisted of bringing these members slowly up to speed and humoring each of their individual plans which they had brought to the nation's capital, none of the people's business would have been accomplished.

In the 73rd Congress, the House of Representatives quickly reconfigured itself to be a body for prompt and streamlined action, through the use of unorthodox lawmaking

procedures, especially special closed rules.[175] Special rules allow a measure to be brought up for debate and passage out of order and with specified (and often restricted) procedures. Contemporary expert Barbara Sinclair (2012, 31) describes their function quite clearly, "Special rules can be used to save time and prevent obstruction and delay, to focus attention and debate on the critical choices. [Such] rules that restrict amendments and waive points of order also save time and prevent obstructionism." In short, special rules "make it easier for the majority-party's leadership to advance its members' legislative goals" (Sinclair 2012, 49). Special rules, which were not generally used in the 1930s, but have become exceptionally common in the contemporary Congress, are frequently criticized by members of the minority party. Special rules can have "the result of excluding the minority from meaningful participation in the legislative process," because they are passed with only a majority vote (Sinclair 2012, 49). Similar concerns were expressed in the House of the 73rd Congress, even by members of the majority party, due to the frequency of their use.

One finds it difficult to evaluate the use of these expedients negatively, however, in the context of the situation prevailing in 1933, especially at the opening of Congress in March. With nearly every bank in the country closed, immediate action was needed to reopen them. The House sprang into action in the first moments of the special session called by President Roosevelt. Immediately and even before the formation of committees the House acted:

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[175] "The Rules Committee reports such rules, which take the form of House resolutions— designated H.Res. A majority of the House membership must approve each one" (Sinclair 2012, 27).

> [The] Majority Floor Leader [requested] 'unanimous consent,' introduced the emergency banking act with debate limited to 40 minutes. [The] Minority Floor Leader … stated: "The house is burning down, and the President of the United States says this is the way to put out the fire." He asked for Republican support. *The House had not yet adopted rules of procedure; the bill was not available in printed form; the members were acquainted with its contents by the reading clerk.* But leaders of the House and Senate had met with the President the night before and had promised to expedite the measure. The bill passed the House without a record vote (Herring 1934, 70, emphasis added).

Obviously, such streamlined legislative procedures place an extreme of deference to the initiator of policy, which in this case was the executive branch. Nevertheless, one must recall that speed was itself a criterion of merit in the bill. The crisis in the banking sector was real but exacerbated by a crisis of confidence. The banking system could be placed back on sound footing if the government showed a sufficiently energetic and decisive response. Debating the pros and cons of the president's surprisingly conservative plan for reopening the banks was simply not of primary moment in the House.[176]

[176] "FDR's plan for the [banking] emergency was conservative, perhaps because its origin lay in the Hoover administration… The emergency bill combined a hodgepodge of ideas, many proposed in February 1933. Title I [in particular] would legalize FDR's actions by authorizing the president to restrict banking operations during a national liquidity crisis. It would [also] authorize the secretary of the Treasury both to license member banks for reopening and to require delivery of all privately held gold or gold certificates to the treasurer of the United States" (Patrick 1993, 139–141).

A growing budget deficit presented the second topic quickly addressed in the House. While it may seem odd to contemporary readers, FDR had campaigned on a balanced budget and contended that the deficit would greatly constrain efforts of the government to promote the general welfare if it was not addressed (Schickler 2016, 32). President Roosevelt and other fiscal conservatives hypothesized that the nation's credit worthiness would suffer if the deficit was not immediately addressed. FDR thus proposed a so-called Economy Act, requiring sharp cuts to the salaries of federal employees and benefits for veterans of the Spanish-American War and the First World War. The mechanism chosen by House leaders to move to a quick consideration of the economy bill was particularly clever. Rather than turning to a special rule, "the regular order" was used to generate a short debate and a quick vote President's economy plan. "This was possible since the calendars were clear, [standing committees had not yet been organized], and there was no business before the House wherewith obstructionists could effectively delay action. This procedure was a masterpiece of simplicity and directness without precedent in Congress in many years" Herring 1934, 71-2). The use of such expedients reminds one that "the regular order" does not refer to a substantive state of affairs, but rather to the ordinary progression of a Chamber through its legislative calendar. The calendar being left strategically empty, the House moved quickly. "After the opening prayer and approval of the minutes, the House proceeded at once to the orders of the day. The floor leader introduced a resolution providing that debate on the economy bill be limited to two hours and ruling out amendments" (72). The unusual

resolution was favorably approved by the majority, and then the bill itself was approved in short order, closing much of the budget deficit in two rapid steps.

While such radical expedients were turned only in these limited exceptions, special rules more broadly proved to be an important source of ensuring the timely consideration of bills proposed in the House. "The Rules Committee held the House to the strictest limitations in discussing legislation. Special rules directed the consideration of all the [other] important legislation of the session" (Herring 1934, 75). Even more far-reaching, non-emergency legislation was thus subject to the same legislative martial law. H.R. 5081, The Muscle Shoals and Tennessee Valley Authority bill, for instance, passed after only six hours of general floor debate in the House. Another critical bill, aiming to give relief to owners of small mortgaged homes, only saw an hour and a half of floor debate (75). Such a sharp restriction of floor time ensured that all items on the agenda could be passed during the Hundred Days. "Critical times have been faced before and remedial measures found, but the hundred days of this session are unparalleled for the speed and discipline with which Congress was brought to face and finish its task" (65).

It is certainly no great revelation that the Congress of the Hundred Days was very responsive to the agenda proposed by President Roosevelt, but it is important to note that this level of presidential leadership was authorized (in some sense) by the public. Attention to public opinion is important, because it made the leadership posed by the president *conditional* on an accurate reading of public opinion, and operated to reinforce rather than degrade the independent electoral connection between MCs and their

constituents. While some MCs made the President sound like the nation's savior, matters on the ground were somewhat more complex.[177]

Consider the issue of the deficit. In the first place, Roosevelt had prominently emphasized deficit reduction in his campaign platform in the 1932 election (Imler 1975, 68).[178] FDR's wide electoral mandate presented clear evidence of popular support, perhaps not for every plank, but in general for the president's proposed platform. But all budget cuts are politically hazardous, as no individual or group wants to see the resources dedicated to them be redirected or removed. In the case of the President's "Economy Act," there was a countervailing force to this natural unpopularity of spending cuts: an unusually activated group in favor of the president and his agenda. On the House floor many spoke, not unreasonably, regarding the deflationary consequences of focusing on the deficit and budget cuts in a depression. Others spoke of the deserving nature of veterans and the underserving nature of the bankers which just received the nation's aid. Yet, "while orators droned, [MCs] studied the thousands of letters that had cascaded into congressional offices urging support of the administration" (Imler 1975, 74).[179] Apparently at every turn, literal truck-loads of letters descended on Congress urging its

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[177] "'This is the President's special session of Congress,' declared Representative Blanton. 'He is the Moses who is leading us out of the wilderness'" (Herring 1934, 80).

[178] Why did this issue arise? "Pension and disability payments to one percent of the population had spiraled until by 1933 they threatened to reach a billion dollars, nearly a quarter of the federal budget" (Imler 1975, 68).

[179] An interesting development question concerns determining when letters supplanted petitions as a means of interacting with and informing MCs. In any case, by the 1930s, technological capacity (that the letters *could* be cheaply and quickly carried to Washington) and state capacity (that the letters *would* reach DC) combined to facilitate communication between constituents and their MCs. Telegrams presented another alternative to the mail, and were also used by constituents in the 73rd Congress.

Members to follow the president's lead. Likewise, "members of Congress, especially Democrats, who failed to support the administration, ran the risk of sharp criticism from home" (336). One House Democrat put matters rather bluntly, "It seems to be the purpose here to follow the President's leadership and though it may work hardships, and does in a great many instances, yet every mail brings letters of endorsement of the course of the Democrats in putting through the President's program" (336). Not just in terms of responsiveness to exigent needs, but in terms of responsiveness to constituent pressure, the House was urged to follow the FDR's lead.

Members were not, however, pushed to monomaniacally support the President. As the Hundred Days wore on a different dynamic emerged later in the session. Some groups of constituents began pushing their MCs to check and sometimes even oppose the president. "As the veterans' lobby publicized (and in some cases exaggerated) the impact of administration [budget cuts], letters and cards urged representatives to reconsider their position" (Imler 1975, 307). While the measure apparently used by MCs to judge public opinion, the literal weight of letters hitting their desk, were rather crude, it was apparent that the political winds had changed:

> Each mail delivery reiterated to legislators dissatisfaction at home. Hiram Johnson confessed: "In all my life I never want again to receive communications such as I have received in the last month and a half. I never want to read the appeals of misery and of want, of anticipation of hardship and horror, that I have read in letters of good people..." Johnson praised Roosevelt, but cited articles from the *San Francisco News* … and

> letters from American Legion posts which led him to seek reconsideration of projected pension reductions (Imler 1975, 307).

Adding the weight of the popular press to the collected correspondence from constituents, MCs grappled with the difficult choice of opposing an otherwise remarkably popular president. The Congress bit the bullet, moving to reverse some $100 million worth of cuts to veterans' benefits. "The President objected to this compromise, but the veteran's bloc was ready to demand more" (Herring 1934, 81). Notwithstanding his immense popularity, FDR was powerless to stop Congress from adjusting his earlier attempts to balance the budget.

Popular pressure not only forced a minor checking of some of the President's plans, but also to was able to push the Congress entirely in opposition to his dictates. The emergency banking bill succeeded in restoring confident to depositors, ending the run on banks, but it had by no means fully set the banks on the path to recovery. The president favored broader efforts at bank reform but felt it was not an immediate concern. Most especially he was reflexively opposed to one of the most straight-forward plans for bank reform, the creation of an insurance system for depositors. "FDR and eastern bankers opposed deposit insurance because they thought it would force sound bankers to pay for mistakes of unsound ones" (Patrick 1993, 165). FDR's opinion was not an idle one, and he backed it up with a threat, printed in the pages of the *New York Times,* to veto a bill containing deposit insurance (175). The public, on the other hand, was strongly in favor

of deposit insurance (165).[180] The conflict between a popular president and a diffuse public interest did not end as one would think: "Throughout the 73rd Congress, legislators were more willing than the president to protect depositors. The Banking Act of 1933 … was a result of constituent pressures in favor of deposit guaranty, which FDR was unable to ignore… It was constituent pressure, recognized first by Congress and only later by Roosevelt, that caused changes in public policy toward depositors" (Patrick 1993, 189).[181] In the 73rd Congress, it was possible to get a measure through the body even if it benefited a diffuse group of unorganized individuals, and was opposed by the president and powerful vested interests such as the banks. Even in the midst of the greatest instance of presidential leadership in the history of our polity, the Congress, through the individual political calculations of its members, retained a connection and an important degree of responsiveness to its constituents independent of and even occasionally contrary to the FDR's agenda.

It will not be said, however, that the reformulation of the House of Representatives as a conveyor-belt for the president's agenda was costless. Surely, the immediate responsiveness of the House to popular presidential leadership came at the cost of some deliberative capacity in that chamber. Especially in the radical measures taken in response to the banking emergency, there was little independent evaluation of

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[180] "Thousands of telegrams and letters, many from depositors of closed banks, inundated the politicians with pleas for a guarantee." One single box of Senator Carter Glass's (D-VA) Papers contain 1500 telegrams in favor of deposit insurance (Kennedy 1973, 219).

[181] Representative Fuller (D-AK), stated that, "It is not the big banks that want security or guaranty. None of them wants it. It is the people who are demanding this law" (*Congressional Record* 1933, 4032).

the merits of the bill proposed by the president. "No member of Congress, not even former Secretary of the Treasury Glass, engaged directly in the formulation of the [banking] bill" (Imler 1975, 56).[182] Even the more ordinary course of special rules had the practical effect of limiting independent evaluation of the bills as "committees reported bills without critical deliberation… members were expected to vote upon measures when no printed copies were available for study, and [occasionally] even those sponsoring a measure could not adequately explain the terms of their bill" (Herring 1934, 76). The power and prestige of a popular president continuously bore down on representatives in the House. In private, internal caucus deliberations over the FDR's economy act, for instance, many House Democrats were opposed to the cuts, but as soon as members reached the floor, dissent ceased.[183] In the House, there was some worry that power had been yielded: In the 73rd House, "asserted one member, 'we are nothing but rubber stamps!'" (Herring 1934, 76).[184]

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[182] One MC presented a rather reasonable statement on the dangers of this course of action. He said that, "When we undertake to frame important banking legislation in an hour we are liable to get ourselves in trouble" (Imler 1975, 58).

[183] "Democrats who had viewed the bill unfavorably in secret caucus changed their viewpoint in the open debate, and the Democratic leaders found their hands strengthened by Republican support and by public approbation of the Administration's position (Herring 1934, 71).

[184] "Roosevelt also moved quickly to produce emergency relief and explore plans for recovery. He took advantage of his widespread support to send Congress a steady stream of legislation. One result, which worked to his benefit, was that members rarely had time to deliberate. 'The bills came through in such bewildering succession you could hardly read them before it was time to vote on them,' Stephen Young of Ohio remembered, and Borah wrote, 'In these days the legislative hopper is grinding so rapidly, it is difficult to familiarize oneself with them until they approach a hearing.'" (Imler 1975, 337).

DELIBERATION AS DIVISION OF LABOR: BICAMERALISM ASCENDANT

While the independent deliberative capacity of the House had been compromised by streamlined procedures and the pressure of a popular chief executive, the existence of an upper house proved incredibly beneficial for congressional health writ large. The Senate of the 73rd Congress retained the independent capacity for democratic deliberation for which it had been designed. The upper house maintained this ability even in the face of crisis, a president with an inarguable mandate for change, and popular pressure to act. Rarely in the history of the polity had the theories and concepts expressed in *The Federalist* came into more complete realization than in FDR's First One Hundred Days; while the People's House quickly ratified the agenda of a popular president, the Senate emerged as a site for pushback, examination and criticism.

The very first action of the Congress demonstrated the difference between the chambers in microcosm. The House passed the emergency banking bill without a printed bill and with MCs chanting, "Vote, vote, vote" before the forty minutes devoted to debated even had fully elapsed. Senators insisted on taking a closer look at the proposal. Sen. Huey Long (D-LA), held forth on the Senate floor about an amendment he proposed that would alter President Roosevelt's proposal. Long hoped to modify the emergency bank bill to aid banks chartered under state law and outside the Federal Reserve System (77 Cong. Rec. 52, 1933). Long then took questions from other senators that revealed a lack of sophistication in his proposal, as it offered only symbolic rather than substantive aid, leading to its defeat. Such exchanges typify deliberative exchange on the floor, as a well-intentioned idea faced criticism designed to test its merit. Independent-minded

progressive, Sen. Robert LaFollette, Jr. (R-WI), focused a separate strand of critique on the fact that the bill would not address the *causes* of the crisis, and expressed exasperation than such a conservative attempt to ameliorate its *consequences* was being proposed (64). For more than two hours the conversation over the emergency banking bill continued, and terminated only after two votes were taken on proposed amendments to the President's plan.

From the very first moments of the special session, senators were sure to emphasize that they would not offer unqualified complaisance to either the President or the bills passed by the House under Democratic Party leadership. The United States Senate operated as an important independent voice, especially in the service of deliberation, by continuing to stand by its open floor process for considering bills. The Senate thus remained the deliberative center of Congress, generating critical amendments to administration proposals, conducting debate regarding their substantive merits, and carefully concerning the tradeoffs contemplated between different interests in those propositions.

The House frequently passed bills identical in form and substance to proposals from the White House; the Senate was not eager to offer carte blanche to the President. Senate rules, which the experienced lawmakers were loath to give up, encouraged free debate and provided the opportunity to substantively amend bills. Senators were simply unwilling to become tools of the leadership (Imler 1975, 342). In the Senate, therefore, no special rules or other kinds of unorthodox procedural devices could be implemented to

hurry along deliberation. Beyond simply having the opportunity or potential, senators frequently exercised their prerogative to amend legislation.

Senators prevented the Congress from becoming a "rubber-stamp" on FDR's proposals by exercising the ability, supported by their institutional place and norms, to promote their own conception of what would conduce to the general welfare of the nation.[185] Just as popular preferences sometimes fail to *genuinely* conduce to the common good, the same truism applies to the proposals of the President. An active and deliberative Senate interrogates both popular preferences as well as the President's view on what it would take to satisfy those preferences. Despite overwhelming Democratic control of the Senate, independent reasoning on the merits of proposals made "party control in the Senate was far less effective than in the lower chamber" (Herring 1934, 78).[186] The Senate took the lead in mollifying interests and in investigating the merits of bills through the process of amending bills, sometimes to the point of comprehensively altering the original proposal. As an example, Roosevelt signed a farm bill which he had proposed eight weeks to after his initial message to the legislature. "Far from ratifying the original bill, it had added 85 amendments, and in the process produced a more comprehensive measure" (Imler 1975, 142).

On several key occasions senators passed amendments which were specifically opposed by FDR. Senators framed amendments which sought to mandate a 30-hour work

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[185] "The Senate was not so amenable as the House, and in the debate … [in that chamber] serious disagreement appeared." Indeed, "The only effective criticism of the Administration came from the Senate" (78)." (Herring 1934, 78)

[186] "When important amendments were made, it was the Senate that acted" (80).

week, make public the income tax returns of individuals, and change the tax-exempt status of securities (78). Examining a crucial sample of Senate votes 34 on the president's agenda shows an important degree institutional loyalty and independence from the Executive (see Appendix Figure A-1). Democrats voted with the president only around 70% of the time on these pivotal votes; Republicans only voted with the President 40% of the time (Imler 1975, 346). As the president was guaranteed neither lock step opposition from Republicans, nor ironclad support from Democrats, the Senate could maintain its critical posture throughout the first one hundred days.

Even smaller amendments were important in maintaining the independent role of the Senate. The process of connecting legislators with constituents (as well as legitimating the claim of the former to be good stewards for the welfare of the latter) depends especially on the specialized interests-based deliberation of reelection-minded MCs. Especially in terms of balancing interests, and justifying any sacrifices of one group to the overweighing consideration of another, it was critical that this open amendment process continue. While rural Americans were suffering severe privation in the Depression, city-dwellers had hardly emerged unscathed. Senators representing urbanized states needed especially to be able to utilize an open floor process to defend the interests of their constituents, and insure that the Senate's pervasive imbalance in favor of low population states did not doom their prospects for relief. Consider the issue of urban foreclosure: "As reported by the Banking and Currency Committee … the Home Owners' Loan Act of 1933 provided no moratorium on principal installments due on mortgages acquired by the corporation, a divergence from the farmers' relief act" (Huthmacher

1968, 142). Utilizing the open Amendment process which prevailed after that bill was reported to the floor, Sen. Wagner (D-NY) proposed that the same benefits be provided to urban residents owning a mortgage that were provided to rural residents who owned a mortgaged farm. Besides accepting the idea itself on the merits, the chance for passage was increased by a sense of fair bargaining, as Sen. Wagner had supported the rural benefits, his amendment was incorporated. The version of the bill signed by the President in June 1933, "the Home Owners' Loan Act … eventually benefited one out of every five mortgaged urban homes in the nation" (142). The Senate, acting as the deliberative center of Congress, succeeding in synthesizing policies which would broadly and *effectively* respond to citizen preferences.

A close examination of the Senate debate regarding the deposit insurance (what would become the FDIC) provision of the Glass-Steagall act provides apt illustrations of both an open and deliberative process for considering the merits of public policy, and for the advancement of reasons that justify the sacrifice of interests for the sake of advancing the public good. As aforementioned, FDR opposed federal deposit insurance on the idea that well-run banks should not be required to bail-out depositors of poorly-run banks.[187] On the Senate floor, more reasons were brought to bear in favor of FDR's view. Rising to speak with measured criticism, Sen. Hebert (R-RI) stated that while he believed "that for the most part [the Glass-Steagall Act] has a great deal of merit and will commend itself to

[187] Even today, some contemporary economists and economic historians argue that the "moral hazard" presented by deposit insurance is a potentially larger problem than the issue posed by possible runs on banks (see Hogan and Johnson 2016; Neal and White 2012).

the consideration of the Members of the Senate… I cannot see my way clear to support that provision of the bill which would guarantee bank deposits. My investigation of that subject leads me to the conclusion that wherever that has been tried it has been a failure" (77 Cong. Rec. 4181, 1933). The Senator from Rhode Island was not in error: deposit insurance had been tried in many states, but none had a working system by 1929. Open debate over deposit insurance provided an opportunity for proponents of deposit insurance to provide *reasons* why this bill would succeed where state programs had failed, by specifying *substantive* changes to the bill to ensure that it would be efficacious. Sen. Vandenberg (R-MI) "was able to fend off those who criticized the federal program as merely replicating the earlier unworkable state programs," by making an amendment to the bill which set a limit on the amount of deposits subject to insurance (Bradley 2000, 6).[188] "Senator Vandenberg's amendment introduced an aspect of depositor discipline into the system by not covering all deposits with a guarantee [thereby incentivizing depositors] to be cautious in deciding where to put their money" (6). Setting a limit on how much of any given depositor would be insured substantively responded to the argument of his fellow Senator, improving the bill's chances of successfully resolving the problem of banking instability. Since the argument was responsive to the President as well, it was similarly effective in helping the bill avoid a potential presidential veto.

Another issue subject to intense debate on the floor of the Senate was the interaction between banking institutions and so-called postal savings banks (PSBs).

[188] The limit started at $2,500; today the FDIC insures up to $250,000 of deposits in member banks.

Established in 1910, this system allowed small depositors to utilize the post offices as an access point for small-scale savings accounts. Since the interest offered by these banks was very low, they were often not competitive with commercial banks. In the banking crisis of the Great Depression, however, savers were attracted to a feature of the banks that had gone otherwise overlooked: their security. "The ability of PSBs to offer security to depositors, which bankers were unable to match, became a primary concern during the 1933 congressional debates. PSBs had become legitimate competitors of other financial institutions, and in the year immediately preceding adoption of federal deposit insurance, deposits in PSBs increased by more than 125 percent" (Bradley 2000, 7). Instead of operating as an incentive to thrift by the working class, PSBs were replacing commercial banking for many individuals. The increased usage of PSBs caused a ripple effect through the financial system, especially in the rural hinterland of the US. The problem was that, "PSBs deposited the funds outside the jurisdiction in which they originated. Consequently, not only did the increase in PSB deposits mean a corresponding decrease in the funds held by private financial institutions, but the increase in PSB deposits further exasperated the financial chaos found in local markets by withdrawing money from the community itself" (Bradley 2000, 7). Creating federal deposit insurance for all banks, up to the limit of $2,500 specified by Sen. Vandenberg, had the additional effect of resolving this problem, "since it provided the same protection as the Postal Savings System while insuring over 90 percent of the depositors" (Bradley 2000, 8). Contrary to the argument of those who seek coherence in law through executive leadership, in this case effective legislation was produced by an open floor process where arguments against a proposal

could be advanced and in which responsive counterarguments could be deployed to resolve those difficulties.

In the issue of deposit insurance, Senators also had to face a clash of interests, particularly between organized banking interests, which generally opposed the policy and unorganized diffuse interests (depositors) in favor. While one's impulse may be to question the self-interested motives of the bankers, it is the role of Congress to air arguments in favor of a position, and through deliberation to discover if there is more than mere self-seeking there. On one hand, the banks which had made it through the crisis simply resented the imposition of costs upon their future transaction of business.[189] In addition there was certainly some intemperance in the bankers' opposition as "New York bankers were threatening to withdraw from the reserve system if the Glass bill became law" (Patrick 1993, 175). But in debate it became apparent that real obstacles were in the way of setting up a working system of deposit insurance. "During the debates on the bill, bankers vehemently opposed the plan: There was no way they could reasonably expect to turn things around and pay such large assessments," in the midst of the Great Depression (Bradley 2000, 8). While citizen preferences in having their deposits covered with insurance was reasonable, an inappropriately large assessment to fund the insurance would devastate the remaining health banks, destroying the whole system. Banking opposition to the insurance thus made proponents of the bill aware of

[189] "Bankers, especially those in areas that had few failures, were appalled when the House passed a bill containing deposit and alarmed when the Senate followed with a plan for an immediate guaranty" (Patrick 1993, 174).

obstacles to the success of the policy. Sen. Vandenberg was one again pivotal in addressing the concerns of opponents to his initiative to create deposit insurance. “Under his amendment, banks were assessed 0.5 percent of insured (rather than total) deposits; 0.25 percent of the assessment was to be paid in cash, with the other 0.25 percent subject to call by the FDIC, and only one additional assessment could be imposed (Bradley 2000, 8). Vandenberg’s change meant that large, healthy banking institutions, largely in the New York and other northeastern financial centers, had a much smaller proportional assessment to pay rather than smaller banks, where a greater proportion of total assets would be insured (Kennedy 1973). The 0.5% number itself was chosen on the basis of calculations regarding the amounts of money the banks could reasonably be expected to raise in the midst of economic decline.

Ultimately, the Banking Act of 1933 represented the outcome of a truly deliberative process. Arguments were presented for and against the passage of the bill; grievances of interest groups were considered and examined in good faith; and reasonable compromises were forged with due attention to the prospective efficaciousness of the bill proposed. Significantly, the process remained one of public, democratic deliberation, confined to the upper house of the Congress. It was not accidental that the process of deliberation on the Senate floor resolved difficulties of conception and execution in the policy of deposit insurance. From the first day of the session the Senate had been operating as a site of deliberation between equals. In an earlier chapter, it was discovered that the image of the ideal senator as giving principled and lengthy speeches on the floor can lead to unfortunate results if those speeches are not responsive to the words of other

MCs. In the Senate of the 73rd Congress, senators still gave speeches, but they did not center their deliberations around those devices. Returning to the scheme of analysis carried out in the chapter regarding the antebellum Congress, I have examined the days of Senate debate devoted to the issue of banking. Examining the *Congressional Record* allows one to count the number of speakers who addressed the body, the number of times their speeches extended for at least one column of the *Record* (in this case greater than or equal to 500 words), and the number of times in a given debate that one senator directly responded to the previous senator regarding the merits of the bill or amendment under consideration.

The results of such a quantitative investigation, (see Table 5-1), show that senators frequently responded to one another and infrequently gave speeches, allowing an environment of mutual give and take to exist. In an average day of debate regarding banking in the 73rd Congress the floor only saw two speeches given, maximizing the amount of time that could be spent in dialogue rather than in passive listening. Given the technical nature of financial and banking questions under debate, only a relatively small number of senators spoke on the floor,[190] but those that did were engaged in a back in

[190] The technical nature of the debate made some senators rather reticent, but participants in the debate seemed to retain good humor and faith, even if not every senator was equally expert on matters of finance. One representative conversation proceeded between Sens. King (UT-D) and Glass.

"Mr. KING. Before the Senator leaves the insurance features of the bill, I hope he will be tolerant of some of us who have not had the opportunity of becoming fully acquainted with the bill-speaking for myself, anyway asked which may not be very intelligent.

Mr. GLASS. I have boasted recently of being the most tolerant Member of the Senate" (77 Cong. Rec. 3728, 1933).

forth regarding the merits of the bill to an extent very similar to that seen in the First Congress's model debate over molasses.

Table 5-1: Senate Debate on Banking Reform: March 9, May 19 – 25, and June 13, 1933

Summary Statistic	*No. of Speakers*	*No. of Speeches*	*Substantive Interactions*
Median	10	2	17
Average	14	2.4	13.6
Emergency Bill (March 9)	29	7	17
Glass Bill (May 19-25)	11.3	1	16
Conference Glass-Steagall (June 13)	7	2	3
Total	N/A[191]	12	68

Source: 77 Cong. Rec., 1933.

Not only the merits, but also the purpose of the bill was investigated. Sen. Connally (D-TX) asked, "Why have all of this banking legislation? People talk about passing a bill for the aid of the banks. That is not our concern. Our concern is to pass

[191] A sum of all speakers would lead to significant double-counting. It appears that all senators who wished to speak on the bill could do so.

legislation which will permit the establishment and operation of a banking system in order that it may serve the public, that it may serve the people, that it may furnish a reservoir of credit and money with which the people of this country can transact their normal business." (77 Cong. Rec. 4170, 1933). Only on the very last day of debate, on which the conference report on the bill was considered, were remarks perfunctory. Only a few senators spoke, and those who did often did not respond to one another. Unfortunately, the debate held on June 13th was nearly the very last day of the hundred-day session; the patience for extended debate almost always seems to flag by this point in a congress.

While the Banking Act of 1933 (the Glass Steagall bill) was imperfect,[192] the establishment of deposit insurance was rendered much more effectual because of the deliberations which occupied the Senate. The FDIC in particular "was for many years [the] most effective provision for preventing bank failures. It increased the safety and stability of the banking system because it reduced the possibility that frightened depositors would cause runs on solvent institutions" (Patrick 1993, 188).[193] No less authority than Milton Friedman stated that the establishment of the FDIC was "the structural change most conducive to monetary stability… since … the Civil War" (Friedman and Schwartz 1963, 434). In terms of financial self-sufficiency, the FDIC

[192] Indeed, the sources of some of its imperfection will be examined in the next section regarding representation.

[193] "Ironically, the controversial issue of insurance succeeded for exactly the same reasons that its bitterest critics condemned it to failure: it made strong banks responsible for the losses of the weak. As a result, the more stable members of the system compelled their less sound colleagues to reform before disaster force them to seek refuge in the fund" (Kennedy 1973, 222).

needed no additional infusion of money after the original grant of 1933 until 1991, when the need for some reform became apparent (Patrick 1993, 293). The FDIC did so well that it more or less completely ended the problem of runs on banks: "from 1921 to 1933, depositors lost an average of $156 million per year or $.45 per $100 in commercial banks; from the establishment of the FDIC until 1960, losses average only $706,000 per year or less than $.002 per $100" (Kennedy 1973, 223). Contrary to the theory that only the President can propose efficacious, coherent policy for the nation, here is an example of a Congress deliberating over a popular proposal for economic stability, overcoming the opposition of a president and entrenched interests, and refining it to the point that even libertarian economic thinkers were impressed with its effects. The New Deal Congress of the Hundred Days deliberated well despite the restricted rules of the House, because the Senate played its role: "for breadth of knowledge, technical skill, analytical acumen, close reasoning and dignified presentation, [the addresses and debates of its senators] compare favorably with similar utterances made in the preceding century by the so-called great orators" (Beard 1942, 531).

REPRESENTATION: INNOVATIONS AND LIMITS

The 73rd Congress, aligned to a new-found responsiveness through the special rules in the House and devoted to democratic deliberation in its Senate, found it somewhat more difficult to structure a representative lawmaking process. On one hand, the leaders of the House were in fact aware of the potential that seniority in the body would lead to disproportionate sectional representation and attempted countermeasures in

response. The Senate for its part ensured that the diverse views and interests of the nation could gain a hearing on its floor, once again by maintaining an open floor process. On the other hand, in both the Senate and House the congressional lawmaking process was occasionally dominated by individual "experts." When experts produce a bill nearly single-handedly, coherence may be brought to a bill, at the cost of forfeiting the opportunity to make the proposal more broadly representative.[194] Finally, the intensity and number of interests joined together to advocate for black civil rights failed to make an impression on the body in any way. The Congress of the Hundred Days thus finds a mixed evaluation on the dimension of representativeness.

Starting with the effects of seniority, House Democratic leaders were remarkably self-conscious that this ostensibly neutral device could have serious problems for representation in Congress. Since the southern region of the United States was virtually a one-party-state during the early 1930s, southern MCs has substantial advantages in seniority over their co-partisans from the rest of the nation. Seniority dictated the that most senior member of each standing committee would get to be the chair of that committee, with all the perquisites that go with such a leadership role. Such a procedure led to a disproportionate influence over legislative leadership by southerners. "Southerners chaired twenty-nine of the forty-seven committees in the House, including Appropriations, Banking and Currency, Judiciary, Foreign Affairs, Agriculture, Military Affairs, and Ways and Means…" (Katznelson 2013, 149). Since southern Democrats

[194] The general principles behind this surprising problem will be elaborated below; a concrete instance of the phenomena will also be presented in the domination of the Senate by banking expert, Sen. Carter Glass.

only made up only one third (146 out of 435) of the seats, controlling more than half of the committees was a pretty large disproportion. The Democratic caucus, when arriving at Washington in March of 1933, tried to remedy the sectional imbalance, first, by electing a northerner as Speaker of the House, Rep. Henry Rainey (D-IL).

The election of Rainey as speaker was at least partially premised on the fact the candidate for speaker had promised to inaugurate a "steering committee." The steering committee's membership was to be drawn by dividing the nation into fifteen districts, with each having approximately the same number (21) of Democratic representatives (Herring 1934, 69). These districts were clearly created with an eye to reversing or tempering southern influence as the only districts which were *overrepresented* (districts with smaller numbers of Democratic representatives) were those representing the Northeast and the Inter-mountain West, hardly redoubts of traditional Democratic strength during this period. The Democratic members from each district voted on sending one representative to the steering committee. "The speaker, the whip, the majority floor leader, and the chairman of the caucus [were added as ex-officio members]. Since the speaker had sponsored the establishment of this committee, he could not very well ignore its existence or attempt to override it." (69). The Speaker of the House thus had a more representative set of voices to consult regarding the proposals emanating from the President than he would had, should he have simply convened the committee chairs.[195]

[195] Yet, one must keep in mind that the steering committee system of "party organization was better designed for carrying out orders from above than for initiating policies." The creation of whips from each district confirmed this impression. "Especially did the new members need direction and advice. Chief Whip

While not perfectly balancing the disproportionate influence in the lawmaking process possessed by southern Democrats, the attempt at least illustrated a self-conscious attempt to structure representation of the nation's vying sections.

While the Senate attempted no such representative schemes,[196] it did continue to maintain a generally open floor, which had the effect of allowing advocates for interests to freely jockey for advantage, bringing views to bear on questions of recovery in a reasonable proportion to the presence of those ideas in the society at large. A prominent example of this general trend concerned views expressed on the Senate floor regarding the National Industrial Recovery Act (NIRA). NIRA was an ambitious plan to attack the Great Depression across three dimensions: (1) through an attempt to encourage the voluntary development of "codes of fair practices" by trade organizations, by relaxing anti-trust regulations through cooperative planning; (2) by providing workers the right to organize and bargain collectively; and (3) by appropriating funds for a massive $3 billion program of public works spending to immediately tackle the problem of unemployment (Katznelson 2013, 229-31). Despite the massive proposed change from the earlier general policy of laissez-faire, only six hours of debate were conducted in the House and only one substantive amendment was considered (regarding the distributive policy of highway fund allocation) to this policy (Herring 1934, Katznelson 2013, 240). It would then be

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Greenwood accordingly named assistant whips for the regional divisions identical with the steering committee districts" (Herring 1934, 69)

[196] "In the Senate … southerners headed thirteen of thirty-three committees, counting the most significant, including Agriculture, Appropriations, Banking and Currency, Commerce, Finance, and Military Affairs" (Katznelson 2013, 150). This breakdown, however, was less disproportionate than in the House, as Southern states were represented by 34 (out of the 96 total) Senators

correct to say that, “When the National Recovery Act was before the House, an attitude of acquiescence characterized the debate” (Herring 1934, 80). The various ideological, principled, constitutional or interest-based considerations one might have for accepting or rejecting the bill were not really heard in the House.

In the Senate, however, the open floor process led to Senators being able to criticize the proposal, alongside substantive proposals to alter the plan. Fifteen substantive amendments were voted on, paired with a comprehensive airing of views, pro and con. Several of these critical amendments even emerged from the Democratic members. Some worried NIRA was going too far, like Sen. Clark (D-MO), who objected to the suspension of antitrust regulations, (Katznelson 2013, 239). Others, such as Sen. Long (D-LA), thought Roosevelt was not going far enough (Huthmacher 1968).[197] Indeed, “examination of the process of law-making during this session emphasizes the fact that despite the emergency conditions necessitating quick and decisive action, and despite the unified support given the President by the general public, factions remained in Congress. Blocs, such as the farmers', the veterans', and the inflationists', gained strength because of the critical economic situation” (Herring 1934, 82). In general, due to the perceived (and actual) support of the public for the president these blocs were not generally successful in opposing FDR during the Hundred Days. Especially on NIRA,

[197] “On the whole the Senate’s debate on the recovery bill was conducted on an unusually high plane. For sustained periods Wagner matched wits with Borah, one of the most distinguished lawyers in the chamber, in discussions of the constitutional phases of the legislation… [Wagner] listened patiently … while Huey Long delivered a long tirade against the Roosevelt Administration and while, more thoughtfully, Hugo Black suggested that government limitation of profits might be a necessary corollary to the great powers conferred on corporations by the measure…” (Huthmacher 1968, 150-1).

substantive amendments, such as those of Sen. Clark, were voted down by wide margins.[198] But there is no doubt that Senators, including of the president's party, felt free in expressing the views critical of the course of action proposed by the chief executive.

While the openness of the Senate floor operated to allow critics to have their say in the lawmaking process, norms of deference to "experts" within Congress operated to vitiate some of this diversity. One of the most important aspects of numerous legislative bodies is the fact that well-structured assemblies to allow different accounts of the same general phenomenon to be brought to bear. Different representatives might have various theories of what caused the phenomenon, and if the subject in question is a problem (which it almost always is in politics), then they might possess varying hypotheses regarding possible solutions. If the problem-solving process is dominated by one individual, this possible advantage of legislatures over single executives is lost. Problems of legitimacy arise as well, given the fact that whatever "expert" has been denominated by his peers was not so elected by the people.[199] One chief example of the expert dominance concerned the Glass-Steagall Bank Act.

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[198] Roosevelt's proposal survived its trial by fire in the Senate, because "it avoided alienating supporters of the Black bill and gained backing from Republicans and Democrats as well as representatives of business, labor, and the unemployed. As in the past, interest groups complained about portions of the industrial recovery bill, but not to the point where they opposed final passage. Legislators naturally showed more enthusiasm for the public works title which meant jobs for constituents. Still, the final vote indicated that the President had conciliated shrewdly enough to insure passage of either title independently" (Imler 1975, 285).

[199] Problematically, the "expert" themselves might very well deny they are such, deflecting attention from the problem with a mixture of play-acted humility and noblesse oblige. Senator Glass, was one such "expert." Coming to the end of his defense of his banking bill, he stated: "Mr. President, I think I have about reached my limit in the explanation of the bill, but as we proceed with its consideration, I shall be glad to answer any questions that I can, reminding the Senate, if you please, that I am not a banking expert.

While sometimes bills are named after for political reasons or for the creation of a convenient shorthand title, in the case of the Glass-Steagall Act the bill was named correctly for the individuals who had the most impact of its substantive provisions, and in that order. Starting before the beginning of the session, "[Sen.] Glass composed the banking and monetary blanks of the [Democratic] platform, which the delegates [to the Convention] adopted without debate" (Patrick 1993, 97). Glass's control of his bill caused real problems for the efficacy of the bill due to the fact that he possessed an idiosyncratic understanding of the monetary system: "Because Glass believed in 'real bills theory,' many provisions in his original reform bill would have had a deflationary effect…" (Patrick 1993, 100). The "real bills theory" refers to a monetary theory which held that only a very small range of financial instruments were credit worthy. This theory further held that if banks were limited to only this range of activity they would more or less automatically be safe. Such a monetary theory has proven inconsistent with subsequent experience; we can hardly blame Sen. Glass before the fact. But by being so critically dependent on one man's reading of the situation, and not very curious about alternative views of how to address this complex issue, the Glass-Steagall bill would go on to cause deflation – which was the last thing that the nation needed in 1933. "In the Banking Act of 1933 Congress, led by Glass and … Steagall, misread events after 1920 and consequently imposed many unnecessary controls on member banks. The Senate and House Banking and Currency Committees did not conduct detailed statistical studies of

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Although people say I am, I am not; and I hope the questions will be as simple as possible (77 Cong. Rec. 3731, 1933).

banking problems, relying instead on testimony from bankers, economists, and government officials. Such evidence was impressionistic and at times misleading" (Patrick 1993, 295). The result was that the portions of the bill overly reliant on Glass's construction were not efficacious. Not only that, but they were likely harmful to the safety and efficiency of the banking system.

While the controversy over deposit insurance drove debate regarding a wide range of opinions regarding their advisability and efficacy, the aspects of Glass's bill which later became economically problematic were not addressed due to his dominance over the process. While legislative leaders like Glass typically exercise their control somewhat behind the scenes, Glass's control over the banking bill (in the Senate) was overt and complete. One senator rose to offer an amendment to the bill, and began to give his argument for why this technical change was needed. The following is the complete record of what transpired:

> Mr. KEYES. Mr. President, I am prompted to offer that amendment--
>
> Mr. GLASS. I have no objection, at all, to the amendment.
>
> Mr. KEYES. Very well.
>
> The PRESIDING OFFICER. The question is on agreeing to the amendment proposed by the Senator from New Hampshire.
>
> The amendment was agreed to (77 Cong. Rec. 4181, 1933).

Rather than listening to the reasons for or against the amendment and examining these views, the Senate voted simply to accept the change on the mere word that Sen. Glass had no objection. Recalling that Sen. Glass was not even the chair of the Banking Committee,

it becomes yet more clear that informal deference played a great role in determining not only the agenda, but also the substantive contents of bills in the Senate.

Such informal norms of deference can lead to severe consequences for representativeness, even apart from the effect they might have on restricting the range of views expressed on the floor. In the Senate, a norm of avoidance of conflict with powerful southern Democrats (of which Sen. Glass was one) negated an effort to bring attention and policy change regarding the issue of black Civil Rights. While the nation as a whole was certainly suffering, the year of 1933 presented special problems for black Americans. Twenty-six individuals were lynched in the South, the second-highest total in a decade (Katznelson 2013, 166). While lynching was at its worst in the late nineteenth and first decade of the 20th centuries, clearly any taking of life by a lynch mob was too many. Despite the uptick in racial terror (often tolerated if not supported by local and state authorities), the Congress of the Hundred Days spent not one day on addressing the pressing violation of human rights in the South.

Matters seemed somewhat different, at first, in the second session of the 73rd Congress in 1934. The Judiciary Committee was referred an anti-lynching bill, which proposed to apply sanctions to any state which did not sufficiently act to prevent these horrendous crimes. The committee did hold hearings, "taking testimony from a wide range of witnesses including spokespeople from the American Civil Liberties Union (ACLU), Young Women's Christian Association, Women's International League for Peace and Freedom, as well as academics, lawyers, and state officials from around the country. Also testifying were Walter White and other representatives from the NAACP"

(Jenkins et al 2010, 79). Examining the witness list, it is apparent that it included organizations outside the ambit of black organizations; a wide range of interests demonstrated strong favor for a civil rights bill to stop this brutal practice.[200] Surprisingly, given the fate of earlier anti-lynching bills which failed consistently for more than fifty years, the Costigan Wagner (Anti-Lynching) Bill was reported favorably. Helping matters was the fact that "Only three of the eighteen members of the Senate's powerful Judiciary Committee in 1934 were southerners (Huthmacher 1968, 173). The bill even passed through the committee on a voice vote (Jenkins et al 2010, 79). Nevertheless, "southern senators threatened to filibuster and the Democratic leadership refused to take up the bill for full debate. As a consequence, the Senate adjourned…without considering the measure" (Jenkins et al 2010, 80). When a bill is favorably reported by committee after extensive hearing and substantial mobilization of diverse interests and views in its favor, and yet is blocked from even being considered, it must be said that the Congress as an institution lacks ideal representativeness.[201]

CONCLUSION: EXECUTIVE LEADERSHIP IN CONTEXT IN THE FIRST HUNDRED DAYS

In March of 1933 the polity faced a devastating crisis imperiling the general welfare. The Congress faced the emergency with a constitutionally-aligned division of

[200] While one might think that black Americans should not have to mobilize as an interest group to secure their constitutionally granted rights – this instance provides yet another example of the fact that even when they do play the game of interest group politics, there is no guarantee of success.

[201] The filibuster does not seem to have a place in encouraging deliberativeness (as actions such as these provoke no arguments on the merits), responsiveness (as popular majorities are ignored) or representativeness (as the less numerous views are not accommodated, but rather given control over the process). Accordingly, one must say that the filibuster is no aid to legislative health in Congress.

responsibility. The People's House changed its internal structure to accommodate a popular course of action – a set of proposals emanating almost daily from a president fresh off an election mandate. Senators, however, leaned into norms emphasizing their independence, defended their traditional rules, and emerged as key critics of administration outputs. The Senate floor became a venue for substantive deliberation on the model of that practiced by the best statesmen of the First Congress.

Such a comprehensive evaluation of Congress meaningfully differs, in key respects, from both contemporaneous and retrospective accounts. Harvard political scientist E. Pendleton Herring, who had observed the Congress in real-time, contended that, "despite federalism, bicameralism, factionalism, and the negative character of our political parties, the present governmental structure is capable of meeting a national crisis" (Herring 1934, 83). I would agree that the present constitutional regime of the United States has proven capable of meeting the test of emergency, but I would say that Congress succeeded *because* of bicameralism, not *in spite of it*. Columbia political scientist Ira Katznelson (2013) argues that, "In placing the recovery program entirely in the president's hands, Congress did flirt with what might be thought of as a functional Enabling Act. But flirt though it did, the institution did not cross the line. Congress kept, and increasingly asserted, its legislative prerogatives. … Even the nineteenth-century ideal of a deliberative legislature where lawmakers sought to persuade one another by rational argument did not entirely disappear." Katznelson 2013, 125). While more in line with Katznelson's conclusion, this chapter shows that in no way did Congress flirt with an enabling act – even the emergency banking bill received deliberative attention and was

subject to amendment and challenge on the merits. Further, the technical deliberation undertaken in the Senate ensured that the conditions in the nation would indeed be ameliorated. Such debate was *better*, especially for the context, than the ideal of a speech-giving nineteenth century Congress. Norms encouraging exchange and discouraging solely expressive speech spurred the Senate (and hence the Congress) to pass laws which promoted the general welfare.

The important role played by the Congress, even in the First Hundred Days, illustrates the fundamental place of legislatures in our regime, and the insufficiency of purely presidential leadership. FDR was no doubt profoundly successful in the First Hundred Days, but the story of his success is not one of unilateral, heroic leadership. As aforementioned, Democrats dominated the House and utilized special rules to shepherd his bills to passage. The real key to the President's success, however, was that he and his advisers literally targeted his bills to be supported by the median member of the Senate. Roosevelt's pragmatic proposals were based on the knowledge that bills needed to meet muster with the median senator to pass. As evidence of this proposition, consider the fact that Roosevelt's proposals received equal critique from both conservative and progressive (i.e. liberal) members of the Senate and higher support from moderates. On a set of 34 key roll call votes, moderate support of the President's position averaged 78%, whereas progressive support stood at 41%, and conservatives voted in his favor 45% (Imler 1975, 353-7). The Senate, deliberating substantively over the pragmatic proposals of the chief executive often found reasons to urge changes, and thus hardly saw need to give the President cart blanche. Yet, the crisis and the president's wise strategy placed the median

senator in a position where it would hardly be rational to comprehensively object to a presidential proposal.

While Congress was clearly not the leader or initiator of most proposals in the Hundred Days, that is not a reason to evaluate Congress poorly over the course of this session. A healthy Congress is responsive, deliberative and representative so that the laws it passes will have the maximum chance of serving to promote the general welfare. These tasks do not require the Congress obstruct the president's agenda for its own sake, especially if what he proposes is basically coincident with the sense of Senate.

In crisis, the cooperation of a pragmatic president, and a deliberative Congress can yield large benefits for the polity, without leading to a permanent loss of authority or abdication for the Congress. As was seen in the example of deposit insurance and budget cuts, Congress could often be a force for moderating a president's instincts to react to crisis, when those instincts led to politically unpopular or inefficacious policies. It was not therefore, as if FDR brought a coherent program to the presidency, which was forced to be watered down by appealing to the "parochial and grasping Congress." On the contrary, "The President…brought no over-all plan of his own to Washington [and] picked and chose in his pragmatic way from among the proposals presented by competing brain trusters, congressmen, and pressure groups, and fashioned them into a program—a New Deal—that was 'highly experimental, improvised and inconsistent'" (Huthmacher 1968, 130). It was in fact men with coherent plans, such as Sen. Glass on banking, Sen. Wagner on NIRA, or Sen. Norris on the TVA, who pushed to form

something more coherent out of the FDR's agenda.[202] "Thus, the 'legislative miracle' came not as a result of Executive dominance over a helpless legislature, but because of the cooperation between two often antagonistic branches of government in the face of a deteriorating economic situation and a clear mandate for immediate action" (Imler 1975, 343).

Congress decided to grant some remarkable power to the executive in that special session of the Hundred Days, but declined to permanently delegate or abdicate to the presidency. Even in the House, where deference was the order of the day, Representatives remained clear-sighted: "I confidently believe" said Rep. Blanton (D-TX), "in the ability and courage of our President to put us back on a sound financial basis. When the crisis is a thing of the past, then we can resume all powers which we are now temporarily transferring to the President" (77 Cong. Rec. 131, 1933). Not to put too fine a point on the matter, it is quite evident that constitutional change is not required to achieve executive leadership of Congress, when that leadership is both necessary and popularly acclaimed.

While some of the products of the Hundred Days have come under scholarly criticism, the process settled on in Congress was no doubt generative of both renewed popular support and legitimacy for the regime. On September 1933, a parade rolled down the streets of Manhattan, with as many as two million looking on, to celebrate the passage

[202] At this point it is wise to reflect on the fact that coherent is not, by itself, a synonym for good. The coherence of Glass's banking bill nearly led to its failure – thankfully it was made "less coherent" by the addition of deposit insurance, primarily as advocated by Sen. Vandenberg, Vice President Garner and Rep. Steagall (Kennedy 1973, 219).

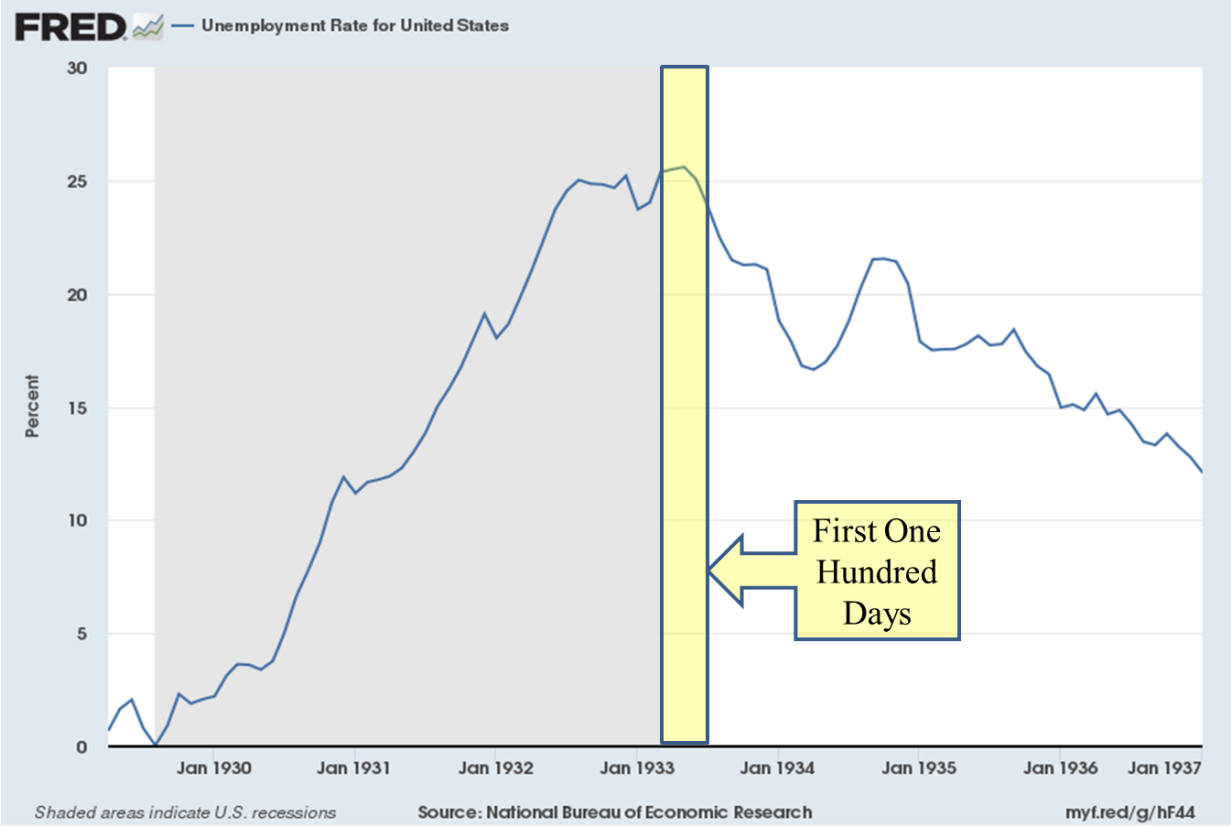
of NIRA. Infrequently do American celebrate astronauts (or even athletes) with the enthusiasm evident on that day; participation had to be limited by quota, and the parade, which started in mid-afternoon, extended well past midnight. It was organized, not by the Democrats of Tammany Hall, but by "seventy-seven trade and industry divisions—including law firm, taxi garages, florists, furriers, barbers, banks, and laundries" (Katznelson 2013, 228). Even the *Wall Street Journal*, which was somewhat cool to the president's agenda, admitted that "the celebration [was] one of the greatest in the nation's history" (228).

Beyond opinion (which can hardly be ignored in a democratic state), the Hundred Days corresponded with an end to the nation's economic contraction (see Figure 5-1). With stability restored to the banking system and some public works spending beginning to be felt, unemployment began a slow march downward. While not in the position to assess economic causality directly, it would not have been unreasonable for MCs to insist that they had done their part in beginning to arrest the Depression. Although its representativeness was not surely not complete, as explained above, and demonstrated by the hostility of NIRA, both as written as implemented, to the interests of black Americans,[203] (Katznelson 2013, 242) the Congress remained pivotal in promoting liberalism by responding to deep popular impulses and rationally deliberating over how

[203] The only cold rationalization for Congress's lack of representation consists in the fact that early (1932 – 36) New Deal white liberals exhibited little if any interest in making the Democrat Party platform responsive to the needs of black Americans. Only the Communist Party platform substantively addressed the human rights of black Americans in the early 1930s (Schickler 2016). While this is an explanation, it certainly does not suffice as justification.

to bring those impulses to efficacious fruition.[204] Congress, so far from being a relic, appeared essential to the economic recovery of the mid-1930s.

Figure 5-1: Unemployment in the United States, 1929-1937



[204] "In the final analysis the Seventy-Third Congress in the hundred days way much like other Congresses. It passed more [landmark] legislation, but faced the most severe economic crisis in the nation's history. It was more responsive to the President, but in this merely followed the dictates of constituents…" (Imler 1975, 348).

Epilogue: The Contemporary (115th) Congress

The purpose of developing a comprehensive conception of congressional health is to make systematic evaluation of the institution of Congress possible. Given contemporary worries regarding the state of America's national lawmaking body, it is important to offer a first-pass evaluation of the present Congress.[205] While some caution needs to be taken in evaluating the 115th Congress, since its history has yet to be written, it labors under three self-inflicted difficulties: (1) its internal structures for policy initiation and formulation forfeit rather than capitalize on the diversity of views present in the House and Senate; (2) MCs systematically fail to make use of the rich contemporary environment of popular feedback for proposed policy (protests, polls, virtual town halls, social media, etc.), imperiling the ability for Congress to substantively respond to popular preferences; and (3) its norms and rules discourage deliberative exchanges regarding the merits of policy being proposed.[206] In order to justify and present evidence for these claims, I will chiefly investigate the efforts of Congress in addressing two pivotal agenda

[205] Some readers may instead wish that epilogue had turned to a process of hypothesis generation regarding the causes or conditions which gives rise to (or inhibit) congressional health. Given the case studies marshalled in this work some speculative possible variables of interest include the size of the operating majority in the Congress, the degree of partisan or sectional polarization in the body or in the nation at large, among many others. While this potential *causal* analysis presents an exciting opportunity for future research, I stay focused in this work on the question of *what congressional health entails* rather than *why particular congresses succeed or fail*. Extending this work to the contemporary Congress is thus in the service of continuing to articulate what makes a Congress functional or dysfunctional.

[206] One ought to notice the problems of Congress do not primary concern (1) lack of productivity; (2) lack of comity/civility; (3) partisan polarization, as such. It does seem possible that each of these three factors inhibit the Congress from developing appropriate reforms to address the bodies difficulties, but this requires further *causal* testing. See previous footnote.

items in 2017 and 2018: the attempt to repeal the Affordable Care Act (ACA or Obamacare) and the "open debate" regarding DACA.

Though careful observation of those processes does not paint a flattering picture of the U.S. Congress, one relatively surprising attribute prevents the Congress from being labeled a "failure:" MCs themselves seem to be very aware of the fact that its deliberations and lawmaking process are not operating in an ideal fashion. Such self-consciousness would not generally qualify as an attribute of health, especially given the fact that MCs do not fully appreciate the extent of their difficulties, often speculating, for instance, that a return to the "regular order" will fully rectify the institution's disorders. Nevertheless, MC's awareness that Congress is dysfunctional has had observable consequences for member behavior. At critical points in 2017 MCs were compelled to oppose the products generated by Congress's broken processes, such as the AHCA. More impressively, MCs opposed these products at some political cost to their partisan teams. Such a body is reasonably described as unhealthy; but, its surprising self-restraint indicates that it has not yet succumbed to full-blown failure. Congress is perched on a precipice, where a continued acknowledgement of its difficulties without a concomitant effort at reform raises the danger of complete failure, in the foreseeable future.

REPRESENTATION: LIMITED VIEWS CONSIDERED IN POLICY INITIATION

The popular impression that the Congress fails to accurately represent the American people contributes to the American people's disgust for Congress. Unfavorable polls are a dime a dozen; in one instance 59% of Republican and Republican-leaning

respondents to a Pew Research Center (2015) poll said that even congressional *Republicans* were not doing a good job representing their views. Pew did not even ask the participants to evaluate the institution as a whole, which would have doubtlessly yielded an even higher degree of distrust. Truly dispiriting degrees of popular approval for Congress continue in the current Congress: Only 14% of registered voters in a recent Rasmussen (2018) poll said evaluated the MCs as a good or excellent. Since constituents do not feel well served by their representatives, it is worth taking at face value the proposition that MCs are not representing voters appropriately. Indeed, examining the lawmaking process in the 115th Congress, it becomes quite clear that Congress is not operating in a representative fashion; the complication is that its representative deficit is not the one frequently appearing in journalistic narratives.

Representativeness, in this study, is conceptualized as the ability for Congress to bring diverse views and interests to bear in the lawmaking process in some rough proportion to the existence of those same views and interests in the polity at large. One common intuition is that the growing polarization of parties prevent diverse views from being expressed in Congress. A partisan Congress, the accusation goes, takes the nation's remarkable viewpoint diversity and flattens it into two diametrically opposed and homogeneous teams (Muirhead 2014, Drutman 2018, Wallach 2018). Yet, when one observes even a heated partisan debate in Congress, MCs express diverse views generally spanning the large range of publicly expressed viewpoints in the society.

Consider the issue of DACA. During President Obama's term Deferred Action for Childhood Arrivals (DACA), an executive action, was promulgated. This policy

effectively made a select group of undocumented immigrants who were brought to the United States when they were very young eligible for temporary work permits and protected them from deportation. In 2017, President Trump decided to wind down this program due to concerns regarding its constitutionality, but delayed implementation of its revocation to give Congress time to act to protect its recipients (Romo et al 2017). DACA thus found its way onto the agenda of Congress.

Views among the citizenry regarding the substance of DACA run the gamut. Some object to the idea that "amnesty" should be tendered to anyone who violates the law, regardless of circumstances, and hold that DACA recipients not only should not be eligible for permits, but should in fact be deported from the United States.[207] On the other end of the spectrum, an argument exists that children cannot to be made responsible for the immigration law violations of their parents. Many thus support making the presence of DACA individuals in the nation legal or even placing them on a path to citizenship. While it is impossible to fix with precision the exact contours of public opinion on this question, consistent majorities respond in favor of some version of legalization for individuals in the DACA program.[208]

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[207] At a speech by Sen. Kamala Harris (D-CA) in favor of citizenship for so-called Dreamers (generally the same individuals eligible for DACA), a group of individuals protested this proposal. Opposing Sen. Harris's message "was … a scattering of red 'Make America Great Again' hats and people holding signs that 'Deport dreamers and their parents,' 'Build the wall, keep them out' and 'Defund sanctuary cities.'" (Wisckol 2017).

[208] Sanders (I-VT), relatively accurately summed up matters on the Senate floor: "On February 5, in a Monmouth poll, when asked about Dreamers' status, nearly three out of four Americans support allowing these young people to automatically become U.S. citizens as long as they don't have a criminal record. In other words, the votes that are going to be cast hopefully today, maybe tomorrow, are not profiles in courage. They are not Members of the Senate coming up and saying: Against all the odds, I believe I am

Contrary to expectations, views expressed by members of Congress run the full gamut of popularly expressed views, with virtually any shade of opinion from deportation to citizenship expressed. Sens. Lindsey Graham (R-SC) and Richard Durbin (D-NY) are in favor of a path to citizenship for Dreamers. Representative Ed Royce (R-CA) represents a moderate view as he is in favor of legal status for DACA recipients but is opposed to a path to citizenship (Wisckol 2017). Sen. Chuck Grassley's (R-IA) released a more law-and-order oriented statement on the day DACA's suspension was announced. He called DACA "executive overreach" and stated that any solution must uphold "the rule of law" and "encourage lawful immigration" Further, he said that any compromise on this issue must address "the status of those who have been unlawfully brought into this country" (Grassley 2017). At the extreme end of viewpoints, Sen. Ted Cruz (R-TX) opposes any form of legalization as a violation of the rule of law and thus voted against opening debate on DACA on the Senate floor (154 Cong. Rec. S868, 2018).[209]

MCs even have public negotiating positions regarding their preferences and what they will "trade" to see these views enacted in statute. Sen. Jeff Flake (R-AZ) supports a path to citizenship, but will accept a three-year continuation of DACA in exchange for fully funding the Trump administrations border security proposal (Flake 2018). Sen. Kamala Harris (D-CA) supports funding for border security as part of a DACA bill, but

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going to vote for what is right. This is what the overwhelming majority of the American people want" (164 Cong. Rec. S942, 2018).

[209] Cruz described the proposals under debate in February as amnesty, even the Republican plan based on President Trump's "4 pillars." "If this body gets 60 votes for one of these amnesty proposals," Sen. Cruz said, "then it is incumbent on the House to stop it, much like with the Gang of 8" (164 Cong. Rec. S1145, 2018)

refused to appropriate any money for a border wall because she believes "the appropriation of $25 billion for a border wall is a waste of taxpayer money. A wall will not secure our border and [she] remain[s] concerned those billions of dollars may also be used to implement this Administration's anti-immigrant agenda – one that targets California and its residents" (Harris 2018). Sen. Grassley opposed earlier proposals to address DACA without a border wall or changes to legal immigration as "a massive amnesty to millions of people who're in the country unlawfully" (Grassley 2018). MCs thus express and stand behind views far more diverse than the talking points of two warring camps.

Co-sponsorship of bills in the House of Representatives provides further evidence that congressionally expressed views are roughly proportional to those possessed in the society at large. The USA Act of 2018, which combines conditional permanent legal status for Dreamers with border security funding and an increasing in general funding for immigration processing and enforcement, was introduced by Rep. Will Hurd (R-TX). This bill was cosponsored by 55 other representatives including 27 other Republicans and 28 Democrats.[210] In addition to these 28 Republicans, a further 92 Republicans co-sponsored the Securing America's Future Act of 2018, which is more conservative, but still grants legal status (but not a path to citizenship) to DACA recipients.[211] Assuming that the Democrats who did not cosponsor Hurd's bill have views to the left of his bill

[210] "H.R.4796 – USA Act of 2018." *Congress.gov*. Accessed March 23, 2018. <https://www.congress.gov/bill/115th-congress/house-bill/4796>

[211] "H.R.47960 – Securing America's Future Act of 2018." *Congress.gov*. Accessed March 23, 2018. <https://www.congress.gov/bill/115th-congress/house-bill/4760>

(i.e. they prefer a more direct path to citizenship, or do not want to appropriate more money for border security), a wide majority of 313 MCs in the House have expressed support for some version of DACA, very much in line with wide popular majorities in favor of this same position.

Given this fact, how is it possible that as of May 2018 the Congress has yet to act favorably on any DACA related bill? The answer is disappointingly clear: the process for integrating the preferences of the House and Senate into the form of generally acceptable bills has broken down. Rather than develop a bill, which will then be reported to a relevant committee for mark-up and then a vote on the floor, policy formulation in the 115th Congress has been captured by a centralized and oddly ad hoc process in turn cartelized by party-leaders. Unorthodox lawmaking has become the norm, with negative consequences for representativeness in the policy process.

While the committee process does not automatically lead to an efficient integration of diverse views (see Chapter Three), avoiding committees in the manner practiced in the 115th Congress can prime bills for representative failure. Consider the process for dealing with DACA in the Senate. Rather than develop a bill, which would then be sent to the Judiciary committee for mark-up, Senate majority leadership (including the chairman of the Judiciary committee, Grassley, and Majority Whip, John Cornyn [R-TX]) formed an ad-hoc working group to frame a DACA bill. This working group consisted of the two leaders and five other individuals, Sens. Tills (R-NC), Perdue (R-GA), Lankford (R-OK), Cotton (R-AR), and Ernst (R-IA) (164 Cong. Rec. S856, 2018). Whereas the Senate as a whole contained views roughly consonant with the

population at large, this "committee" failed to contain any moderate Republican voice on DACA, to say nothing of moderate or liberal Democratic views. When the proposal framed by this group came to the floor senators spoke of the great compromises made within the working group to find a common ground.[212] In terms of the group itself, this was undoubtedly true, as Senators Cotton and Perdue were on the record opposing all efforts at "amnesty" before the unveiling of this bill and had earlier in the Congress proposed a bill to halve legal immigration (Brownstein 2018). Yet, in all fairness to the claims of compromise within this group, it is no great sign of *representation* that all views from far-right to center-right were consulted in the formation of a bill. Predictably, this bill failed to find support from the Senate at large, since it failed to even include a consideration of the chamber median on this issue – a moderate Republican – and it went down in failure with fewer than 40 votes in its favor (164 Cong. Rec. S1148, 2018).

Demonstrating that this process is not an outlier, a similar process played out regarding the drafting of the bill to replace the ACA (Obamacare) in the Senate. Rather than utilizing the committee process, Majority Leader Mitch McConnell (R-KY) opted to convene an ad hoc working group to frame a proposal to repeal and replace the ACA. The thirteen-member working group thereby formed famously failed to contain a single female senator and drew media attention for this reason (Pear 2017). While the working

[212] Majority Leader McConnel (R-KY) claimed that, "This legislation is a fair compromise that addresses the stated priorities of all sides" (164 Cong. Rec. S856, 2018). Sen Tillis (R-NC) described the process as fair and broad: "Now, this week, we have an opportunity to debate one that I think works. No. 1, there is broad consensus. Even among people who have never supported a path to citizenship before, there is broad consensus that this is a workable, viable, compassionate framework. So, 1.8 million DACA-eligible persons qualify for a path to citizenship [in this proposal]" (164 Cong. Rec. S863, 2018).

group's failure to descriptively represent the Congress was noticeable, recall that the framework of representation in this work focuses mainly on substantive representation of interests and views. Much less remarked upon is the fact that this working group misrepresented both views and interests that would be relevant to proposing a policy to replace the ACA.

Demonstrating the mal-representation of the ACA repeal process requires reasoning about several key national divides. Operating geographically, one might split the nation into the coasts and the interior, with 20 states bordering the Atlantic or Pacific Ocean, and 30 in the interior. It is well-known that the nation's coastal states differ from the rest of the nation; indeed, they differ to the extent that, in the 2016 election, Hillary Clinton prevailed in 14 of the 20 coastal states, whereas President Trump won 24 of the 30 interior states. In sum, coastal states are generally peopled by individuals considerably more liberal than those who live in states which do not border the Atlantic or Pacific. Operating in terms of policy relevant to the ACA, the states might also be cleaved with respect to whether they decided to expand Medicaid as provided for under that statute. 32 states adopted the Medicaid expansion and 18 declined to do so. Senators obviously had different interests at stake depending on whether they were from a state which covered hundreds of thousands of residents with heath care access provided by new federal money.

In terms of these views and interests, senators ought not to be automatons. The design of Congress does not require that MCs deterministically present views favorable to conservative ideology if they are from a state in the nation's interior, or advocate for

the continuation of the Medicaid expansion if they represent a state which has done so. MCs are not instructed delegates, pledged to an unalterable program held by their constituents. But the electoral connection nevertheless does operate to nudge MCs to pay attention to the views and interests of their constituents. The electoral connection can be in some sense defeated, however, by improperly constituted internal structures, such as the working group working to repeal the ACA. Whereas 40 of the nation's senators hail from the nation's more liberal coastal states, only one Senator from the working group came from such a state. While 32 states had expanded Medicaid, only five of the thirteen members came from those states. And while the Senate was majority Republican, in 2017 it included 48 Senators who were Democrats or caucused with Democrats. The working group had none; it was an exclusively Republican affair. It was not surprising when a bill proposed by this group, the BCRA, ignominiously failed to receive majority backing when it came to a vote on the Senate floor, despite the great pressure exerted on Republicans to vote for any bill that successfully fulfilled their campaign promise to repeal and replaced the ACA (163 Cong. Rec, S4183, 2017). In the end, the problem with Congress is not precisely that it "tends to flatten the nation's diversity into two polarized, warring camps," (Wallach 2018), but instead that essential parts of the nation's diversity are simply ignored at the initiation stage of legislation.

THE ELECTORAL CONNECTION UNYOKED: UNRESPONSIVENESS

The problems in the legislative process unfortunately do not end in the state of initiation, they continue throughout the legislative cycle. After an especially salient bill

becomes public, it is natural that constituents will begin offering their opinions on the proposed enactment, whether by calling or emailing their representative, attending a town-hall, or being queried for their view by public polling outfits. In the present, the sheer quantity of information regarding the preferences of the public is potentially overwhelming. Recalling that one of the preeminent attributes of congressional health is a thorough-going attempt to make laws that are acceptable, in principle, to a popular majority, it is important for the institution to structure ways for information regarding the potential popularity of bills to brought into the lawmaking process. The 115th Congress fails to exhibit much attention, however, to this task, as its majority party often assumes that popularity of its bills flow automatically from election results, and as institutional capacity for transmitting preferences from the society at large into the institution, such as town halls, correspondence, and calls, is degraded by both norms and a lack of resources devoted to this task

In the 115th Congress, MCs of the majority party often exhibit behavior suggesting that responding substantively to expressed citizen concern is irrelevant to the task of drafting and passing a bill. Polling data on the Republican effort to repeal and replace the ACA (Obamacare) confirmed time and time again that constituents who were aware of the bill did not take a great liking to it. In general, the average poll showed that disapproval outweighed approval by more than twenty percentage points (Bacon 2017). Nevertheless, Republican boosters of the bill continued to insist that they had promised to repeal the ACA and thus would do so. Republican leaders, such as Majority Party Whip Cornyn stated that the bill which they had drafted, “is not perfect, but it is better than the

status quo, and we intend to do our duty" (163 Cong. Rec. S4415). While perhaps fitting in a Gilbert and Sullivan number, statements such as these were fundamentally unresponsive to what was occurring in their constituencies. On one hand, Republicans were certainly correct to note widespread antipathy to the ACA and government interference in health care provision. Yet, the problem was that constituents objected to the specific *means* chosen by congressional Republicans to fulfill their promise to repeal (or fix) the ACA. Indeed, their bill was so unpopular, by one reasonable estimate "there are only about 80 congressional districts — out of 435 — where support for the bill exceeds opposition" (Silver 2017).[213] Simply put, there is little normative support for the passage of a bill, like the AHCA (the House's repeal and replace plan), which is supported by fewer than 100 of the nation's 435 geographically demarcated districts.

And while perhaps Republicans felt justified in being warry of polling after the reputed failures of those instruments to predict Donald Trump's victory in the 2016 elections, significant information existed outside of public opinion polling to suggest that the AHCA was not approved, in principle, by a popular majority. In some sense, the signs of dissent emerged immediately and reasonably: The election of 2016 was very tightly contested; congressional Republicans won a plurality but not a majority of votes cast across the nation for Representatives. The scope of opposition surprised many MCs,

[213] A further estimate suggested that the bill was so unpopular that in only *three* constituencies did it have majority support. Silver developed this estimate by taking advantage of a March YouGov poll which broke down support or opposition to the bill by presidential vote choice in the last election. Silver then "allocated the Trump, Clinton and other voters in each district based on their overall levels of support or opposition to the bill in the YouGov poll." (2017).

however, as protests emerged immediately and vociferously to the proposals emerging out of the 115th Congress. At one event Rep. Stefanik (R-NY) heard from constituents regarding the AHCA; "No one other than Stefanik had anything good to say about the bill" (Hirsch 2017). By February of 2017 (one month into the first session of the 115th Congress), "many Republicans [chose] not to hold events at all, wary of protests that might greet them" (Gabriel et al 2017). Given the responsibility of Congress, and especially the People's House, to bring popular opinion to bear, this was already a dubious step. The reasoning publicly expressed for these decisions, made a bad situation worse. "Republicans have accused the protesters who have roiled town hall-style meetings of not representing a true grass-roots outpouring but instead being an AstroTurf movement paid by shadowy groups" (Gabriel et al 2017).[214] While some Republicans such as Sen. Grassley pushed back against this narrative, insisting that the protestors were genuine constituents, the actions of majority party MCs are clear: Republican members of Congress held 133 town halls from February through April, only to hold 2 in all of July – the pivotal month were the Senate almost passed a repeal of the ACA (Stein 2017). One key role of a legislature, especially one with geographic representation with defined representatives, it to provide an ear to popular grievance. In the 115th Congress, however, MCs inserted earplugs to drown out unfavorable response to the bills which they had "crafted."[215]

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[214] Rep. Jason Chaffetz (R-UT) accused the Democrats of "bullying" in a "concerted effort" to create chaos at Republican town halls (Nelson 2017).

[215] The subsequent section reveals that not very much "crafting" goes into developing policy proposals at present.

The actions of MCs are perhaps more culpable given the large citizen interest in the goings-on of Congress. In the contemporary era a great deal of discussion and worry concerns the quantity and quality of citizen's understanding of and interaction with the political process. Citizens are widely accused of being disconnected, ignorant and uninterested in holding their leaders to account. Yet, in an important respect, contemporary citizens are remarkably engaged in trying to contact their representatives, as an overwhelming flood of letters, emails, and calls deluges the capitol. "Constituent correspondence to the Senate," for instance, "increased by 548 percent between 2002 and 2010" (Finley 2017). This trend continued into the 115th Congress. "The office of Sen. Bob Casey, a Democrat from the large battleground state of Pennsylvania, has received more than 50,000 letters and emails opposing DeVos' confirmation as education secretary" (Hefling 2017). Not simply a feature of the first moments of session, engagement has continued throughout the session. "Between 2016 and 2017, calls, emails, and letters to representative Moulton's office alone grew from 500 a month to 3,000 a month—and that's in an almost entirely Democratic district with a Democratic congressman" (Lapowsky 2018). Such a concerted effort to contact their representatives raises two questions: (1) are MCs listening? And (2) are they responding?

Congressional norms and limited resources devoted to this task impede the process of listening and make responding very difficult. In terms of norms, MCs publicly express little interest in hearing from those who disagree with them. In fairness to MCs, such lack of interest is a more or less universal human behavior; in fairness to constituents, representatives have voluntarily agreed to be lawmakers, taking on all duties

which are entailed in being an MC. Rep. Gohmert (R-TX), for instance, justified his opposition to meeting with constituents by sketching a picture of town hall participants as violent revolutionaries: "Unfortunately, at this time there are groups from the more violent strains of the leftist ideology, some even being paid, who are preying on public town halls to wreak havoc and threaten public safety" (Gohmert 2017). Even reasonable norms, like a preference for hearing from one's own constituents rather than Americans at large, are exploited and expanded beyond due bounds. After being deluged with calls suggesting that Sec. DeVos was unqualified, Sen. Scott (R-SC) said in a statement that while he "wants to hear from every one of his constituents…out-of-state callers are doing a disservice to our folks who are trying to reach the office" (Hefling 2017). As a Senator, one is not merely an ambassador from a state, the decisions made in that body affect all citizens. Sec. DeVos was, when confirmed, placed at the head of the Department of Education across the nation, not just in South Carolina. Public facing expressions are perhaps not even biggest problem; work with congressional staffers suggest that "Constituent input is used most universally to back up existing policy agendas…. And constituent correspondence is consistently delegated to the most junior staffers, whose turnover, experience, and capacity inhibit innovation" ("From Voicemails" 2017, 9). MCs do not seem to be listening especially closely.

MCs are moreover unable to respond to the sheer amount of correspondence they receive based on self-imposed funding caps. The lack of congressional resources devoted to responding to constituents is part of an overall decline in the staffing of Congress. As an example of this wholesale decline in congressional capacity, consider one

representative committee of Congress. “In 1975, the Commerce Committee had 112 staffers, which increased to 162 by 1985. By 2015, staffing on the committee had fallen to eighty-three” (Drutman 2017).[216] These cuts at the committee level have been carried out in parity with congressional staff for individual MCs. “Budgets for House members' personal offices had been cut by 21 percent since 2011” (Lapowsky 2018). A substantive lack of staffing means that a third of those who email Congress receive no response. “Nearly half of those who did receive a response found it lacking, usually because they believed it failed to actually address their issue. The reason for those dismal results is simple: Members of Congress are only allowed to hire eighteen staffers each. That means that as the volume of email grows, those dozen-and-a-half staffers are stuck with more work, and Congress can't hire more people to help” (Finley 2017). Funding is scarce, but within the available amount of resources, MCs have made their priorities painfully clear.

In an age of large deficits, the popular pressure to cut the budget of Congress is real, but one of the most essential attributes of Congress concerns that body’s openness to influence from its constituents. Recall that it was considered a landmark in the history of democratization for constituents in the First Congress to be able to sit in the gallery and watch the House of Representatives debate petitions which they had themselves submitted. It seems perverse to think of the current Congress, an institution embedded

[216] “House staffing levels underwent an even sharper decline after Newt Gingrich became speaker in the 1990s and slashed committee budgets. Neither chamber has recovered. Nonpartisan sources of expertise in Congress have also declined. The Government Accountability Office and the Congressional Research Service, which provide nonpartisan policy and program analysis to lawmakers, now employ 20 percent fewer staffers than they did in 1979” (Drutman 2017).

within a more democratic polity, seem nearly closed off from the public at large. And rather than being a problem of corruption or special interest influence, the issue seems to be will and desire, which is potentially as much or more troubling than the former.

DELIBERATION: MISSING ON THE FLOOR

The deliberative deficit of the contemporary Congress is greatly remarked upon by congressional observers and experts, but the scale of current difficulties must nevertheless be emphasized. The end of the regular order has led to a dearth of committee hearings and mark-up sessions on bills and reduced the quality of the few hearings that were conducted (Lewallen et al 2015). As mentioned above, the Congress has reduced its own resources for committee staffing and the like, which can help MCs to make more informed determinations regarding the merits of the thousands of bills that are introduced in a given legislative session (Wallach 2018).[217] In this section, however, I would like to focus especially on floor debate. In 2017 and 2018, congressional deliberation was hampered by norms regarding debate on the floor, as well as procedures that eliminated the possibility for meaningful deliberation. The deliberative muscles of the Senate have atrophied to the point that when Majority Leader McConnell structured an "open floor debate" on DACA, the floor was not open, and there was no substantive debate. Just as in the antebellum Congress, senators failed to make substantive contact with one another's arguments, preferring to provide expressive speech for their constituents back home.

[217] "Even as the executive branch's responsibilities have ballooned, legislators have thinned the ranks of their own staffs and diminished their salaries" (Wallach 2018).

The special rules used to organize "debate" in the 115th Congress do not in fact encourage meaningful deliberation regarding the merits of proposed legislation. Let one turn, for instance, to the attempt to repeal the ACA. By July of 2017, several efforts to repeal the ACA had bogged down. On July 27th a new proposal was being floated by Republican legislative leaders called a "skinny repeal," which would repeal the insurance mandate in the ACA, defund Planned Parenthood, and encourage states to get exemptions from various other mandates regarding the scope of insurance which could be sold in exchanges under that law. When it was made public for the first time, around 10:00 PM on the evening of July 27th, the Senate gave unanimous consent to for a two-hour debate over a motion to recommit the "skinny repeal," with time equally divided between Democrats and Republicans. In the first place, two-hours was given to discuss a fundamental change in the American health care system, with no pressing deadline. The Senate debated the emergency bank bill in 1933 for longer than this; the House of Representatives would have considered such a time limit "martial law" in 1933. While clearly partisan as well as procedural concerns abounded, Senate Democrats expressed astonishment at this process. Sen. Murphy (D-CT) said that, "this process is an embarrassment. This is nuclear-grade bonkers what is happening here tonight. We are about to reorder one-fifth of the American healthcare system, and we are going to have 2 hours to review a bill which, at first blush, stands essentially as healthcare system arson" (163 Cong. Rec. S4401, 2017). Under no pressing emergency, there is little reason for the Senate to operate under such stark control.

Compounding this limited time was the manner chosen by the parties' designees for dividing it. Rather than having Democrats and Republicans alternate, the Democrats presented their broadsides against the bill in an hour of continuous declamation, with no substantive response by Republicans. When the Republican time arrived, bill manager Sen. Enzi (R-WY), undertook to filibuster his own bill, discussing health co-ops and other features of health-care policy unrelated to the bill at hand. A surreal exchange occurred when the Democrats attempted to force a substantive exchange regarding the bill:

> Mr. ENZI. Well, where are the suggestions [you Democrats have] for making it as near perfect as possible? We put up a lot of——
>
> Ms. HEITKAMP addressed the Chair.
>
> Mr. ENZI. I am not asking that as a rhetorical question. Think about it for a little while, come up with constructive suggestions.
>
> The PRESIDING OFFICER. The Senator from Wyoming has the floor.
>
> Ms. HEITKAMP. Would the Senator yield for a question?
>
> Mr. ENZI. No, I will not yield for a question. (163 Cong Rec. S4408, 2017).

Sen. Enzi asked for Democrats to propose substantive improvement to his bill, insisted it was not a rhetorical gesture, and then refused to yield to a Democrat when they asked to

respond.[218] Such an exchange, or rather the deliberate attempt to avoid a genuine exchange on the floor of the Senate, reveals a settled norm *against* providing substantive arguments in favor of or opposed to a given bill or amendment on the Senate floor, when someone might be on hand to give counter-arguments. The floor is, in reality, not designated for lawmaking deliberation or negotiation. Only under the sway of such a norm is the suggestion of Sen. Cornyn, that the Democrats did not participate, legible (163 Cong. Rec. S4415). Democrats had talked on the floor for an hour; where they had absented themselves from (or been excluded, depending on who tells the story) was the informal negotiation actually taking place regarding the bill off the floor.

The pattern of floor usage prioritizing "expressive speech" continued during the "open debate" on DACA held in February of 2018. While Sen. Grassley proclaimed that "Leader McConnell has honored his commitment and allowed us to have an open, fair immigration debate this week" (S895), reality did not bear out this assertion. Curiously enough, the first aspect missing from debate was deliberation of any kind. Even though this was supposed to be a special week, the floor looked just like any other in the contemporary Congress, with senators presenting prepared speeches to an empty room. Worse, when it came time to give her speech the next senator in line would often fail to even address the existence of the previously given speech. An example of from the

[218] Other oddities occurred off the Senate floor. Accurately recounting what he had seen on television, Sen. Kaine (D-VA), reported on what "Senator GRAHAM [had said] just a few hours ago. He described the bill that is now on the floor, the skinny repeal, the skinny bill, as a policy is a disaster as a replacement for ObamaCare. It is a fraud. Is ''fraudulent disaster'' the best that the United States Senate can do now?" (163 Cong. Rec. S4407, 2017). Sen. Graham would go on to vote in favor of the skinny repeal.

Congressional Record during this "open debate," is given below (see Figure 6-1). In the illustration that follows, one can see that Sen. Cornyn gains the floor from Sen. Durbin and begins talking on an entirely different subject than immigration. Juxtaposing this type of "debate" with an example from an earlier Congress makes for a downright alarming comparison. Figure 6-2 represents a page chosen from the *Congressional Record* during Senate debate regarding the banking emergency of 1933. The first thing which leaps off the page is the number of interlocutors present on the page (five), and the tendency of the speakers to directly answer one another's arguments. Keeping in mind that this earlier debate was carried out under immense time and presidential pressure "to get things done," it is yet more remarkable that Senators are responding to one another, and genuinely attempting to figure out if the proposal from the White House will be able to resolve the crisis.

Figure 6-1: Page of the *Congressional Record* from February 12, 2018

When it comes down to the fundamentals of the debate that faces us in the Senate, the American people, by overwhelming majority numbers, have picked their side on this. The question is whether Democrats and Republicans here can find a middle ground to agree on. It remains to be seen.

I have been engaged in this debate now for 17 years. That is a long time even by Senate standards. It was 17 years ago when I introduced the DREAM Act. It was 17 years ago when I said: If you were brought here as a kid, a baby, an infant, a toddler, even a young teenager and you had no voice on where your family was headed, it shouldn't be used against you. If you have had a good life, gone to school, are not a criminal, and offer some promise for a job or future in America, you deserve a chance to earn your way to legal status and to citizenship.

I come to this with some prejudice. My mother came as an immigrant to this country. She was brought here at the age of 2. She was the first Dreamer in my family, and she was brought here from Lithuania, where she was born. Her mother brought her to this country and didn't speak English, but she brought her three kids here in the hope that they could find opportunities that they couldn't find back in Lithuania. For them, the land of opportunity was the city of East St. Louis, IL, which is where I was born and I grew up. It offered immigrants a lot of tough jobs but opportunities to maybe create a better life for their kids. When it came to this kid, my mom and her family gave me a chance to serve in the U.S. Senate. That is my story, that is my family's story, but that is America's story. Time and again, that is America's story. My grandfather didn't come here with any extraordinary skills. He came here with a strong back and a determination to work and feed his family, and he did it; my grandmother, the same. That is the story of this country.

We are going to debate this week in the U.S. Senate whether it will continue to be the story of this country. Some will argue that we have had enough of these immigrants; we don't need any more of them. Others, I hope, will realize that we have an opportunity here—an opportunity not only to allow people to come to this country and be part of this country's future but to create the kind of diversity that makes us unique in the world, the diversity of immigration. I think we can come up with a reasonable answer to this. There will be differences of opinion, strongly held beliefs on one side or the other.

The question is whether this body, the U.S. Senate, with 49 Democrats and 51 Republicans—just about as close as you can get—can reach a common, bipartisan agreement. Wouldn't it be a headline across America if this Senate actually had a debate and this Senate actually agreed on something—a bipartisan agreement. I see some heads nodding, and I won't say where, but it is somewhere in this Chamber—people who are following this debate. I think we can do it. I really believe we can. It will be a real test for us, but that is what we are sent to do, isn't it? It is not to debate, issue press releases, and wave our fists at one another, but to actually tackle a problem.

The President has created a challenge—a challenge that involves hundreds of thousands of lives. Now it is our turn to meet that challenge as a Senate and to show we are up to the job.

I yield the floor.

The PRESIDING OFFICER (Mrs. ERNST). The Senator from Texas.

FOREIGN INVESTMENT RISK REVIEW MODERNIZATION ACT

Mr. CORNYN. Madam President, I want to begin my remarks today by discussing a piece of bipartisan legislation that I have sponsored with our colleague, the senior Senator from California, Mrs. FEINSTEIN. In all likelihood, this bill is not something you are going to see reported on in the evening news. It is rather obscure in its origins, but it is extraordinarily important, and I will explain that in just a moment. It is called the Foreign Investment Risk Review Modernization Act, and it concerns another acronym—the Committee on Foreign Investment in the United States, known as CFIUS. It is the Committee on Foreign Investment in the United States.

CFIUS is a multiagency panel headed by the Treasury Department, and Secretary Mnuchin chairs that panel. Its job is to vet foreign investments to determine if they pose a threat to our national security. I am an ardent supporter of free trade, and I strongly support more foreign, direct investment in the United States. Unfortunately, some of our adversaries—most notably China—have altered the strategic landscape and are not playing by the same set of rules. China has weaponized investment in an attempt to vacuum up our advanced technologies and simultaneously undermine our defense industrial base.

As it acquires U.S. firms, technology, and intellectual property, as well as the know-how to put them to use, the risk is that the Chinese Government, which has its tentacles not only in state-owned Chinese companies but also in so-called ''private'' Chinese firms, will get its hands on these capabilities and use them against us. This has already been shown to have happened in a number of documented cases.

Standing by and allowing our national security to be compromised through these continued transfers of certain dual-use technology and know-how to China would be highly irresponsible. That is why the CFIUS—the Committee on Foreign Investment in the United States—process needs to be updated and modernized. At its core, the bill I have introduced would expand the scope of reviewable transactions to more effectively address national security concerns.

CFIUS's jurisdiction has not been updated in more than 40 years, and since that time, global threats like the one posed by China have grown in complexity and scope. China has studied our laws, and it has found ways to game the export control system and to evade CFIUS review.

This bill has strong support, not just from the White House but also from Treasury Secretary Mnuchin, Commerce Secretary Ross, and the Attorney General of the United States, Jeff Sessions. It has also been endorsed by Secretary of Defense Mattis, as well as three of his predecessors, two former Directors of National Intelligence, and many others.

In industry, major U.S. companies are starting to recognize the risks here, as well, and several have stepped up and endorsed this bill. However, there is a very small group of other U.S. firms that are actively opposing CFIUS modernization, having decided their bottom line is more important than our Nation's security. Unfortunately, they are starting to release some of their false claims about this legislation into the press that really don't hold water on further examination. And their own track records, when it comes to handing over sophisticated, dual-use technology and know-how to China, undercut the credibility of their arguments. I would call this a patriotism deficit on their part.

In order to perpetuate the status quo and prevent statutory updates that are both urgent and necessary, this handful of firms and their proxies like to point to exaggerated, doomsday scenarios. These are typified by the words of one detractor, who recently stated that the new legislation would ''literally paralyze business.''

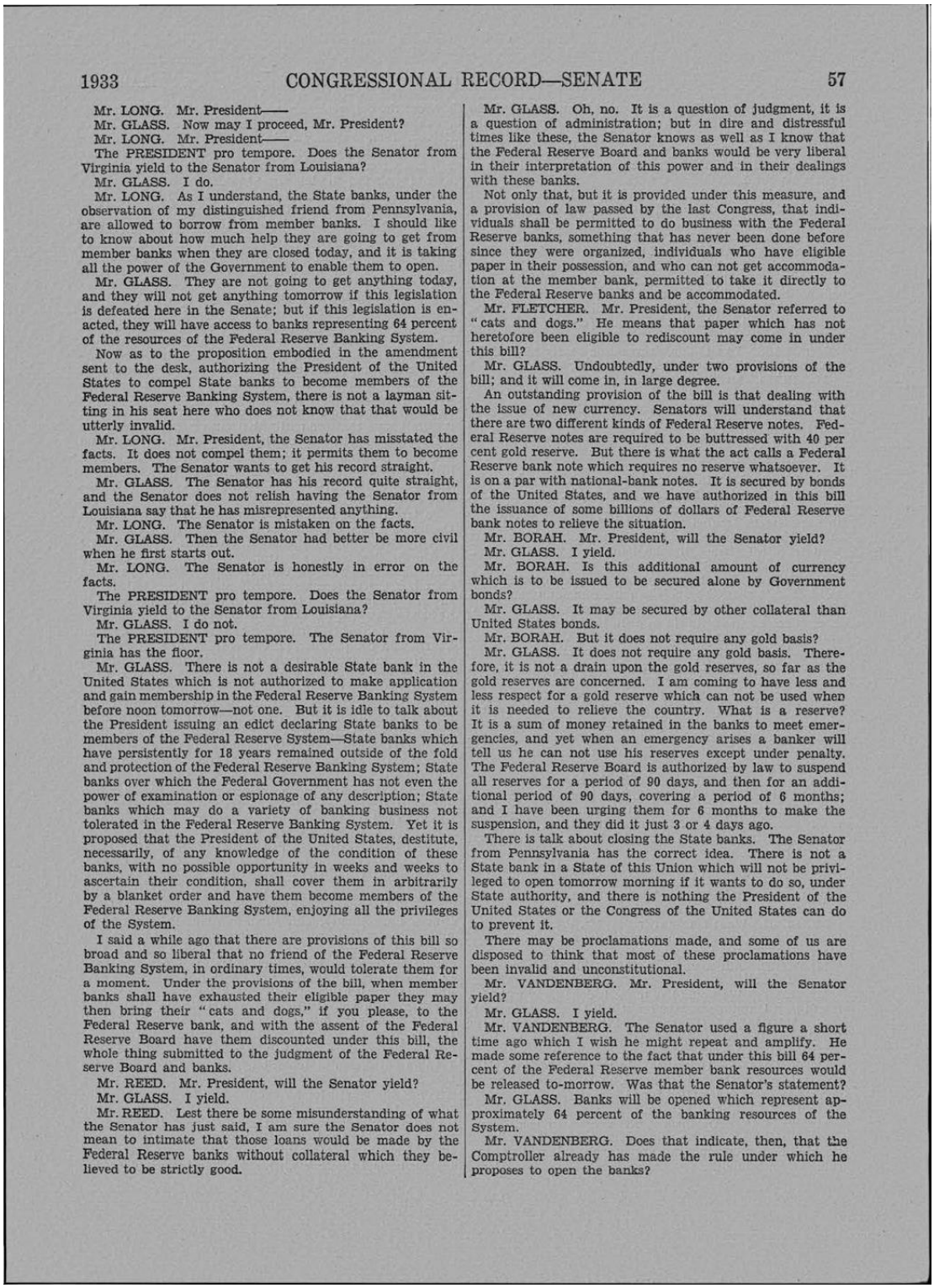
I urge all of our colleagues to study this legislation more and to resist these kinds of scare tactics and mischaracterizations. I urge them to consider the paralysis we would incur by not passing CFIUS reform. Progress would be stunted and our security jeopardized. We could see the erosion of our defense industrial base and that means jobs here in the United States going overseas because they are capable then of building this cutting-edge, dual-use technology in their home country and not having it built here in the United States.

Despite the critics' scare tactics, the bill would not sweep up harmless business transactions with no ties to national security. That is not the point. But I do want to make that abundantly clear. Under the bill, there are reasonable safeguards to prevent this from happening.

For example, CFIUS would be authorized to create a safe list of certain allied countries for which certain transactions are exempt from review. Under the bill, CFIUS would also be granted authority to exempt ordinary, routine transactions where other laws already address national security risks.

The Treasury Department, as the lead agency for CFIUS, has stated an

Figure 6-2: Page of the *Congressional Record* from March 9, 1933



1933 CONGRESSIONAL RECORD—SENATE 57

Mr. LONG. Mr. President——
Mr. GLASS. Now may I proceed, Mr. President?
Mr. LONG. Mr. President——
The PRESIDENT pro tempore. Does the Senator from Virginia yield to the Senator from Louisiana?
Mr. GLASS. I do.
Mr. LONG. As I understand, the State banks, under the observation of my distinguished friend from Pennsylvania, are allowed to borrow from member banks. I should like to know about how much help they are going to get from member banks when they are closed today, and it is taking all the power of the Government to enable them to open.
Mr. GLASS. They are not going to get anything today, and they will not get anything tomorrow if this legislation is defeated here in the Senate; but if this legislation is enacted, they will have access to banks representing 64 percent of the resources of the Federal Reserve Banking System.
Now as to the proposition embodied in the amendment sent to the desk, authorizing the President of the United States to compel State banks to become members of the Federal Reserve Banking System, there is not a layman sitting in his seat here who does not know that that would be utterly invalid.
Mr. LONG. Mr. President, the Senator has misstated the facts. It does not compel them; it permits them to become members. The Senator wants to get his record straight.
Mr. GLASS. The Senator has his record quite straight, and the Senator does not relish having the Senator from Louisiana say that he has misrepresented anything.
Mr. LONG. The Senator is mistaken on the facts.
Mr. GLASS. Then the Senator had better be more civil when he first starts out.
Mr. LONG. The Senator is honestly in error on the facts.
The PRESIDENT pro tempore. Does the Senator from Virginia yield to the Senator from Louisiana?
Mr. GLASS. I do not.
The PRESIDENT pro tempore. The Senator from Virginia has the floor.
Mr. GLASS. There is not a desirable State bank in the United States which is not authorized to make application and gain membership in the Federal Reserve Banking System before noon tomorrow—not one. But it is idle to talk about the President issuing an edict declaring State banks to be members of the Federal Reserve System—State banks which have persistently for 18 years remained outside of the fold and protection of the Federal Reserve Banking System; State banks over which the Federal Government has not even the power of examination or espionage of any description; State banks which may do a variety of banking business not tolerated in the Federal Reserve Banking System. Yet it is proposed that the President of the United States, destitute, necessarily, of any knowledge of the condition of these banks, with no possible opportunity in weeks and weeks to ascertain their condition, shall cover them in arbitrarily by a blanket order and have them become members of the Federal Reserve Banking System, enjoying all the privileges of the System.
I said a while ago that there are provisions of this bill so broad and so liberal that no friend of the Federal Reserve Banking System, in ordinary times, would tolerate them for a moment. Under the provisions of the bill, when member banks shall have exhausted their eligible paper they may then bring their "cats and dogs," if you please, to the Federal Reserve bank, and with the assent of the Federal Reserve Board have them discounted under this bill, the whole thing submitted to the judgment of the Federal Reserve Board and banks.
Mr. REED. Mr. President, will the Senator yield?
Mr. GLASS. I yield.
Mr. REED. Lest there be some misunderstanding of what the Senator has just said, I am sure the Senator does not mean to intimate that those loans would be made by the Federal Reserve banks without collateral which they believed to be strictly good.
Mr. GLASS. Oh, no. It is a question of judgment, it is a question of administration; but in dire and distressful times like these, the Senator knows as well as I know that the Federal Reserve Board and banks would be very liberal in their interpretation of this power and in their dealings with these banks.
Not only that, but it is provided under this measure, and a provision of law passed by the last Congress, that individuals shall be permitted to do business with the Federal Reserve banks, something that has never been done before since they were organized, individuals who have eligible paper in their possession, and who can not get accommodation at the member bank, permitted to take it directly to the Federal Reserve banks and be accommodated.
Mr. FLETCHER. Mr. President, the Senator referred to "cats and dogs." He means that paper which has not heretofore been eligible to rediscount may come in under this bill?
Mr. GLASS. Undoubtedly, under two provisions of the bill; and it will come in, in large degree.
An outstanding provision of the bill is that dealing with the issue of new currency. Senators will understand that there are two different kinds of Federal Reserve notes. Federal Reserve notes are required to be buttressed with 40 per cent gold reserve. But there is what the act calls a Federal Reserve bank note which requires no reserve whatsoever. It is on a par with national-bank notes. It is secured by bonds of the United States, and we have authorized in this bill the issuance of some billions of dollars of Federal Reserve bank notes to relieve the situation.
Mr. BORAH. Mr. President, will the Senator yield?
Mr. GLASS. I yield.
Mr. BORAH. Is this additional amount of currency which is to be issued to be secured alone by Government bonds?
Mr. GLASS. It may be secured by other collateral than United States bonds.
Mr. BORAH. But it does not require any gold basis?
Mr. GLASS. It does not require any gold basis. Therefore, it is not a drain upon the gold reserves, so far as the gold reserves are concerned. I am coming to have less and less respect for a gold reserve which can not be used when it is needed to relieve the country. What is a reserve? It is a sum of money retained in the banks to meet emergencies, and yet when an emergency arises a banker will tell us he can not use his reserves except under penalty. The Federal Reserve Board is authorized by law to suspend all reserves for a period of 90 days, and then for an additional period of 90 days, covering a period of 6 months; and I have been urging them for 6 months to make the suspension, and they did it just 3 or 4 days ago.
There is talk about closing the State banks. The Senator from Pennsylvania has the correct idea. There is not a State bank in a State of this Union which will not be privileged to open tomorrow morning if it wants to do so, under State authority, and there is nothing the President of the United States or the Congress of the United States can do to prevent it.
There may be proclamations made, and some of us are disposed to think that most of these proclamations have been invalid and unconstitutional.
Mr. VANDENBERG. Mr. President, will the Senator yield?
Mr. GLASS. I yield.
Mr. VANDENBERG. The Senator used a figure a short time ago which I wish he might repeat and amplify. He made some reference to the fact that under this bill 64 percent of the Federal Reserve member bank resources would be released to-morrow. Was that the Senator's statement?
Mr. GLASS. Banks will be opened which represent approximately 64 percent of the banking resources of the System.
Mr. VANDENBERG. Does that indicate, then, that the Comptroller already has made the rule under which he proposes to open the banks?

It was not just the structure of sequential set-piece addresses that imperiled debate: the speeches expressed on both sides substantively failed to argue regarding the merits of the proposal from Sen. Grassley's working group. Democrats who spoke on the question of DACA generally limited their remarks to stories of individual DREAMERS and their contention that it was unreasonable and unjust to deport individuals who were teachers, or soldiers, or doctors, or the like. Republicans generally spoke to their belief that the proposal from the Grassley proposal was the only bill that had a chance to be voted upon by the House, or signed by the President.[219] Even the exception to this general rule, goes on to prove the rule.

While there were almost no substantive interactions between senators there was one exchange over the concept of "chain migration." Chain migration is a term of current political contestation; Republicans hold that this is a metaphor to describe the way that one legal permanent resident or citizen can eventually sponsor many members of his or her extended family to immigrate to the United States; Democrats hold that the term is offensive, particularly to members of minority groups whose ancestors literally were brought to this country in chains (164 Cong. Rec. S934-7, 2018). Sens. Menendez (D-NJ) and Tillis (R-NC) sparred over the appropriateness of this term, or one should say more accurately that Sen. Tillis responded negatively to a speech given by Sen. Menendez.

[219] Grassley (R-IA) stated that "at the end of the day, in spite of everything else, the simple fact remains that this amendment is the only plan that the President supports. This plan is the only Senate plan that has any possibility of passing the House of Representatives and becoming law. So I have asked my colleagues who oppose this proposal: Are you interested in actually getting something done, in actually providing a path to citizenship for these DACA kids, or are you interested in a political issue for the 2018 elections? If you are actually interested in getting something done, in getting a bill signed into law, and fixing the DACA issue, the choice is obvious: You will vote to support this plan" (164 Cong. Rec. S861, 2018).

After hearing Menendez, Tillis opined that, "We just heard a discussion. I tell you, sometimes I think I teleport from this Chamber to the Kennedy Center because there are more theatrics going on here than you can find down there on any given day" (164 Cong. Rec. S936, 2018). Sen. Tillis insisted that the term chain migration was appropriate and that this process must be limited to for the sake of "our economic growth [and] for our economic security" (S937). Sen. Menendez not being in the room, or anyone else other than the presiding office and clerks, the exchange stopped at this point.

Instead of being elaborated or extended, a potential for real debate was lost. Had anyone been around, senators could have discussed family-reunification ("chain migration") as a policy of immigration, and whether this topic really needed to be folded into a debate regarding DACA. Instead, Sen. Tillis himself descended to the theatrics that he was decrying only moments before, questioning the motives of his opponents: "I guarantee you, anybody who sits here and says that the President's proposal is unfair and insincere and hardline is playing politics. It makes me wonder if some of them would just as soon have this be the 'if you elect me next year, I promise I will fix this problem' campaign speech versus take this off the table, provide them certainty, and do something different for a change" (S938). Tillis's guarantee fairs especially poorly in retrospect, as he is here describing a bill that would only go on to get 39 votes out of 99 in the Senate.

The second feature missing from the "open debate" was an open process regarding amendments. In the aforementioned debate regarding the banking emergency in the 73rd Congress, several senators developed amendments in the midst of debate and successfully got a hearing of those amendments. In the process regarding DACA, there

was no attempt to develop a bill and then to modify it by successive amendments to a shape that would pass the Senate. This lack of openness likely contributes to the lack of genuine debate, as there is no reason to substantively reason with your opponent, especially one whom you dislike, if there is no way to provide signals of good faith argumentation. In an open process another senator could offer that an amendment to their proposition will induce them to support a proposal that they would otherwise oppose. Without this expedient deliberation suffers. Indeed, the process was remarkably closed. Rather than debate one bill, the Senate process revolved around four separate proposals (one which did not address DACA at all) all of which were preliminarily made subject to cloture, necessitating 60 votes for passage. While Democrats such as Sen. Murphy (D-CT) explained that they wanted a deal, "Negotiation still has to be part of the legislative process, and I am glad there are Members of the Republican and Democratic caucuses who have been trying to do that. We will see where that goes" (S949). All negotiations regarding DACA, however, happened off the floor, where several proposals were created, only to see each ultimately fail to receive sixty votes.

To confirm that this qualitative account is driven by a genuine difference between the deliberation of the present Congress and previous ones, one can subject the debate regarding the ACA "skinny repeal" and DACA to the same quantitative analysis carried out in earlier chapters. Recall that the procedure is to examine each debate, counting the number of speakers, the number of speeches (continuous addresses at least one column of the *Record,* being about 750 words), and the number of substantive replies that are

delivered between MCs. Under this scheme of analysis, it is apparent that the Senate exhibited high quantities of expressive speech and very little deliberative debate.

Table 6-1: Senate Debate on ACA, July 27, 2017 and DACA February 12 – 15, 2018

Summary Statistic	***No. of Speakers***	***No. of Speeches***	***Substantive Interactions***
Median	15	12	1
Average	16.4	12.8	1.8
ACA "Skinny" Repeal	24	14	0
DACA "Open Floor Debate"	14.5	12.5	2.3
Total	N/A[220]	64	9

Source: 163 Cong. Rec. S4350-4415, 2017; 164 Cong. Rec. S855-1148, 2018.

The key to determining if Senators are talking to one another, or to some audience outside Congress, is to compare the number of speakers on the floor with the number of speeches. Seeing this number is generally the same for the 115th Congress – i.e. that each person talking is giving a speech – confirms the qualitative interpretation offered above; Senators used their time on the floor as an opportunity to make a speech, not to debate the merits of a bill with another individual. In some sense, the degree of substantive interaction is actually over-estimated by the method of counting employed here. In fact,

[220] A sum of all speakers would lead to significant double-counting. Therefore, this count is not summed.

the majority (five) of substantive interactions in this data set occurred on the last moment of DACA floor debate where proponents of a moderate plan argued about what day one of its provisions ought to go into effect. This "debate" obviously did not touch on the fundamental matters regarding the bill.

In the end, deliberation is perhaps even in worse shape than suggested in some modern accounts (Loomis 2011, Taylor 2012, Wallner 2012). While caution must be exercised in evaluating the Congress based on a sample of its total deliberation, one might consider the very real possibility that this sample represented the Senate at its most deliberative moments; after all, that is what Senators said they were doing during the week of February 12 – 15 in particular. Given the great consensus across experts and even opposite partisans in Congress regarding the lack of deliberation, it is possible that deliberation over typical, rather than salient, topics is even worse than that presented here.

CONCLUSION: THE CONGRESS ON THE BRINK

Up to this point in the chapter, Congress has been evaluated rather poorly along dimensions of representativeness, responsiveness, and deliberativeness; only a limited and mostly individualized respect for traditional norms of the lawmaking process have prevented outright failure in the Congress. The clearest example of such observable behavior by Members of the 115th Congress was the speech given by Sen. McCain (R-AZ) on July 25th, 2017, and the votes taken by Sens. Collins (R-ME), McCain, and Murkowski (R-AK) on July 27th, 2017. Returning from medical treatment for cancer,

McCain delivered a long speech on the floor of the Senate which heavily criticized the Congress for its violation of norms and traditions that helped that body function in the past. Suggesting that the process that the Senate was using to attempt to repeal the ACA was dysfunctional, McCain said, "Let's return to regular order…. Both sides [have] mandate[ed] legislation from the top down, without any support from the other side, with all the parliamentary maneuvers it requires. We are getting nothing done, my friends. We are getting nothing done" (163 Cong. Rec. S4169, 2017). Lacking any incentive to persuade or bargain with the other side, he suggested that "Our deliberations … haven't been overburdened by greatness lately. Right now, they aren't producing much for the American people" (S4168). Emphasizing the role of the Congress in providing for the common good of all Americans, McCain wound up to his peroration:

> This place is important. The work we do is important. Our strange rules and seemingly eccentric practices that slow our proceedings and insist on our cooperation are important. Our Founders envisioned the Senate as the more deliberative, careful body that operates at a greater distance than the other body from the public passions of the hour (163 Cong. Rec. S4169, 2017).[221]

Upon concluding his address, the Senator from Arizona was treated to a standing ovation by his colleagues on both sides of the aisle.

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[221] Senator John S. McCain elaborated on this point when he noted that, "Our responsibilities [as senators] are important—vitally important—to the continued success of our Republic. Our arcane rules and customs are deliberatively intended to require broad cooperation to function well at all" (163 Cong. Rec. S4168, 2017).

Stepping back from the adulation, one can see that McCain's address presented a logically sequenced argument. He provided an account of the importance of "regular order," tied the set of norms and procedures that make up the "regular order" to the ability of the Senate to deliberate, and then connected this feature of the Congress to its role in the constitutional system that it anchors. McCain, although not a political scientist or theorist, thus traced out in practical terms one important element of the role of Congress, in a way not dissimilar from that articulated in this study. Since a conception of congressional health or functionality still exists in the dysfunctional contemporary Congress, and can prove a spur to pivotal action to reject products of highly-suboptimal processes, the present Congress cannot be said to be a failed institution; it remains perched on a precipice.

One must note with some hope that the jury-rigged Senate bill, fashioned by a process which had so perturbed McCain, was voted down, removing the chance that the 115th Congress would pass a policy favored by little more than a third of the citizenry. Moreover, it was not as if it was voted down by some agency outside the senior Senator from Arizona's power. In his speech of July 25th, he stated, regarding the Senate's efforts at repeal:

> I will not vote for this bill as it is today…. I know many of you will have to see the bill changed substantially for you to support it. We have tried to do this by coming up with a proposal behind closed doors in consultation with the administration, then springing it on skeptical Members, trying to convince them it is better than nothing—that it is better than nothing—

> asking us to swallow our doubts and force it past a unified opposition. I don't think that is going to work in the end and probably shouldn't (S4169).

Then, Sens. McCain, Murkowski and Collins all voted against the bill on the 27th, ending the process of comprehensively repealing and replacing the ACA. The three senators, by acting on their stated opposition to the process, provided behavioral reinforcement for the stated, expressive norm regarding the place of a senator. The actions of the three Republican senators provoked a restrained response from the Democratic Minority Leader. Rather than gloating (publicly at least) regarding the salvation of "Obamacare," Sen. Chuck Schumer delivered a short statement reaffirming the sentiments of Sen. McCain:

> This august body has been around for over 220 years. It has rules. It has traditions we are very proud of. In recent years—both parties to blame—many of those traditions have been eroded. What happens when you erode the traditions—the bipartisanship, the ability to work through the regular order—is very simply that the product that emerges is not very good. There is a reason this body has been the greatest deliberative body in the world, and it is because it had those traditions. Now we don't have them (*Congressional Record* S4414).

Senators on both sides of the aisle are both cognizant of the fact that Congress (and the Senate in particular) lacks the requisite processes to make good law.

Yet, one must face the fact that not passing an unpopular bill scored by Congress's own deliberative institutions, such as the CBO, as disastrous, does not make that institution healthy. The norms, rules and procedures of Congress must help promote the general welfare for to be healthy; while muddling through it has its virtues, abstaining from harming the general welfare is not good enough.[222] Indeed, despite the widely expressed contention of those such as Sen. McCain, there is little work ongoing in Congress which heeds his call for greater or more substantive bipartisan deliberation. Later in the same year as the ACA, Congress passed a substantial change in the tax policy of the United States with a very similar amount of (which is to say little) substantive deliberation, hearings and a closed amendment process. In 2018, there has been no action on DACA or gun policy, the latter of which has grown remarkably in salience after a mass shooting in February at a Florida high school.

One reason for the lack of movement on the reform front is the sketchy grasp expressed by MCs of the comprehensiveness of the dysfunction of their institution. McCain, Schumer and others seem to suppose that if the Congress can go "back" to its traditions, the Congress will function well. But, as shown in this study, functional Congresses often need to innovate to respond to exigent circumstances. In the Early Republic and in the New Deal, Congress found that it needed to reject traditions to maintain representativeness in changed contexts, to respond to emergent crises, or to

[222] Sen. Shelly Moore Capito said, regarding the Senate's attempt to repeal the ACA, "*I did not come to Washington to hurt people*. For months, I have expressed reservations about the direction of the bill to repeal and replace Obamacare" (Abramson 2017, emphasis added). This sentiment generally goes without saying, but such is not the case in the 115th Congress.

deliberate wisely in a complex world. The regular order did not serve the 73rd Congress, but that did not stop the legislators from attempting to be more responsive to their constituents, or deliberative under tight time pressures. In some sense, the comprehensive and systematic approach to evaluating the institution of Congress undertaken in this work must be adopted by reformer within or without Congress if congressional functionality is to be restored.

Finally, something must be said about institutional perspective and its importance for the prospects of the renovation of Congress. Comparing the New Deal Congress to the Congress of today reveals important changes in member motivation that must be considered in any attempt to address the doleful state of the fundamental lawmaking institution in our polity. President Franklin Delano Roosevelt was a president who won his election in a landslide among the worst peacetime turbulence in American history. President Donald John Trump was elected in a narrow victory during a time of slow but steady economic growth. His reputed populism, however, is unusual, in that many of his proposals to Congress are unpopular.[223] Notwithstanding these radically different contexts, and all the intuitions that would follow for the rate of presidential support in the Senate (i.e. all differences suggest that President Roosevelt would have comparatively higher support) *Trump is supported at the same or a higher level by the Senators of his*

[223] One of President Trump's most recent proposals is to appropriate funds for allowing, training and licensing teachers to carry concealed weapons in the classroom. Among a set of gun related policies that poll well, this proposition stands out; a Fox News poll shows that 57% of respondents *oppose* this policy (Blanton 2017).

party than FDR was during the First Hundred days (see Appendix Table A-1).[224] Whether or not a motive to support the Congress as an independent actor can be reestablished is very likely to be a pertinent factor in the potential future course of Congress; whether it is to recover, or to plunge further into ignominy on the pattern of the Antebellum Congress. Yet, the cases in this work do not show a steady march of decay or decline; while Congress is profoundly dysfunctional at present, equipping ourselves with appropriate historical knowledge regarding Congress can give rise to hope. Especially given the consequences of congressional failure, the future of Congress is not a mere academic concern; the study of congressional health, which this work seeks to inaugurate, will hopefully be one tool which can be called on to arrest its decline and support the placing of its edifice upon a surer foundation.

[224] To come to this conclusion, I compared a list of pivotal votes prepared by Herring 1934 in the 73rd Congress, and created a similar list of votes in the contemporary Senate. Simply dividing the number of votes in favor of the president's position by the number of voting members of his party yields a presidential support score for each vote, which ranges from 0 to 1. President Trump receives an average support score of 0.88 and a median of 0.95 from Republicans; President Roosevelt received an average level of support of 0.87 and a median of 0.93 from Democrats.

Appendix

Figure A-1: List of 34 Critical Votes from the 73rd Congress (Senate)

The thirty-four test votes include:

- passage of the Emergency Banking Act;
- three amendments (limiting impact) to the Economy bill;
- passage of the Economy Bill;
- passage of the Beer Bill and the conference report on Beer;
- passage of the Federal Emergency Relief Bill;
- eight amendments to the Farm Bill including those related to cost-of-production and inflation;
- passage of the Farm Bill;
- passage of the bill establishing the Tennessee Valley Authority;
- Repeal of the Gold clause;
- an amendment limiting the thrust of the Black Bill;
- six amendments to the National Industrial Recovery Act including those related to the licensing section, sales tax, Title I and labor;
- passage of the NIRA and the conference report on NIRA;
- five votes related to the Independent Offices Bill, including suspension of the rules, a motion to recommit, and passage of the Cutting-Steiwer amendment;
- and passage of the conference report on the Independent Offices Bill.

Source: Imler 1975, 355.

Table A-1: Presidential Support for FDR and Donald J. Trump in United States Senate

Description of Senate Vote	**Date**	**President's Party Support**	**Opposition Party Support**
Reform Dodd-Frank – S 2155	3/14/2018	100%	35%
Trump 4 Pillars Immigration Plan – HR 2579	2/15/2018	72%	6%
Continuing Res. (Govt. Shutdown) – HR 195	1/19/2018	90%	10%
Continuing Resolution (December) – HR 1370	12/21/2017	96%	38%
Trump Tax Bill – HR 1	12/20/2017	100%	0%
Debt Limit / Hurricane Relief – HR 601	9/7/2017	63%	98%
ACA Repeal (Skinny Repeal) – HR 1628	7/28/2017	94%	0%
FY 2017 Appropriations Bill – HR 244	5/4/2017	62%	98%
Eliminate Filibuster for SCOTUS Noms.	4/6/2017	100%	0%
Repeal SS Admin. Rule on Gun Bkgrnd. Checks	2/15/2017	100%	10%
AVERAGE FOR TRUMP		88%	30%
Emergency Banking Act – HR 1491	3/9/1933	98%	81%
Economy Bill (Spending Cut) – HR 2820	3/15/1933	91%	50%
Legalization of Beer (Conference) – HR 3341	3/20/1933	65%	37%
Direct Unemploy. Aid (Conference) – HR 4606	3/30/1933	95%	44%
30 Hour Work Week – S 158	4/6/1933	98%	35%
Tennessee Valley Authority – HR 5081	5/3/1933	94%	45%
Farm Aid (Conference) – HR 3835	5/10/1933	78%	43%
NIRA (Conference) – HR 5755	6/13/1933	73%	18%
AVERAGE FOR FDR		87%	44%

Source: *Congress.gov* for 115th Congress, Herring 1934 for 73rd Congress.

References

Abramson, Alana. 2017. "GOP Senator Slams Obamacare Repeal Bill: 'I Did Not Come to Washington to Hurt People." *Time*. July 18. Accessed on March 25, 2018. <http:// time.com/4863692/shelley-moore-capito-obamacare-repeal-opposition-health-care>

Adair, Douglass. 1957. "'That Politics May Be Reduced to a Science:' David Hume, James Madison, and the Tenth Federalist." *Huntington Library Quarterly* 20: 343 – 360.

---. 1974. "The Authorship of the Disputed Federalist Papers." In *Fame and the Founding Fathers: Essays by Douglass Adair*, ed. Trevor Colbourn. New York: W.W. Norton & Co.

Adams, John Clarke. 1970. *The Quest for Democratic Law: The Role of Parliament in the Legislative Process*. New York: Thomas Y. Crowell Company.

Aldrich, John H. 1995. *Why Parties? The Origins and Transformation of Political Parties in America*. Chicago: University of Chicago Press.

---. 2011. *Why Parties?: A Second Look*. Chicago: University of Chicago Press.

Bacon, Jr. Perry. 2017. "Why the GOP Is So Hell-Bent on Passing an Unpopular Health Care Bill." *FiveThirtyEight*. Accessed on March 26, 2018. <https://fivethirtyeight.com/ features/why-the-gop-is-so-hell-bent-on-passing-an-unpopular-health-care-bill>

Baker, Peter. 2015. "G.O.P. Senators' Letter to Iran About Nuclear Deal Angers White House." *New York Times*. Mar. 9. Accessed Electronically March 10, 2018. <https://www.nytimes.com/2015/03/10/world/asia/white-house-faults-gop-senators-letter-to-irans-leaders.html>

Barber, Sotirios A. 2003. *Welfare and the Constitution*. Princeton: Princeton University Press.

Bartels, Larry M. 1996. "Uninformed Votes: Information Effects in Presidential Elections." *American Journal of Politic Science* 40: 194 – 230.

Bates, Robert H., Avner Grief, Margaret Levi, Jean-Laurent Rosenthal, and Barry R. Weingast. (Eds.) 1998. *Analytic Narratives*. Princeton, NJ: Princeton University Press.

Beard, Charles A. 1913. *An Economic Interpretation of the Constitution of the United States*. New York: Macmillan.

---. 1942. "In Defense of Congress." *The American Mercury* 55: 529 – 535.

Bessette, Joseph M. 1994. *The Mild Voice of Reason: Deliberative Democracy and American National Government*. Chicago: University of Chicago Press.

Bickel, Alexander M. 1962. *The Least Dangerous Branch: The Supreme Court at the Bar of Politics*. Indianapolis, IN: Bobbs-Merrill.

Bickford, Charlene Bangs and Helen E. Veit. (Eds.) 1986. *Documentary History of the First Federal Congress of the United States of America: Volume V Legislative*

Histories Funding Act [HR-63] through Militia Bill [HR-1l2]. Baltimore, M.D.: Johns Hopkins University Press.

Bickford, Charlene Bangs, Kenneth R. Bowling, and Helen E. Veit. (Eds.) 1992. *Documentary History of the First Federal Congress of the United States of America: Volume X Debates in the House of Representatives*. Baltimore, M.D.: Johns Hopkins University Press.

Binder, Sarah A. 2003. *Stalemate: Causes and Consequences of Legislative Gridlock*. Washington, DC: Brookings Institution Press.

---. 2015. "The Dysfunctional Congress." *Annual Review of Political Science* 18 (7): 1 – 17.

Binder, Sarah A. and Steven S. Smith. 1997. *Politics or Principle? Filibustering in the United States Senate*. Washington, D.C.: Brookings Institution Press.

Blanton, Dana. 2018. "Fox News Poll: Voters Favor Gun Measures, Doubt Congress Will Act." *FoxNews.com*. Accessed on March 26, 2018. <http://www.foxnews.com/politics/2018/ 03/25/fox-news-poll-voters-favor-gun-measures-doubt-congress-will-act.html>

Bordewich, Fergus. 2016. *The First Congress: How James Madison, George Washington, and a Group of Extraordinary Men Invented the Government*. New York: Simon & Schuster.

Bowling, Keith. 1991. *The Creation of Washington, D.C.: The Idea and Location of the American Capitol.* Fairfax, VA: George Mason University Press.

Bowling, Keith, William Charles diGiacomantonio, and Charlene Bangs Bickford. (Eds.) 1998. *Documentary History of the First Federal Congress of the United States of America: Volume VIII Petition Histories and Nonlegislative Official Documents*. Baltimore, M.D.: Johns Hopkins University Press.

Bradley, Christine M. 2000. "A Historical Perspective on Deposit Insurance Coverage." *FDIC Banking Review* 13: 1 – 25.

Brownstein, Ronald. 2018. "Cotton-Perdue Bill Would Reduce High-Skilled Immigration." *The Atlantic*. Accessed on March 25, 2018. <https://www.theatlantic.com/politics/archive/ 2018/01/gop-immigration-bill/550724>

Campbell, Angus, Philip E. Converse, Warren E. Miller and Donald E. Stokes. 1960. *The American Voter*. Chicago: University of Chicago Press.

Campbell, Jud. 2017. "Republicanism and Natural Rights at the Founding." *Constitutional Commentary* 32: 85-112.

Carey, George W. 1984. "Publius: A Split Personality?" *The Review of Politics* 47: 5 – 22.

Chafetz, Josh. 2011. "The Unconstitutionality of the Filibuster." *Connecticut Law Review* 43: 1003 – 1040.

---. 2012. “Congress’s Constitution.” *University of Pennsylvania Law Review* 160: 715 – 778.

---. 2017. *Congress’s Constitution: Legislative Authority and the Separation of Powers*. New Haven: Yale University Press.

Chamberlain, Lawrence H. 1946. *The President, Congress and Legislation*. New York: Columbia University Press.

Chernow, Ron. 2004. *Alexander Hamilton*. New York: Penguin.

Cooke, Jacob. 1970. “The Compromise of 1790.” *William and Mary Quarterly* 27: 523 – 545.

Cong. Globe. 1854. 33rd Cong., 1st Sess.

Cong. Globe. 1857. 35th Cong., 1st Sess.

Cong. Globe Appendix. 1854. 33rd Cong., 1st Sess.

Converse, Philip E. 1964. “The Nature of Belief Systems in Mass Publics.” In *Ideology and Discontent*, ed. David Apter. New York: Basic Books.

Cox, Gary W and Mathew D. McCubbins. 2005. *Setting the Agenda: Responsible Party Government in the U.S. House of Representatives.* Cambridge: Cambridge University Press.

Crafts, Nicholas and Peter Fearon. 2013. “Depression and Recovery in the 1930s: An Overview.” In *The Great Depression of the 1930s: Lessons for Today*, eds. Nicholas Crafts and Peter Fearon. Oxford: Oxford University Press.

Deering, Christopher J. and Steven S. Smith. 1997. *Committees in Congress*. Washington, DC: CQ Press.

Delli Carpini, Michael X. and Scott Keeter. 1996. *What Americans Know About Politics and Why it Matters*. New Haven: Yale University Press.

De Pauw, Linda Grant. (Ed.) 1972. *Documentary History of the First Federal Congress of the United States of America: Volume I Senate Legislative Journal*. Baltimore, M.D.: Johns Hopkins University Press.

---. (Ed.) 1977. *Documentary History of the First Federal Congress of the United States: Volume III House of Representatives Journal*. Baltimore, M.D.: Johns Hopkins University Press.

Diamond, Martin. 1986. "Ethics and Politics: The American Way." In *The Moral Foundations of the American Republic*, ed. Robert H. Horwitz. Charlottesville, VA: University of Virginia Press.

diGiacomantonio, William Charles. Kenneth R. Bowling, Charlene Bangs Bickford, and Helen E. Veit. (Eds.) 1995. *Documentary History of the First Federal Congress of the United States of America: Volume XIV Debates in the House of Representatives and Biographies of Members*. Baltimore, M.D.: Johns Hopkins University Press.

Douglass, Frederick. [1854] 1950. "The Kansas-Nebraska Bill." In *The Life and Writings of Frederick Douglass*, ed. Phillip S. Foner. New York: International Publishers, 316–332.

---. [1860] 1950. “The Constitution of the United States: Is It Proslavery or Antislavery?”” In *The Life and Writings of Frederick Douglass,* ed. Phillip S. Foner. New York: International Publishers, 407–424.

Drutman, Lee. 2017. “Congress Wasn’t Always This Awful: A Former Senate Staffer Reminds Us of a Time When Lawmakers Actually Got Stuff Done.” *Washington Monthly*. Accessed on March 25, 2018. < http://link.galegroup.com/apps/doc/A515578392/OVIC? u=txshracd2598&xid=22357887>

---. 2018. “Rage Against the Machines: How Party Activists Deliberatively Made Congress More Partisan.” *Washington Monthly*. Accessed March 25, 2018. <http://link.galegroup.com/ apps/doc /A524739183/OVIC?u=txshracd2598&sid=OVIC&xid=532e134a>

Easton, David. 1965. *A Framework for Political Analysis*. Englewood Cliffs, N.J.: Prentice-Hall, Inc.

Edling, Max M. 2003. *A Revolution in Favor of Government: Origins of the U.S. Constitution and the Making of the American State*. Oxford: Oxford University Press.

2017. “Election Statistics, 1920 to Present.” Accessed January 8, 2018. http://history.house.gov/Institution/Election-Statistics/Election-Statistics/

Elkins, Stanley and Erick McKitrick. 1993. *The Age of Federalism: The Early American Republic, 1788-1800*. Oxford: Oxford University Press.

Ellis, Joseph. 2000. *Founding Brothers*. New York: Alfred A. Knopf.

Eyal, Yonatan. 1998. "With His Eyes Open: Stephen A. Douglas and the Kansas-Nebraska Disaster of 1854." *Journal of the Illinois State Historical Society* 94: 175 – 217.

---. 2005. "Trade and Improvements: Young America and the Transformation of the Democratic Party." *Civil War History* 51: 245 – 268.

Farrier, Jasmine. 2004. *Passing the Buck: Congress, the Budget, and Deficits*. Lexington: University Press of Kentucky.

---. 2010. *Congressional Ambivalence: The Political Burdens of Constitutional Authority*. Lexington: University Press of Kentucky.

Fenno, Richard F. 1978. *Home Style: House Members in their Districts.* Boston: Little and Brown.

Finley, Klint. 2017. "Apps Make Pestering Congress So Easy That Politicians Can't Keep Up." *Wired*. Accessed on March 25, 2018. <https://www.wired.com/2017/01/apps-make-pestering-congress-easy-cant-keep>

Fisher, Louis. 2000. *Congressional Abdication on War and Spending*. College Station, TX: Texas A&M University Press.

---. 2013. *Presidential War Power*. Lawrence, KS: University Press of Kansas.

Flake, Jeff. 2018. "Congress Has Failed on DACA. Here's What Must Happen Now." *The Washington Post*. February 19. Accessed March 25, 2018. <

https://www.washingtonpost .com/opinions/congress-has-failed-on-daca-heres-what-must-happen-now/2018/02/19 /92944440-15b4-11e8-92c9-376b4fe57ff7_story.htm>

Forde, Steven. 2009. "The Charitable John Locke." *The Review of Politics* 71 (3): 428 – 458.

Freehling, William W. 1990. *The Road to Disunion: Secessionists at Bay, 1776-1854*. Oxford: Oxford University Press.

---. 2007. *The Road to Disunion: Secessionists Triumphant, 1854-1861*. Oxford: Oxford University Press.

Friedman, Milton and Anna J. Schwartz. 1963. *A Monetary History of the United States, 1867 – 1960*. Princeton, NJ: Princeton University Press.

Gabriel, Trip, Thomas Kaplan, Lizette Alvarez and Emmarie Huetteman. 2017. "At Town Halls, Doses of Fury and a Bottle of Tums." *The New York Times*. February 21. Accessed on March 25, 2018. < https://www.nytimes.com/2017/02/21/us/politics/town-hall-protests-obamacare.html>

Garvey, Todd and Alissa M. Dolan. 2014. "Congress's Contempt Power and the Enforcement of Congressional Subpoenas: Law, History, Practice and Procedure." *Congressional Research Service*. Accessed Electronically October 18, 2016. <http://fas.org/sgp/crs/misc/RL34097.pdf>

Gerring, John. 2007. *Case Study Research: Principles and Practices*. Cambridge: Cambridge University Press.

Gienapp, William E. 1987. *The Origins of the Republican Party, 1852-1856*. Oxford: Oxford University Press.

Gilens, Martin and Benjamin L. Page. 2014. "Testing Theories of American Politics: Elites, Interest Groups, and Average Citizens." *Perspectives on Politics* 12 (3): 564 – 581.

Gohmert, Louie. 2017. "Gohmert Responds to Group Calling for Town Hall Meeting." *House.gov*. Accessed on March 25, 2018. < https://gohmert.house.gov/news/documentsingle.aspx?DocumentID=398419>

Grassley, Chuck. 2017. "Grassley Statement on President Trump's Announced Plans to End DACA." *Senate.gov*. Accessed on March 25, 2018. <https://www.grassley.senate.gov/ news/news-releases/grassley-statement-president-trumps-announced-plans-end-daca>

---. 2018. "Latest Immigration Proposal Heavy on Amnesty, Non-existent on Security Measures." *Senate.gov*. Accessed on March 25, 2018. <https://www.grassley.senate.gov/ news/news-releases/grassley-latest-immigration-proposal-heavy-amnesty-non-existent-security-measures>

Habermas, Jürgen. [1971] 2001. "Reflections on the Linguistic Foundations of Sociology: The Christian Gauss Lectures." In *On the Pragmatics of Social*

Interaction, Trans. B. Fultner. Cambridge, MA: Massachusetts Institute of Technology Press.

Hamilton, Alexander, James Madison and John Jay. [1787] 1961 *The Federalist Papers*. Ed. Clinton Rossiter. New York: Signet Classics.

Harrington, James. [1656] 1992. *The Commonwealth of Oceana*. Ed. J.G.A. Pocock. Cambridge: Cambridge University Press.

Harris, Kamala. 2018. "Harris Statement on Immigration Vote." *Senate.gov*. Accessed March 25, 2018. < https://www.harris.senate.gov/news/press-releases/harris-statement-on-immigration-vote>

Hartz, Louis. 1955. *The Liberal Tradition in America: An Interpretation of American Political Thought since the Revolution*. New York: Harcourt, Brace & World.

Hefling, Kimberly. 2017. "Thousands Flood Senate Phone Lines Seeking to Halt Confirmation of DeVos." *Politico*. Accessed on March 25, 2018. < https://www.politico.com/story/ 2017/01/betsy-devos-confirmation-senate-phone-lines-234216>

Herring, E. Pendleton. 1934. "First Session of the Seventy-third Congress, March 9, 1933, to June 16, 1933." *American Political Science Review* 28: 65 – 83.

Hinds, Michael deCourcy. 1993. "Budget Vote Still Hounds Lawmaker." 12 December 1993, *New York Times*, 12 December: 30.

Hirsch, Zach. 2017. “At Town Hall Meeting, Republican Lawmakers Get an Earful Over Health Care.” *NPR*. Accessed on March 25, 2018. <https://www.npr.org/2017/05/09/527533782/ at-town-hall-meeting-republican-lawmaker-gets-an-earful>

Hobbes, Thomas. [1647] 1998. *On the Citizen*. Ed. and Trans. Richard Tuck and Michael Silverthorne. Cambridge: Cambridge University Press.

---. [1651] 2002. *Leviathan*. Ed. A. P. Martinich. Ontario: Broadview Literary Texts.

Hodder, Frank H. 1913. *The Genesis of the Kansas-Nebraska Act*. Madison, WI: The Society.

Hoffert, Robert W. 1992. *A Politics of Tensions: The Articles of Confederation and American Political Ideas*. Niwot, CO: University Press of Colorado.

Holt, Michael F. 1999. *The Rise and Fall of the American Whig Party: Jacksonian Politics and the Onset of the Civil War*. New York: Oxford University Press.

Howell, William G. and Terry M. Moe. 2016. *Relic: How Our Constitution Undermines Effective Government and Why We Need a More Powerful Presidency*. New York: Basic Books.

---. 2017. “Book Review Symposium, *Relic: How Our Constitution Undermines Effective Government and Why We Need a More Powerful Presidency*.” *The Journal of Politics* 79: e78 – e88.

Hume, David. 1994. *Political Essays.* Ed. Knud Haakonssen. Cambridge: Cambridge University Press.

Huthmacher, J. Joseph. 1968. *Senator Robert F. Wagner and the Rise of Urban Liberalism*. New York: Atheneum.

Imler, Jospeh A. 1975. "The First One Hundred Days of the New Deal: The View from Capitol Hill." Doctoral diss., Indiana University. Retrieved from ProQuest Dissertations and Theses (76–11,395).

Ives, Anthony L. 2018. "Frederick Douglass's Reform Textualism: An Alternative Jurisprudence Consistent with the Fundamental Purpose of Law." *The Journal of Politics* 80: 88 – 102.

Jenkins, Jeffrey A., Justin Peck and Velsa M. Weaver. 2010. "Between Reconstructions: Congressional Action on Civil Rights, 1891 – 1940." *Studies in American Political Development* 24 : 57 – 89.

Jensen, Merril. 1948. *The Articles of Confederation: An Interpretation of the Social-Constitutional History of the American Revolution.* Madison, WI: University of Wisconsin Press.

Jillson, Calvin and Rick K. Wilson. 1994. *Congressional Dynamics: Structure, Coordination, and Choice in the First American Congress, 1774-1789.* Stanford, CA: Stanford University Press.

Jones, Charles O. 1995. “A Way of Life and Law: Presidential Address, American Political Science Association, 1994.” *American Political Science Review* 89: 1-9.

Jones, Jeffrey M. 2015. “Americans Again Opposed to Taking in Refugees.” *Gallup*. November 23. <http://www.gallup.com/poll/186866/americans-again-opposed-taking-refugees.aspx>

Katznelson, Ira. 2011. “Historical Approaches to the Study of Congress: Toward a Congressional Vantage Point on American Political Development.” In *The Oxford Handbook of the American Congress*, eds. Eric Schickler and Frances E. Lee. Oxford: Oxford University Press.

---. 2013. *Fear Itself: The New Deal and the Origins of Our Time*. New York: Liveright Publishing Corporation.

Kennedy, Susan E. 1973. *The Banking Crisis of 1933*. Lexington, KY: University Press of Kentucky.

Kernell, Samuel. 1986. *Going Public: New Strategies of Presidential Leadership*. Washington: CQ Press.

Kiewiet, D. Roderick. 2003. “Vote Trading the First Federal Congress? James Madison and Compromise of 1790.” In *James Madison: The Theory and Practice of Republican Government*, ed. Samuel Kernell. Stanford, CA: Stanford University Press.

Klein, Ezra. 2012. "14 reasons why this is the worst Congress ever." *The Washington Post*. Accessed Electronically April 23, 2015. <http://www.washingtonpost.com/blogs/ wonkblog/wp/2012/07/13/13-reasons-why-this-is-the-worst-congress-ever>

---. 2013. "If you're from California, you should hate the Senate." *The Washington Post*. Accessed Electronically October 18, 2016. <https://www.washingtonpost.com/news/wonk/wp/2013/03/11/if-youre-from-california-you-should-hate-the-senate/>

Krehbiel, Keith. 1990. "Are Congressional Committees Composed of Preference Outliers?" *The American Political Science Review* 84: 149-163.

---. 1993. "Where is the Party?" *British Journal of Political Science* 23(2): 235-266.

---. 1998. *Pivotal Politics: A Theory of U.S. Lawmaking*. Chicago: University of Chicago Press.

Lansford, Tom. 2011. "Rotten Boroughs" *The Encyclopedia of Political Science*. Ed. George Kurian. Washington, DC: CQ Press. 1489-1490.

Lapinski, John S. 2013. *The Substance of Representation: Congress, American Political Development, and Lawmaking*. Princeton, NJ: Princeton University Press.

Lapowsky, Issie. 2018. "What It Takes to Make Congress Actually Listen." *Wired*. Accessed on March 25, 2018. <https://www.wired.com/story/opengov-report-congress-constituent-communication>

Laslett, Peter. 1957. “John Locke, the Great Recoinage, and the Origins of the Board of Trade: 1695-1698.” *William and Mary Quarterly* 14: 370-402.

Lee, Frances E. 2009. *Beyond Ideology: Politics, Principles, and Partisanship in the U.S. Senate*. Chicago: University of Chicago Press.

Levinson, Sanford. 2006. *Our Undemocratic Constitution: Where the Constitution Goes Wrong (And How We the People Can Correct It)*. New York: Oxford University Press.

Lewallen, Jonathan, Sean M. Theriault, and Bryan D. Jones. 2015. “Congressional Dysfunction: An Information Processing Perspective.” *Regulation & Governance* 10(2): 179-190.

Lincoln, Abraham. [1854] 1953. “Speech at Peoria, Illinois.” In *Collected Works*, ed. Roy P. Baler. New Brunswick, NJ: Rutgers University Press.

Locke, John. [1689] 1963. “*Two Treatises on Government*. Ed. Peter Laslett. Cambridge: Cambridge University Press.

---. [1689] 2010. *A Letter concerning Toleration.* Ed. Richard Vernon. Cambridge: Cambridge University Press.

---. [1697] 1997. “An Essay on the Poor Law.” In *Political Essays*, ed. Mark Goldie. Cambridge: Cambridge University Press.

Loomis, Burdett A. 2011. *The U.S. Senate: From Deliberation to Dysfunction*. Washington, D.C.: CQ Press.

Macpherson, C.B. 1962. *The Political Theory of Possessive Individualism: Hobbes to Locke*. London: Oxford University Press.

Malavasic, Alice E. 2014. *The F Street Mess: Southern Power in the Antebellum Senate and the Passage of the Kansas-Nebraska Act*. [Dissertation]

Maier, Pauline. 2010. *Ratification: The People Debate the Constitution, 1787-1788*. New York: Simon & Schuster Paperbacks.

Malone, Dumas. 1950. *Jefferson and the Rights of Man.* Boston: Little, Brown.

Mann, Thomas E. and Norman J. Ornstein. 2006. *The Broken Branch: How Congress is Failing America and How to Get It Back on Track*. New York: Oxford University Press.

---. 2012. *It's Even Worse Than It Looks: How the American Constitutional System Collided with the New Politics of Extremism*. New York: Basic Books.

Mansfield, Harvey C. 1971. "Hobbes and the Science of Indirect Government." *The American Political Science Review* 65: 97-110.

Mason, Alpheus T. 1954. "The Federalist – A Split Personality." *American Historical Review* 57: 625 – 643.

Matthews, Donald R. 1959. "The Folkways of the United States Senate: Conformity to Group Norms and Legislative Effectiveness." *American Political Science Review* 53: 1065 – 1089.

Mayer, Kenneth R. and David T. Canon. 1999. *The Dysfunctional Congress?: The Individual Roots of an Institutional Dilemma*. Boulder, CO: Westview Press.

Mayhew, David R. 1987. "The Electoral Connection and the Congress." In *Congress: Structure and Policy, eds. Matthew McCubbins and Terry Sullivan*. New York: Cambridge University Press.

---. 1991. *Divided We Govern: Party Control, Lawmaking, and Investigations, 1946-1990.* New Haven, C.T.: Yale University Press.

---. [1991] 2005. *Divided We Govern: Party Control, Lawmaking, and Investigations, 1946-2002.* 2nd Ed. New Haven, CT: Yale University Press.

---. 2006. "Congress as Problem Solver." In *Promoting the General Welfare: New Perspectives on Government Performance*, eds. Alan S. Gerber and Eric M. Patashnik. Washington, D.C.: Brookings Institution Press.

---. 2009. "Is Congress 'The Broken Branch?'" *Boston University Law Review* 89: 357 – 369.

---. 2011. *Partisan Balance: Why Political Parties Don't Kill the U.S. Constitutional System*. Princeton: Princeton University Press.

---. 2018. "Congress in the Light of History." *Starting Points Journal*. Accessed May 2, 2018. < http://startingpointsjournal.com/congress-light-history>

McDonald, Forrest. 1985. *Novus Ordo Seclorum: The Intellectual Origins of the Constitution*. Lawrence: University Press of Kansas.

Merkel, William G. 2008. “Jefferson’s Failed Anti-Slavery Proviso of 1784 and the Nascence of Free Soil Constitutionalism.” *Seton Hall Law Review* 38: 555 – 603.

Montesquieu, Charles de Secondat, baron de. [1748] 1989. *The Spirit of the Laws*. Trans. and Ed. Anne M. Cohler, Basia Carolyn Miller, and Harold Samuel Stone. Cambridge: Cambridge University Press.

Morgan, Edmund S. 1986. “Safety in Numbers: Madison, Hume and the Tenth *Federalist.*” *Huntington Library Quarterly* 49: 95 – 112.

Muirhead, Russell. 2014. *The Promise of Party in a Polarized Age*. Cambridge, M.A.: Harvard University Press.

Mussolini, Benito. 1935. *Fascism: Doctrine and Institutions*. New York: Howard Fetig.

Nakamura, David. 2015. “Obama Tries to Ease Anxiety over Terrorism with Oval Office Address.” *The Washington Post*. Dec. 6. Accessed March 10, 2018. <https://www.washingtonpost.com/politics/obama-tries-to-ease-anxiety-over-terror-attacks-with-oval-office-address/2015/12/06/95d9a34c-9c72-11e5-bce4-708fe33e3288_story.html?utm_term=.804d71ca1e4c>

Nelson, Louis. 2017. “GOP Split on Whether Paid Protestors are to Blame for Rowdy Town Halls.” *Politico*. Accessed on March 25, 2018. <https://www.politico.com/story/ 2017/02/republicans-paid-protesters-town-halls-235302>

Nichols, Roy F. 1956. “The Kansas-Nebraska Act: A Century of Historiography.” *The Mississippi Valley Historical Review* 43: 187 – 212.

Nokken, Timothy P. and Brian R. Sala. 2002. “Institutional Evolution and the Rise of the Tuesday-Thursday Club in the House of Representatives.” In *Party, Process, and Political Change in Congress: New Perspectives on the History of Congress,* eds. David W. Brady and Matthew D. McCubbins. Stanford: Stanford University Press.

North, Douglass C. 1991. “Institutions.” *The Journal of Economic Perspectives* 5: 97 – 112.

Oleszek, Walter J. 2011. *Congressional Procedures and the Policy Process*. 8th Ed. Washington, DC: Congressional Quarterly Press.

Pangle, Thomas L. 1988. *The Spirit of Modern Republicanism: The Moral Vision of the American Founders and the Philosophy of John Locke*. Chicago: University of Chicago Press.

Patrick, Sue C. *Reform of the Federal Reserve System in the Early 1930s: The Politics of Money and Banking*. New York: Garland Publishing, Inc.

Pear, Robert. 2017. “13 Men, and No Women, Are Writing New G.O.P Health Bill in Senate.” *New York Times*. May 8. Accessed Electronically March 19, 2018. <https://www.nytimes.com/2017/05/08/us/politics/women-health-care-senate.html>

Pew Research Center. 2015. "Negative Views of New Congress Cross Party Lines." Accessed March 25, 2018. < http://www.people-press.org/2015/05/21/negative-views-of-new-congress-cross-party-lines>

Pierce, Franklin. 1853. "First Annual Message to Congress." In *U.S. House Journal*. 33rd Cong., 1st sess.. 6 December. 19-35

Plato. 1991. *The Republic of Plato*. Ed. and Trans. Allan Bloom. New York: Basic Books.

Polin, Raymond. 1960. *La Politique Morale de John Locke*. Paris: Presses Universitaires de France.

Polsby, Nelson. 1968. "The Institutionalization of the U.S. House of Representatives." *American Political Science Review* 62: 145 – 163.

Posner, Eric A. and Adrian Vermeule. 2010. *The Executive Unbound: After the Madisonian Republic*. New York: Oxford University Press.

Potter, David M. 1976. *The Impending Crisis, 1848 – 1861*. Ed. Don E. Fehrenbacher. New York: Harper & Row Publishers.

Rasmussen Reports. 2018. "Congressional Performance: Voters Don't Think Congress Will Fix the Big Problems." Accessed on March 25, 2018. <http://www.rasmussenreports.com/public_content/politics/mood_of_america/congressional_performance>

Rawls, John. [1971] 1999. *A Theory of Justice: Revised Edition*. Cambridge, M.A.: Harvard University Press.

----. 2005. *Political Liberalism: Expanded Edition*. New York: Columbia University Press.

Rensink, Brenden. 2008. "Nebraska and Kansas Territories in American Legal Culture: Territorial Statutory Context." In *The Nebraska-Kansas Act of 1854*, eds. John R. Wunder and Joann M. Ross. Lincoln, NE: University of Nebraska Press.

Robertson, David B. 2005. *The Constitution and America's Destiny*. New York: Cambridge University Press.

Romo, Vanessa, Martina Stewart and Brian Naylor. 2017. "Trump Ends DACA, Calls on Congress to Act." *NPR*. Accessed on March 25, 2018. <https://www.npr.org/2017/09/05/546423550/trump-signals-end-to-daca-calls-on-congress-to-act>

Roosevelt, Franklin D. 1933. "Inaugural Address of President Franklin D. Roosevelt." *Congressional Record* 77, 5-6.

Rossiter, Clinton. 1960. *The American Presidency*. New York: Harcourt, Brace and World.

Rousseau, Jean Jacques. [1762] 1997. *Of the Social Contract or Principles of Political Right*. Ed. And Trans. Victor Gourevitch. Cambridge: Cambridge University Press.

Sabl, Andrew. 2012. *Hume's Politics: Coordination and Crisis in the* History of England. Princeton: Princeton University Press.

---. 2015. "The Two Cultures of Democratic Theory: Responsiveness, Democratic Quality, and the Empirical-Normative Divide." *Perspectives on Politics* 13: 345 – 365.

Schickler, Eric. 2000. "Institutional Change in the House of Representatives, 1867-1998: A Test of Partisan and Ideological Power Balance Models." *American Political Science Review* 94: 267 – 288.

---. 2001. *Disjointed Pluralism: Institutional Innovation and the Development of the U.S. Congress*. Princeton: Princeton University Press.

---. 2016. *Racial Realignment: The Transformation of American Liberalism, 1932-1965*. Princeton: Princeton University Press.

Schlesinger, Arthur M., Jr. *The Coming of the New Deal*. Boston, MA: Houghton Mifflin.

---.1973. *The Imperial Presidency*. Boston: Houghton Mifflin.

Schmitt, Carl. [1922] 2005. *Political Theology*. *Four Chapters on the Concept of Sovereignty*. Trans. G. Schwab. Chicago: University of Chicago Press.

Senate Journal. 1854. 33rd Cong., 1st sess.

Shepsle, Kenneth A. and Barry R. Weingast. 1987. "The Institutional Foundations of Committee Power." *The American Political Science Review* 81: 85 – 104.

Silver, Nate. 2017. “The GOP Health Care Bill Is Unpopular Even in Republican Districts.” *FiveThirtyEight.* Accessed on March 26, 2018. <https://fivethirtyeight.com/features/the-gop-health-care-bill-is-unpopular-even-in-republican-districts>

Sinclair, Barbara. 1999. “Transformational Leader or Faithful Agent? Principal-Agent Theory and House Majority Party Leadership.” *Legislative Studies Quarterly* 24: 421 – 449.

---. 2009. “Question: What’s Wrong with Congress. Answer: It’s a Democratic Legislature.” *Boston University Law Review* 89: 387 – 497.

---. 2012. *Unorthodox Lawmaking: New Legislative Processes in the U.S. Congress*. Washington, DC: Congressional Quarterly Press.

---. 2014. “Is Congress Now the Broken Branch?” *Utah Law Review* 2014 (4): 703 – 724.

Smith, Steven S. 1989. *Call to Order: Floor Politics in the House and Senate*. Washington, D.C.: Brookings Institution Press.

Spencer, Mark G. 2002. “Hume and Madison on Faction.” *The William and Mary Quarterly* 59: 869 – 896.

Stampp, Kenneth M. 1990. *America in 1857: A Nation on the Brink*. New York: Oxford University Press.

Stein, Jeff. 2017. “Republicans Don’t Hold Town Halls Anymore.” *Vox*. Accessed on March 25, 2018. <https://www.vox.com/policy-and-politics/2017/6/27/15880904/republicans-town-hall-health-care>

Steinhauer, Jennifer, Mark Mazzetti and Julie Hirschfeld Davis. 2016. “Congress Votes to Override Obama Veto on 9/11 Victims Bill.” *New York Times*. Sept. 28. Accessed Electronically October 18, 2016. <http://www.nytimes.com/2016/09/29/us/politics/senate-votes-to-override-obama-veto-on-9-11-victims-bill.html>

Stoner, Jr. James R. 1992. *Common Law and Liberal Theory: Coke, Hobbes, and the Origins of American Constitutionalism.* Lawrence: University of Kansas Press.

Storing, Herbert. 1981. *What the Anti-Federalists Were For*. Chicago: University of Chicago Press.

Swift, Elaine K. 1996. *The Making of an American Senate: Reconstitutive Change in Congress 1787-1841*. Ann Arbor: University of Michigan Press.

Taylor, Andrew J. 2012. *The Floor in Congressional Life*. Ann Arbor: University of Michigan Press.

---. 2013. *Congress: A Performance Appraisal*. Boulder, CO: Westview Press.

The OpenGov Foundation. 2017. “From Voicemail to Votes.” Accessed on March 25, 2018. <https://v2v.opengovfoundation.org>

Theriault, Sean M. 2013. *The Gingrich Senators: The Roots of Partisan Warfare in Congress*. New York: Oxford University Press.

Tocqueville, Alexis de. [1840] 2004. *Democracy in America.* Trans. Arthur Goldhammer. New York: Library of America.

Tollestrup, Jessica. 2014. "The Congressional Appropriations Process: An Introduction" *Congressional Research Service* 7-5700.

Truman, David B. 1971. *The Governmental Process: Political Interests and Public Opinion*. New York: Knopf.

Tulis, Jeffrey K. 2009. "On Congress and Constitutional Responsibility." *Boston University Law Review* 89: 515 – 524.

---. 2010. "The Possibility of Constitutional Statesmanship." In *The Limits of Constitutional Democracy,* eds. Jeffrey K. Tulis and Stephen Macedo. Princeton: Princeton University Press.

Tulis, Jeffrey K. and Nicole Mellow. 2018. *Legacies of Losing in American Politics*. Chicago: The University of Chicago Press.

United States. Department of the Interior. Geological Survey. 1970. *The National Atlas of the United States of America*. Washington, DC: U.S. G.P.O.

U.S. House Journal. 1854. 33rd Cong., 1st sess.

Waldron, Jeremy. 1999. *The Dignity of Legislation*. Cambridge: Cambridge University Press.

---. 2009a. “Judges as Moral Reasoners.” *International Journal of Constitutional Law* 7(1): 2 – 24.

---. 2009b. “Representative Lawmaking.” *Boston University Law Review* 89: 335 – 355.

---. 2016 *Political Political Theory: Essays on Institutions*. Cambridge, MA: Harvard University Press.

Wallach, Philip. 2018. “Congress Indispensable.” *National Affairs*. Accessed on March 25, 2018. < https://nationalaffairs.com/publications/detail/congress-indispensable>

Wallner, James I. 2012. *The Death of Deliberation: Political Parties, Procedure, and Policy in the United States Senate*. [Dissertation].

Wawro, Gregory J. and Eric Schickler. 2006. *Filibuster: Obstruction and Lawmaking in the U.S. Senate*. Princeton: Princeton University Press.

Weingast, Barry R. and Sean M. Theriault. 2002. “Agenda Manipulation, Strategic Voting, and Legislative Details in the Compromise of 1850.” In *Party, Process and Political Change in Congress*, eds. David Brady and Mathew D. McCubbins. Stanford: Stanford University Press.

Whittington, Keith E. 2017. “The Place of Congress in the Constitutional Order.” *Harvard Journal of Law and Public Policy* 40: 573 – 602.

Wilson, Rick K. 2002. “Transitional Governance in the United States: Lessons from the First Federal Congress.” In *Legislatures: Comparative Perspectives on*

Representative Assemblies, eds. Gerhard Loewenberg, Peverill Squire, and D. Roderick Kiewiet. Ann Arbor, MI: The University of Michigan Press.

Wilson, Woodrow. [1885] 1981. *Congressional Government*. Baltimore, MD: John Hopkins University Press.

Wirls, Daniel. 2007. "The 'Golden Age' Senate and Floor Debate in the Antebellum Congress." *Legislative Studies Quarterly* 32: 193 – 222.

Wirls, Daniel and Stephen Wirls. 2004. *The Invention of the United States Senate*. Baltimore: Johns Hopkins University Press.

Wisckol, Martin. 2017. "Kamala Harris Spurs on Dreamers at UC Irvine, Calling for New Legal Protections." *Orange County Register*. Accessed on March 25, 2018. <https://www.ocregister.com/2017/10/11/kamala-harris-spurs-on-dreamers-at-rally-calling-for-new-legal-protections>

Wolff, Gerald W. 1977. *The Kansas-Nebraska Bill: Party, Section and the Coming of the Civil War*. New York: Revisionist Press.

Wunder, John R. and Joann M. Ross. 2008. "'An Eclipse of the Sun': The Nebraska-Kansas Act in Historical Perspective." In *The Nebraska-Kansas Act of 1854*, eds. John R. Wunder and Joann M. Ross. Lincoln, NE: University of Nebraska Press.

Zeisberg, Mariah. 2013. *War Power: The Politics of Constitutional Authority*. Princeton: Princeton University Press.