

## Congress and the Constitutional System

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The Constitution that was crafted in Philadelphia over the spring and summer of 1787 created an integrated system of government that was predicated on balancing power horizontally and vertically. The vertical balance was between a national government with newly enhanced capacities, and state governments, which had operated under considerable latitude ever since independence. We now call this balance “federalism.” The horizontal balance was between the various components of the new national government itself, which had hitherto been organized around a unitary structure. We now call this balance the “separation of powers.”

There was a single fulcrum supporting both axes of balance, and that was the newly constituted United States Congress. Even knowing nothing about the actual deliberations of the Constitutional Convention, the centrality of Congress in balancing federalism and the separation of powers is immediately evident in the text of the Constitution itself—fully half of the Constitution was given over to Article I, which constructs Congress. Compared with the sparseness of details in the rest of the document, Article I provided a substantial blueprint for the body’s electoral base and political authority. Reflecting the experience of nearly half a century of failed attempts to knit together the thirteen colonies (now states) along the Atlantic seaboard, Article I’s provisions embodied a carefully crafted compromise that attempted to amass enough political authority to save the foundering experiment in independence from England.

Popular understandings of the Constitution often treat it as a seamless example of Enlightenment thinking applied to governing. It is true that the Framers drew heavily on Enlightenment thinkers, especially Hume, Montesque, and Locke, who advocated dividing

authority in order to simultaneously achieve the twin goals of effective government and individual liberty. Yet other governments around the world have also been established on the same Enlightenment principles, and almost all of them have come to different conclusions about how to balance power between the national and provincial governments, and between the various components of the national government itself. Thus, a tradition of ideas was important in guiding how Congress was initially placed within the American constitutional system, but ideas were not enough.

The additional ingredient was politics and a desire to fix a system that was obviously failing in political, not intellectual terms. Yet to pull the national government away from absolute collapse, the Framers had to face the facts as they found them. What did they face? On the one hand they faced a Congress that was failing to attract a quorum and to enact legislation that the states would voluntarily comply with. The result was increasing instability locally and discredit among the great European powers who were eager to forcefully reassert themselves along the eastern seaboard. On the other hand they faced states that enjoyed the independence enshrined in the Articles of Confederation—large states, which were free to use their commercial power to exploit smaller ones, and small states, which valued the equality that was enshrined in the Articles as the best leverage they had to protect themselves the larger, wealthier states.

How to get distrustful state governments to agree to give up actual political power in return for a promise of greater stability and standing in the world? The Framers were helped by two things. First, public officials and other social elites understood the gravity of the situation and shared a vague sense about the new direction the national government needed to go in. They were open to a proposal. Second, the Framers were deeply knowledgeable about the workings of

popular governments on the North American continent and around the world. They were practical, informed, and moderate men. They inherited a tradition of popularly-elected assemblies on the North American continent that stretched back a century and a half. Almost all of them had served in the Continental Congress or state legislatures in the preceding decade, and so had a working sense of how legislatures actually behaved in a wide variety of governing contexts. Some had served in unicameral legislatures, others in bicameral settings, and some in settings that could even be considered tricameral. Some came from states with an executive who had no check over legislative pronouncements—including everyone who had served in the Confederation Congress—others from states whose governors enjoyed an absolute veto over legislative enactments, and yet others from states between these two extremes.

Using their knowledge and the political opening they enjoyed, the Framers threaded the political needle they were given, producing a significant departure from the past that was compelling enough to overcome the substantial doubts that were raised against it in the ratification effort.

And then life under the Constitution began. The text of the Constitution, especially Article I, was fairly prescriptive, but it was not self-enforcing. It was tailored for a political system that was populated by economic and social elites whose ideas of a continental nation were only a dream. But politics migrated from elite to mass and the center of population wandered ever westward. Some assumptions of the Framers turned out to be wrong. Viewed at a great distance from the Constitutional Convention, the influence of the Constitution on Congress has proven to be varied and not always obvious.

The purpose of this essay is to examine how the Constitution has molded national politics, particularly the politics of Congress, from 1789 to the present. My attention is on the Constitution (particularly Article I) as a political document, in its conception and implementation. *In its conception*, the Constitution was political because its purpose was to address a political crisis; its ratification by the states was constrained by the stuff of normal politics. In the words of John Roche, the Framers “were first and foremost superb democratic politicians.”<sup>1</sup> Had the crisis been a different one or the constraints bearing down on ratification been different, the entire fabric of the Constitution would have been different.

The Constitution was political *in implementation* because the most important legacy of the document was in how it channeled political ambition. The most astute of the Framers understood that over time their words would be reduced to mere ink on parchment. The most complete expression of this realization was provided by the author of Federalist 51:

Ambition must be made to counteract ambition. The interest of the man must be connected with the constitutional rights of the place. It may be a reflection on human nature, that such devices should be necessary to control the abuses of government. But what is government itself, but the greatest of all reflections on human nature? If men were angels, no government would be necessary. If angels were to govern men, neither external nor internal controls on government would be necessary. In framing a government which is to be administered by men over men, the great difficulty lies in this: you must first enable the government to control the governed; and in the next place oblige it to control itself.

The text of the Constitution provided a set of initial conditions that attempted to connect the interests of politicians to the prerogatives of the institutions they inhabited. The power of the constitutional design to continue channeling political ambition is seen when we consider what happened once the Framers were dead and buried. A half century after the Philadelphia convention, American national politics was transformed forever, by the rise of political parties

and the resulting nationalization of politics they wrought. This movement unleashed a direct assault on the fine details of the Constitution, which is most obviously manifest in the modern era by how presidential elections are conducted. The nationalization of politics brought forth by national political parties challenged the constitutional design by aligning the interests of disparate politicians so that ambitions were no longer neatly counterposed.

Still.... The neophyte observer on Capitol Hill ignores the written Constitution at his or her peril. As the world learned in 2000, just because the candidates and voters *act like* the presidential election is decided by the popular vote does not relegate the Electoral College to a nullity. Political parties have mitigated conflicting political ambitions, not eradicated them. The division of labor between the chambers and between Congress and the president have been breached but not destroyed. The fine details of the Constitution still have a material influence on how Congress legislates. Thus, a nuanced understanding of how the Constitution influences the role of Congress in today's politics requires us to be two-handed analysts. On the one hand there is the document that spells out important institutional details that continue to be relevant. On the other hand, some of these details have been contradicted with impunity or have fostered a style of national politics that was unanticipated by their champions in Philadelphia.

The remainder of this essay spells out this argument in more detail. We start by stepping back in time, to the Constitutional Convention and the years immediately preceding it. The various compromises at the Convention influenced subsequent congressional politics in four different realms—in representation, the institutional capacity of Congress, bicameralism, and political competition with the executive.

## The Crisis of Governance and the Convention<sup>2</sup>

The Constitutional Convention created a new form of national government for the United States but, of course, it did not create the *first* form of national (or central) government, nor did it create the first legislature. Popular assemblies in Virginia and Massachusetts had their start more than a century before Philadelphia. Even the proprietary colonies, like Pennsylvania, had a popular assembly with real authority. Before the Revolution every colony had a functioning local legislature that bore major responsibilities for local governance.

### Legislative experience before the Constitutional Convention

At least a minimal colony-wide government infrastructure was in place before the Revolution—Benjamin Franklin’s appointment as deputy postmaster for the British colonies in the 1750s is the best known example, but there are others. Before relations between the colonists and the crown turned sour, several plans for a united assembly linking the colonies had been floated. Franklin enters the picture here again, as the prime architect of the so-called “Albany Plan of Union,” which proposed a unified “Grand Council” of all the colonies, apportioned by population and wealth, which would raise taxes and be responsible for common defense and the encouragement of trade. This idea was rejected by both the crown and colonial assemblies, all of whom recognized the Grand Council as a potential rival for power.

It was with this experience—effective local assemblies but distrust of the greater authority of a “national” assembly—that the colonies participated in the First and Second Continental Congresses. The Second Congress continued as the official national legislature under the Articles of Confederation and Perpetual Union, which were proposed on November 15, 1777

but not ratified until March 1, 1781. The Articles reflected the supremacy of local authority and suspicion of centralized power by declaring that the thirteen states had entered into a “firm league of friendship.” Friends don’t push each other around, and the formal structure of Congress embodied in the Articles reflected what the body truly was—an assembly of ambassadors.

In imagining what governing was like under the Articles, it is unfortunate that its national legislature shared the same name with the American national legislature under the Constitution—Congress—because the national legislature under the Articles was nothing like the national legislature we know under the Constitution. Under the Articles, members of Congress were really ambassadors. They were elected by state legislatures, paid by state legislatures, and potentially recalled by state legislatures. State delegations ranged in size, but that did not matter for voting, since each state only had one vote, regardless of how large it was or how many delegates were in attendance. For any decision of consequence, the Congress depended on the state legislature to voluntarily pass the required legislation. Congress could not directly lay and collect taxes, even when it had international obligations to discharge.

Even though we now recognize that Congress was hamstrung under the Articles of Confederation, the early returns were not so bad. Congress was fairly successful in navigating the crisis of the Revolutionary War. The war was prosecuted, foreign countries were willing to extend credit, revenues were more-or-less raised, and legations were sent to foreign nations to conduct foreign policy. The diplomats and generals sent forth under the authority of Congress defeated the English and gained independence from the crown.

In the early days it appeared that the claims of the most radical Republicans would prove true. Great resources, men and money, could be gathered together by the central government *asking*, not *demanding*, that the states face up to their mutual obligations.

The sacrifices of local interests to the common good ceased with the peace, however, exposing the infirmities of a national government that was built solely on friendship and volunteerism. The Treaty of Paris, which formally ended the war with England, required the United States to compensate loyalists for economic losses inflicted during the Revolution. Congress had no means to implement this requirement directly; the states themselves refused to comply, giving entree to England to retaliate by refusing to decamp from forts it occupied in America's western frontier. State delegations to Congress regularly eviscerated the financial plans of the Superintendent of Finance, Robert Morris; only a small fraction of the taxes requested of states were ever forwarded to the national treasury. States risked trade and shooting wars—on the east as they passed predatory tariffs against each other's goods, and on the west as they fought competing frontier land claims.

The Constitutional Convention deliberates

The so-called Shays Rebellion of 1786–87 is usually viewed as the precipitating event that gave rise to the Constitutional Convention of 1787. Some sly commentators have said that had Shay's Rebellion not existed, the idea of it would have had to have been created, because there was already considerable fodder for men to affairs who envisioned a more coherent commercial and military presence on North American to contemplate. Shay's Rebellion became



the symbol for a movement that believed that existing governing arrangements failed to secure stable governments within and between the states.

The fifty-five delegates who convened in Philadelphia in the spring of 1787 were practiced politicians, unlike the more radical assembly that had met a decade before, in the same room, to declare independence from England. Of these, forty-six had served in a state legislature and forty-two had served in one of the Continental Congresses.

James Madison's "Virginia Plan," which was presented almost immediately upon the assembly of a quorum, was aimed at consolidating national political power in one institution, the Congress, and basing political power on population, rather than on state equality. The legislature was to be bicameral, but it was clear where political power ultimately lay—with the lower chamber. States would be represented in both chambers in proportion to their population. The people would elect the lower chamber; the lower chamber, in turn, would elect the upper chamber. Both chambers would then elect the executive. For the time being, this was about as far as you could go, from the *status quo*.

The Virginia Plan was also unabashedly nationalist, moving commercial and foreign policy firmly within the orbit of the national government. No better sign of its strong nationalism was the proposal that Congress be given the right to veto acts of state legislatures.

Even though most delegates had qualms about the particulars of Madison's plan, it was adopted as the working outline, with details to be hammered out over the course of the convention. This was not an enthusiastic endorsement, a fact that became clear as debate proceeded to perfect the plan. Majorities could never be mustered to scuttle Madison's blueprint, but the political limitations were readily apparent. The problem was obvious. A government

apportioned by population would strip smaller states of their political power in national councils. While no one quite knew what the various state populations were, it was assumed that variation was substantial. (Eventually, the 1790 census would reveal that the largest state, Virginia, was more than ten times more populous than the smallest, Delaware. The four largest states held more than half the population.)

A proposal by a collection of small state delegations, termed the New Jersey Plan, essentially returned the national legislature to the status quo under the Articles. After long debate, it failed. A proposal by Roger Sherman to compromise on representation was ignored at first, as well. But, as debate proceeded, it became clear that the grand alternatives facing the delegates were either compromise or adjournment and disunion. Disunion would mean a return to dominance by England, or worse, as Spain and France were also making plans to carve up spheres of influence among the states.

Compromise was the only way out.

To appreciate the hurdles the delegates faced in reaching a compromise, it is useful to remember that many delegates were simultaneously member of the Confederation Congress—the legislature whose structure faced radical surgery.<sup>3</sup> Others were leading members of the state legislatures that had elected the members and indirectly called the shots in the existing Congress. They were redistributing power among themselves. Even if they regarded this exercise more patriotically than typical mortals, they understood fully well that they would have to leave Philadelphia and sell this redistribution to others who were not in the room and who would regard the plan less generously.

The value of Sherman's "Connecticut Compromise" became apparent through the arduous and often unfocused debate of the summer. Importantly, it retained union, which in the long run favored the smaller states who would have suffered the most from the predatory practices of the larger states had disunion in fact occurred. The formula of the compromise was the familiar design that has been handed down through the ages: a lower house apportioned by population, an upper house of equal population, and an executive elected independently of both in a plan that amounted to muted weighted voting.

The Philadelphia debates were preoccupied with questions of power sharing along two dimensions of institutional design—power sharing among the states and between the branches. I have dealt extensively with the problem of interstate power, which was solved by toning down a scheme of representation based solely on numbers. Of equal preoccupation was how to control the newly empowered national government. While the details were different, the general structure of the problem was much the same as representation.

The delegates generally agreed that the national assembly needed to be more than a congress of friends. But the delegates also worried that a national assembly with real teeth would upset the system of checks and balances they all valued as children of the Enlightenment. The structure of the inter-branch compromise was also similar to the compromise on representation: slightly different institutions were laid on top of each other and required to function simultaneously. In this case those institutions were the two coequal legislative chambers and an executive elected independently by the states.

The Constitutional Convention deliberated for four months because of the complexity of the compromise that needed to be worked out. Yet by focusing on the contentious issues of

representation and institutional balance, we risk forgetting what was never challenged at the Convention. Included among the non-controversial items is a set of provisions that emerged from the first Committee of Detail, apparently never to elicit any debate—the provisions that made the two chambers the regulators and judges of their own elections and the writers of their rules. They were given the authority to construct independent institutions. Because the Congress of the Confederation distinctly did not have this authority, and because so many of the convention delegates had direct experience with the existing Congress, it is doubtful that these provisions were snuck into succeeding drafts of the new constitution surreptitiously. Across the range of opinion in Philadelphia about the relative strength of the central government and its legislature, no one doubted that the legislature needed to be in a position to better protect itself organizationally. Being able to regulate and judge elections would allow the chambers to guard against states trying to sneak back in state legislative election of lower house members or the recall of senators. Being able to establish chamber rules would allow policy majorities to shape the internal rules of the institution to their advantage, even if it meant running roughshod over the rights of chamber minorities.

The convention was the start. In a whirlwind of activity, within the next two years the Constitution was ratified by state conventions and congressional elections were held. The constitutional story begun in Philadelphia continued when the first Congress under the Constitution convened in New York in April 1789. As a comprehensive blueprint for amassing and using national power, the written document was a starting point, but only a starting point. In the move from Independence Hall to Federal Hall, the Constitution left the hands of the Framers and entered the hands of ambitious politicians for whom the document was both a means and an

end. For the remainder of this essay, we consider how the important details written into the Constitution in Philadelphia have affected congressional politics in the 217 years that have followed.

### The System of Representation

Once the Congress of the Confederation tried to govern in peacetime, it was obvious that it labored under the lack of legitimacy that popular election would have brought. The Constitution gave Congress that legitimacy. As a consequence, the U.S. House of Representatives inherited the same constituents as the state legislatures, which inadvertently put into the hands of voters the decision about where *they* wanted power to reside. Others may have recognized this earlier, but certainly by the 1820s a cadre of ambitious politicians recognized this fact, exploiting it to create the most geographically extensive political party organization the world had ever seen.

But this gets ahead of the story that links choices made by the Framers about representation in Congress to subsequent congressional politics. We start with the structure of the document itself and the initial trajectory it imparted on elections and representation.

If we put out of our minds what we know about modern congressional elections and simply read the text of Article I that pertains to elections and representation, we notice a strong lingering role for the states in these elections, even as the locus of power was being pulled away from them. Most obviously, senators were elected by state legislatures. But the regulation of House elections also had a strong state-centered flavor. Seats in the House were apportioned to

states in proportion to population, with very little prescribed about how states would structure House elections. Nothing required states, for instance, to divide themselves into districts.

One feature of the Constitution that has not held up as predicted has been this strong state-centered flavor of representation within Congress. Best known is how the Senate eventually evolved to embrace popular election, but the House as well has a story of how the state-centered scheme of representation was gradually eroded.

Throughout the nineteenth century, four trends conspired to transform House elections, moving them from local, state-centered affairs to more-or-less national events, tinged by local concerns. These trends were (1) the rise of political parties, (2) the expansion of the electorate, (3) the rise of districts, and (4) the coordination of the electoral calendar. In designing the form of representation in the Constitution, the Framers failed to anticipate the two most important developments in mass electoral politics of the nineteenth century, the rise of political parties and the expansion of the electorate. The two developments were of course related.

Political parties, the expansion of the electorate, and congressional representation

The Framers' distrust of factions is well known, best expressed in Federalist # 10 and Washington's Farewell Address. Still, this dislike of factions was understood within a framework of elite politics and limited suffrage. The first flowering of party sentiment in America came at this elite level, between followers of Jefferson and Hamilton, mostly limited to the halls of government. This factional animosity spilled over into elections, but it did not fundamentally challenge the system of elite-based politics.<sup>4</sup> That challenge would come in the

next political generation, as Andrew Jackson and his followers worked to push the doors of white male suffrage wide open.

The Jacksonian expansion of the electorate had a distinctly partisan purpose, to provide an electoral base for the Democratic party as a national organization. As a *national* organization, the leadership of the Democratic party worked hard to suppress divisive regional issues, particularly slavery.<sup>5</sup> The Democrats, and then the other parties that followed them, further worked to coordinate their electoral efforts. Critical to this coordination was the creation of political parties that muted their programmatic characters.

The Jackson-Van Buren system of office-seeking political parties also relied on a dramatic expansion of the electorate. The initial electorate was quite small, generally restricted to property owners. The early nineteenth century saw a gradual expansion of the franchise, abetted most importantly by the actions of Andrew Jackson and his supporters in the sequence of elections from 1824 to 1832. The immediate goal of this expansion was to sweep Jackson into office and keep him there. It was accompanied by the change in many state laws to require the popular election of presidential electors. This presidentially-centered expansion also had immediate consequences for House elections.

The contours of this expansion are illustrated nicely in the congressional turnout in New York state throughout the nineteenth century. Between 1824 and 1828 alone, the size of the new York congressional electorate grew by 40%; from 1800 to 1852 it grew by ten-fold over a period when its population grew six-fold.<sup>6</sup>

Over time, developments in the states that expanded the franchise and facilitated the rise of political parties undercut the electoral world on which the Framers had reached a compromise on representation.

#### The decline in state electoral idiosyncrasy

When the Framers met, state elections were idiosyncratic. They were held on different days. Districting schemes spanned the waterfront, from at-large to single member districts. States even had peculiar rules. Massachusetts, for instance, required candidates for the House to win an absolute majority of all votes cast, leading to many cases in which election after election would have to be held to fill a seat, because of the failure of anyone to achieve a majority.

The earliest House elections were only truly local elections to a limited degree. Three states, Connecticut, New Hampshire, and New Jersey, generally elected its representatives through a general (at-large) ticket; other states, like Pennsylvania, occasionally did so. At-large elections to the House persisted until the 1840s, after the Apportionment Act of 1842 finally required single member House districts.<sup>7</sup>

Another way in which local electoral heterogeneity gave way to national uniformity was in setting the Election Day. The current first-Tuesday-after-the-first-Monday-in-November election day was set for president in 1845, but it was not extended to the House until 1875.<sup>8</sup> Until a unified date was established, elections could be held as early as twenty months before a Congress convened; occasionally states did not hold their elections until Congress had already convened.



As congressional election days became synchronized to correspond with the presidential election, the obvious happened—election outcomes became synchronized. The electoral fates of rank-and-file members of Congress (MCs) became linked with the fates of the presidential candidates and incumbent presidents.<sup>9</sup>

The end result is House elections that are simultaneously *local* affairs and *national* affairs, but not *state* affairs.

The decline of state legislative responsibility for Senate elections

The mediating role of states in the representation of the Senate eventually disappeared, as well.<sup>10</sup> The Framers explicitly excluded from the Constitution a mechanism for senators to be recalled by the states that elected them. Without recall, state legislatures lacked the mechanism to instruct senators (another practice under the Articles of Confederation). Not that states didn't try. Up until the advent of popular election in 1913, state legislatures continued to address Congress, beginning with the stereotyped phrase "Be it resolved that our Senators in Congress are hereby instructed, and our Representatives are requested, to vote for..." Legislatures did instruct, but senators were free to ignore the instructions. They could rely on the long term of office before they would be held accountable, and the hope that the next election would return a legislature controlled by a friendlier majority.

Failing to develop an effective instruction mechanism, some states attempted a different tactic, censure and attempted forced resignation. This mechanism was first used successfully against John Quincy Adams, whose vote for the Embargo Act became a campaign issue in the next Massachusetts state election. The new anti-Adams legislature boldly elected a successor to

Adams six months ahead of time. Offended, Adams resigned. Others would follow a similar fate, but only those with tender enough sensibilities, or disgust with politics back home.

Forced resignations had sporadic success in the antebellum period, but gradually faded from the scene, disappearing after the 1840s. As Riker argues, instructions failed “through lack of a dependable substitute for recall. Forced resignations, the only available sanction, required that elections turn on the issue of obedience and that senators love honor more than office. By mid-century, neither requirement could be met. Voters quite reasonably refused to consider form more than substance....”<sup>11</sup>

Without a formal mechanism reliably subordinating senators to their state legislatures, senators were free to build their own political bases. As national politics popularized in antebellum America, senators joined the fray.

The apotheosis of this trend gave rise to one of the great moments of popular politics in the antebellum period, the Lincoln-Douglas debates. What were Lincoln and Douglas running for? The Senate. But why would senatorial candidates be stumping the state of Illinois in 1858, if it was the state legislature that would do the electing?

The Lincoln-Douglas debates were occasioned by the first instance in which a state party convention endorsed a senatorial candidate and then sought out state legislative candidates who would serve as pledged electors. This practice caught on, leading many (but not all) states to adopt the *popular canvas* for Senate. As the nineteenth century came to a close, even when parties did not endorse senatorial candidate ahead of time, state legislative elections that corresponded with the election of a senator were approached as shadow senatorial contests. In the Gilded Age, the descriptive relationship between senators and state legislatures stood the

normative relationship on its head. Party bosses like James Blaine, Nelson Aldrich, Roscoe Conkling, and Thomas Platt, if anything, controlled the state legislatures, not the other way around.

In the 63rd *Federalist*, James Madison predicted that the Senate would serve as an “instrument for preserving the residual sovereignty” of the individual states. Yet, eventually lacking subservient political ties to the state legislatures, the Senate failed to serve this role. Hence, it is not surprising that once pressures built in the late nineteenth century for the *de jure* popular election of senators, state legislatures were on the forefront of efforts to eliminate the federalist charade. When the U.S. Senate proved recalcitrant in moving the popular election amendment through the Congress, states acted to reinforce the popular tie of senators to the people—first through attempts to manipulate the nomination and election of senators, and then through petitions to call a constitutional convention, if necessary, to move the amendment along.<sup>12</sup>

#### Policy consequences of different constituencies

Developments in the larger polity have conspired over the past two centuries to homogenize national politics, making the Senate and the House less distinct as representative bodies. Still, it would be a mistake to conclude that senators and representatives are identical, either as individual candidates or as collective members of two legislative chambers. Senators serve longer terms than House members and represent larger constituencies. Certainly these differences must make a difference.

They do, but the differences are subtle. Ironically enough, longer terms probably do not give senators a significantly longer time horizon than House members. The reason is that since the 17th Amendment brought the popular election of senators in 1914, the longer term and greater prestige of being a senator draws more robust competition for Senate seats than for House seats. Senators are more likely to be defeated for reelection than House members, and they are more likely to retire at the end of their terms. The consequence is that over a six year period, House members and Senate members have roughly the same survival rates. In addition, the greater electoral vulnerability of senators compared to House members has meant that by some measures, preferences represented in the Senate have been more volatile than in the House.<sup>13</sup>

On the other hand, there is ample evidence that the equal state apportionment of the Senate has led distributive coalitions in Congress to be more broadly dispersed geographically than if the Senate were apportioned by population.<sup>14</sup> But on the major issues that tend to split the political parties and hold the attention of national electorates, there is no correlation between state size and the ideologies of senators, nor has there ever been.

Therefore, the electoral system in the United States has evolved in such a way that the original representational compromise that made the Constitution possible is mostly irrelevant. There are no issues that divide small and large states, and individual state idiosyncracies are not what they once were. This is not to say that the different electoral schemes in the two chambers are inconsequential, only that they are less consequential than they once were and, in some ways, may be consequential in ways diametrically opposed to the expectations of the Framers.

### The Flowering of Internal Legislative Capacity

For all practical purposes the Continental Congress could act effectively only if a consensus emerged among all the states. Therefore, Congress was loathe to pass rules that would be considered “coercive” or in the least way perceived as favoring one perspective over another. The rules were rather loose, befitting an institution that valued consensus. Measures introduced on the floor were considered in the order they were submitted, regardless of how important they were. They were referred to ad hoc committees for study that were newly constituted for each measure; a committee appointed to consider a matter one day was unlikely to be appointed again to consider a similar matter the next. Once the matter returned to the floor, neither the original proposal nor the committee’s recommendation had any privileged position. Consequently, it was possible for floor proceedings to unravel. This, in turn, led to frustration on the part of members, as their hard work on committees and behind the scenes frequently came to naught. Frustration over the inability of Congress to productively focus the considerable talents of its members finally led to high levels of absenteeism, to the point that Congress had a difficult time even getting a quorum to legislate.<sup>15</sup>

Perhaps the best example of how floor proceedings could unravel in Congress under the Confederation is what happened when they reacted to being attacked by mutinous troops in the summer of 1783. Retreating from Philadelphia to Princeton, Congress turned its attention to where they would meet next, that is, where the capital would be relocated to. They first decided to vote for each state, starting with New Hampshire and moving south; the capital would be located in the state that got the most votes, provided it received at least seven votes. No state received more than four. A new voting scheme was called for.

A motion was introduced narrowing down the options to two, one on the Delaware River and one on the Potomac. An amendment was made to move the capital elsewhere; under the Congress's voting rules, the first vote was whether the original language would stand. Only four states voted to retain the original language, so a blank was inserted instead. But, no real location ever received the required seven state majority. The blank remained. Abandoning the idea of a single location, a motion was then made to have two capitals, in Trenton and Georgetown. This finally passed, but ended up being so unsatisfactory that Congress eventually decided to move back to New York temporarily and start voting on a permanent location for the national capital again.

To the modern observer of Congress, the organizational state of the Confederation Congress must certainly be a puzzle. Capitol Hill now is a city-within-a-city, largely because of the committees that so dominate the legislative process. In the House, the rules are such that bare majorities can cut off debate and amendments from minorities; *in extremis*, the majority party can hold open roll call votes long enough to twist arms and carry the day.<sup>16</sup> Even the Senate's cloture procedure, which has regularly been considered the culprit in delaying Senate floor action, has more teeth in it than what was allowed in the Congress of the Confederation. How is this possible?

Article I, section 5, clause 2 makes this possible. It states,

Clause 2: 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.

This provision appeared in the first report of the Committee on Detail and was never challenged. The Framers had intimate experience with a Congress that could get tied in knots when majorities were unable to work their wills. They were set on ensuring that at least procedural barriers would not stand in the way of action.

It took a while for Congress to take full advantage of this provision. In the years immediately following the Founding, a “Jeffersonian ethos” emerged that opposed strong-armed parliamentary tactics. So, early procedures in Congress actually resembled practices in the Congress of the Confederation, especially the practice of relying on ad hoc committees that had little autonomy in considering legislative proposals. Still, the groundwork was set for a more purposive set of rules. As majorities became receptive to a more structured set of rules, some of which might favor some legislators over others, no constitutional barrier stood in the way. Thomas Jefferson, in his copious free time as vice president, wrote a set of legislative procedures that were consistent with the principles of early public choice theorists such as the Marquis de Condorcet. *Jefferson’s Manual*, written for the Senate, was rejected by that body, but embraced by the House. The House also was the first to embrace standing committees as a way to enhance its competency in battles with the executive branch, when it established the Ways and Means Committee in 1789.

The nineteenth century saw the steady accretion of formal and informal institutions within both chambers of Congress, moving the institution a long way from the egalitarian, purely democratic chamber of mutual friendship that was the Congress of the Confederation. This development is the subject of [the next chapter]. The important constitutional point right now is this: As important as providing a direct electoral link between the people and Congress was in

ensuring a robust political base for Congress, the Constitution also provided an institutional base for strength. In the modern age, the president enjoys an even greater electoral link with the people than does Congress. If the Constitution had *only* provided an electoral link between Congress and the electorate, it is doubtful that Congress would have remained a robust governing institution into the twenty-first century. It is Congress's institutional capacity, explicitly sanctioned by the Constitution, that gives congressional majorities a fighting chance when they disagree with the president.

### Bicameralism

The Framers inherited a legacy of bicameral legislatures, rooted in the English parliamentary practice of balancing popular representation (Commons) with the representation of wealth (Lords). In the heady days of the Revolution, some states, like Pennsylvania, experimented with unicameralism, abolishing the special place that the better class of people had in governing councils, relying instead on the popular will alone.

Two decades of experience with highly democratic state legislatures had cooled the ardor of the governing class toward unchecked democratic legislatures. At least among the delegates to the Constitutional Convention—who were admittedly a self-selected bunch uninterested in radical sloganeering—replacing the incumbent Continental Congress with a bicameral institution was beyond question. The Virginia Plan called for a bicameral legislature, even though the upper chamber was electorally subservient to the lower. True, the New Jersey Plan proposed returning to a unicameral scheme, but it was rejected resoundingly. Significantly, it was the bicameralism



of the Connecticut Compromise that swung small state delegations back in favor of making a more radical departure from the Articles than they had originally favored.

The bicameralism written into the Constitution was both expedient and functional. It was expedient because the creation of two coequal branches allowed a compromise over representation. It was functional by divvying up policymaking responsibilities in a way that mapped important elements of national politics onto the expected political tendencies of the chambers. The lower house was given the right of first movement on taxing, cementing a principle of “no taxation without representation;” the upper house was given special prerogatives in two executive-related areas, foreign policy (treaties) and agency administration (nominations). And, of course, neither chamber was constitutionally favored in regular legislation; both were allowed to move first, and both were required to agree.

Two questions emerge in assessing the consequences of the functional distribution of bicameralism in the Constitution. The first is simply whether the functional division has held and whether it has made any difference in policies that have been pursued. The second is whether bicameralism has been a brake on policymaking and, if it has been, whether the brake has been a positive or negative influence on American political history.

Has the constitutional division of labor between the House and Senate held?

The answer to the first question is “mostly yes.” The constitutional division of labor between the House and Senate has fostered a specialization in the two chambers that persists to this day. This is most easily seen in the operations of congressional committees, which are the work horses of congressional activity. In the House, the most desirable committee is Ways and

Means, which has jurisdiction over all tax matters, plus spending programs like social security, which were designed as tax schemes.<sup>17</sup> In the Senate the Finance Committee is certainly important, but Foreign Relations is nearly as desirable an assignment—much more desirable than the House International Relations Committee. The Senate Judiciary Committee handles judicial nominations, which makes Senate Judiciary also highly sought after, unlike in the House, where the House Judiciary Committee is just another committee. The chambers also allocate resources that are consistent with this specialization—the House Ways and Means staff is larger than the Senate Finance Committee staff and works with a larger budget; the Senate Judiciary Committee has a considerably larger staff than the House Judiciary Committee

The division of labor has frayed around the edges, however, bringing consternation to some constitutional scholars. The early 1980s represented the greatest challenge to the House's preeminence in making tax policy. The first challenge was political, not constitutional, as the norms of fiscal restraint that had enveloped the Ways and Means Committee were undermined by the leaders of both parties.<sup>18</sup> The constitutional challenge followed on the heels of the political. The 1981 tax cuts, the largest in the Nation's peacetime history (in percentage terms), were ushered through Congress in an institutional environment in which the House's ability to resist raids on the Treasury were momentarily weakened. The hemorrhaging of revenues spurred the tax writers in Congress to find ways to raise taxes. When the House proved unable to move a major tax increase forward, Sen. Bob Dole (R-Kans.), chair of the Senate Finance Committee, took the lead by performing the legislative equivalent of a full body transplant. He crafted a tax increase, working out the details in a closed Senate Republican caucus. The House's right to originate tax legislation was acknowledged only in the barest of formalities. The Senate took a

minor tariff bill that had already passed the House, voted to remove the entire text of the bill, substituting instead Dole's Tax Equity and Fiscal Responsibility Act (TEFRA). Although Dole's parliamentary maneuver amounted to a clear charade, the House passed the bill and the courts refused to intervene.<sup>19</sup>

The Senate's unique legislative responsibility, treaty-making, has also come under attack, from two directions. The best known challenges have come from the president, where executive agreements have replaced treaties.<sup>20</sup> Nowadays, executive agreements end wars; treaties set the price of postage stamps.

The new challenge to the Senate's role in guiding international alliances and agreements is that the House has begun sharing more of the responsibility. Consider the North American Free Trade Agreement. This is a treaty if there ever was one. Yet the resolution under which Congress approved the pact passed the Senate on a 61–38 vote, far short of the 2/3 agreement necessary to ratify treaties. Why is it law of the land? Because it was entered into as a congressional-executive agreement that received majority support in both chambers.

To anyone enamored of the plain meaning of the constitutional text, it must be perplexing that this clear violation of the treaty clause went unremarked at the time of the agreement's passage. Indeed, such agreements have become commonplace since World War II.<sup>21</sup> In fairness, the House had long entangled itself in the implementation of treaties, as the House controversy over implementing the Jay Treaty (1794) or the interminable politics over Texas annexation attest to. Still, for most of American history entering into solemn agreements with foreign powers was considered something that the Senate did without the assistance of the House. The high hurdle of the 2/3 ratification requirement and the well-known ability of a small number of

senators to delay made presidents cautious and treaties rare. The world America entered into after World War II changed all that.

The whittling away of the “origination clause” and the “treaty clause” underline an important feature of how the integrity of most inter-branch constitutional prerogatives are guarded. Their protection is predicated on counteracting ambitions creating intra-branch jealousies that swing institutional loyalties into play whenever special prerogatives are challenged. Jealousies are feeble, and thus prerogatives unguarded, when ambitions are no longer in high tension.

The nationalization of politics and the shared political fates of members of Congress in both chambers, plus their shared fate with presidential candidates, often undermines the axiom of having counterposed ambitions in the first place.

The political implication of the erosion of the House’s pre-eminence in fiscal policy and the Senate’s pre-eminence in foreign policy is that both policy areas are now more prone to forum shopping among presidents and legislative policy entrepreneurs. International agreement too controversial to yield 2/3 agreement in the Senate? Craft a legislative-executive agreement. House unwilling to raise taxes? Try the Senate.

Bicameralism’s effects on the pace and quality of legislation

The constitution not only instituted a functional division of labor between the two chambers, it also instituted a concurrent majority requirement for legislation in general. What are the consequences of this requirement?

By now, it should come as no surprise that the judgement of history is that bicameralism, *per se*, has had very little effect on delay, especially delay of significant legislation. The loyalties of senators and representatives are to the same set of political parties and the same collection of ideological battles as the nation as a whole. Thus, bicameralism inserts itself most strongly when majorities in the two chambers are ideologically opposed. Operationally, this means that when the parties are both ideologically distinct and the chambers are controlled by different parties (as in the 107th Congress, 2001–2002), gridlock is to be expected. When they are less distinct (as in most of the Cold War era) or control is unified, delay is less in the cards.<sup>22</sup>

American political history has witnessed three periods when bicameralism probably *did* make a difference in how quickly Congress responded to social problems with ameliorative legislation, and the nature of the legislation that was finally forthcoming. The first was during the antebellum period, when national politicians consciously supported a “balance rule” in the admission of new states to the Union. For each slave state admitted, a free state balanced it. This institutionalized a southern veto over efforts to weaken slavery, in light of the fact that the population of the free states was growing much more rapidly. It is undoubtedly true that the balance rule, which could only have worked if the Senate was apportioned equally, prolonged slavery in the United States while forestalling civil war.

Bicameralism was also implicated during the Civil War and Reconstruction Eras, when a series of Republican-dominated Congresses managed to admit a number of Republican-leaning, small-population states to counterbalance the numerical advantage that Democrats would have in the House once the Civil War was over and southern states returned to full participation in national politics.<sup>23</sup> For the decades of the 1880s and 1890s, the presence of these Republican

“rotten boroughs” in the Senate had the effect of protecting many of the pro-commercial and pro-western settlement policies first enacted during the Civil War Congresses and augmented in the 1880s and 1890s; it also influenced the composition of the Supreme Court during the Lochner Era, making it more pro-business than it might have otherwise been. The irony in this strategy of packing the Senate with Republican states came when the agriculture and mining depression hit late in the nineteenth century—states that had been admitted for their Republican proclivities became the hotbeds of agrarian radicalism, and thus the location of the Progressive and Populist revolts that eventually split the Republican party.

In more recent times, bicameralism retarded civil rights legislation that a majority of Americans supported. How much progress was delayed is still subject to debate. The House was willing to push forward when the Senate was not, but that could have been due more to the Senate’s filibuster, not bicameralism per se. Had the House had the filibuster, not the Senate, progress would have been no swifter. Nonetheless, opponents of racial equality were willing to use any means at their disposal to halt the advance of equality. The fact that there were two sets of legislative hurdles, not one, no doubt worked to their advantage.

History’s verdict on bicameralism in Congress’s development is that it has been produced a subtle influence that, again, would have surprised the Framers. The Senate has not become the staid, aristocratic chamber that “cools the legislative tea.” The House has not become the Hall of Firebrands. Having two chambers, whose members possess slightly different perspectives due to their electoral origins, introduces subtle differences into the legislative product. And having two chambers with specialties—even specialties that are no longer as stark as they once were—has helped to bolster congressional influence over fiscal and foreign policy. A bicameral Congress *is*

different from a unicameral one. Still, the national electoral context that is the common influence on members of both chambers brings together two chambers that the Framers wished to push apart.

### The President

The role of the president as a constitutional influence on Congress has been saved for last. To the modern student of American government this may seem like an odd choice, since the president looms so large over contemporary American politics. This fact alone is comment enough about the disjuncture between the expectations of the Framers and the evolution of American politics. To the Framers, the legislature was the keystone of republican government, the executive being necessary only to effectuate legislative intentions and to act decisively in rare instances of imminent national peril.

Populist excesses in the state legislatures after independence led the Framers to appreciate that popular elections of legislators could create an irresistible political force when they assembled in a legislature. Although the Framers shared the popular distrust of strong executives, they also understood that the only hope of providing an effective ballast against populist legislative excesses was through an effective, yet constrained, executive. Throughout the Constitutional Convention, the delegates wrestled with the right mix of details—term lengths; methods of election; extent of veto prerogative; veto override hurdle, if any—that would allow for an effective executive to emerge and remain independent of Congress, especially the popularly elected lower House.

In considering the act of balancing political power between Congress and the president, it is important to remember that the Framers did not consider that the president might gain a robust popular following. Thus the protections the Constitution gave the President in reining in Congress were largely institutional, mainly the veto power. The president might use other resources at his disposal to dominate Congress, but these were resources—money, troops, patronage—that Congress would have to give him. Therefore, within the world view of the Framers, the president was strong, but still subordinate to Congress.

What the Framers did not anticipate was the Jacksonian revolution, coupled with an ever-growing reach of the national media, which together forged an even stronger link between the public and the president. If you ask citizens of the 21st century which branch of the national government is more closely attuned with the American people, Congress or the President, you will get a different answer than the one you would have gotten in the 18th century.

Therefore, the constitutional space that the presidency and Congress cohabit is one that has seen presidential institutional prerogatives remain unchanged, but exercised in a context in which the popular political advantage has migrated in the president's direction. Prefiguration of this dominance could be seen in the nineteenth century. From early on, the most eagerly awaited moment in a congressional session was the president's message, and in the earliest days House and Senate committees were organized around elements of that message. President Polk's movement of American troops into Mexican territory in May 1846 precipitated the Mexican War, a conflict the sitting Congress would not have approved. President Lincoln's usurpation of Congress's role in suspending *habeas corpus* during the Civil War is well known. Yet these were relatively isolated islands of presidential aggrandizement against a sea of congressional



preeminence. It really took Congress going one step further, eagerly expanding the role of the executive during the Great Depression and World War II, giving the president a seemingly endless set of responsibilities, that fundamentally shifted the constitutional geography.

The Constitution created an executive office that was to interact with Congress in two significant ways. First, the president was essentially made a third legislative branch, through the mechanism of the veto. Second, a long list of executive functions that the Continental Congress enjoyed—ranging from the general administration of the executive departments to conducting military and foreign policy—were taken away and given to the President. The exercise of all these powers would initially depend on Congress acting. But once a nascent administrative state was in place, the Framers recognized that the president would have a potent set of tools at his disposal. These powers, over the far-flung executive branch and over the army and navy, yielded political resources that would grow in the president's favor over time.

#### Congress, the president, and the veto

An earlier generation of legal scholars maintained that the Framers intended the veto to serve as a very limited check on legislative power, used only to scuttle constitutional encroachments or forestall the passage of laws that would be impossible to administer. Recent scholarship, relying on a close reading of Convention proceedings and contemporary practices in the states, suggests otherwise.<sup>24</sup> The more recent thinking starts with the fact that the Framers lived in a world in which the states generally had given their governors at least a limited veto; the contemporary trend was to strengthen gubernatorial vetoes as state constitutions were revised. It continues to the sequence of deliberations in the Convention itself. The Framers considered a

number of veto formulations; the one that was finally approved imposed the fewest restrictions on the president of anything actually proposed. In short, the Framers knew how to write a highly circumscribed veto into the Constitution if they wanted, and they did not.

Although the Constitution's text did not limit the use of the presidential veto to grand constitutional matters, in fact before Andrew Jackson's veto of the Maysville Road bill in 1830 and the recharter of the Bank of the United States in 1832, vetoes were rare. This rarity, coupled with the firestorms these two vetoes prompted, led to a common view in most of the twentieth century that Jackson subverted the original intention and practice of the veto, inventing the policy-oriented veto. Yet this view simply does not comport with the facts. George Washington, who presided over the Constitutional Convention, issued his second veto on a bill that reduced the size of the army. His veto was not based on deep constitutional objections, he simply disagreed with Congress's military judgement. From Washington onward to Jackson, the rare veto messages were mixes of constitutional arguments and policy disagreements.

This leaves an important question: If presidents and members of Congress at least vaguely understood that the president could legitimately veto legislation in the early years of the Republic because of simple policy disagreements, why did it take until 1830 for them to become common? The first answer is simple: Until then, a majority in Congress and the president rarely disagreed over important policy matters. Divided government, which is common in our era and the most powerful predictor of when the president will issue a veto, was rare in the early days of the Republic.

The second answer requires us to notice which president first used the veto as a major policy weapon—Andrew Jackson. Jackson had larger electoral fish to fry, and his two highly

visible vetoes pushed his policy leadership into the limelight, rallying his followers to support his electoral vision of building a party, the Democrats, dedicated to states right and limited government.

Since that time, the most important uses of the veto have helped to frame policy debates and set a stark contrast between the president and a Congress that is dominated by the opposite party. There are many examples one could cite. One was in 1992, when the Democratic-controlled Congress passed campaign finance reform knowing that the Republican President Bush would veto it. Had the Democratic majorities desired campaign finance reform at that point, they could have compromised with the president, but they did not. Bush's veto of the bill allowed Democrats to blame him for the failure of campaign finance reform in the 1992 general election. Further evidence that this was an example of "blame game" politics came after the election, when Democrat Bill Clinton, who had attacked Bush's veto of the original legislation, was elected president. The subsequent Congress, which if anything was even more favorably inclined toward campaign finance reform than the previous one, deadlocked and was unable even to re-pass the bill it had sent to the president just a few months before.<sup>25</sup>

It is certainly true that the veto can be used as a pure legislative tool, allowing Congress and the president to give and take over complicated legislation. Recent research by Charles Cameron has shown that roughly half the time when a veto is issued, the vetoed bill is stripped of the offending passage(s), passed again, and signed into law.<sup>26</sup> These are not typically the bills the public hears about, however, since these are bills in which both sides desire the outcome more than gaining political advantage. To attentive citizens of the twenty-first century, the most important thing to understand about the veto is that it has been transformed into a mechanism

that is more broadly political than anything imagined by the first generation of American politicians, including the Framers.

The president as chief executive and commander and chief

The Constitution also set the president over the executive branch, civil and military. The Framers were certainly aware that the secrecy and unity of leadership that characterized executives could lead to an ultimate usurpation of legislative power by the president. Still, in the nineteenth century, presidential usurpations were rare enough that only a cursory knowledge of American history is likely to bring one knowledge of all the significant instances.

The role of the president as chief executive, head of state, and commander-in-chief expanded significantly in the twentieth century. The most important point to make about that expansion is that it was almost entirely made with congressional support and encouragement.<sup>27</sup> Landmark legislation that led to executive aggrandizement—ranging from the Budget Act to the Employment Act to the creation of the “Alphabet Soup Agencies” during the New Deal—were popular in Congress at the time. The decline of Congress’s power throughout most of the twentieth century was primarily of its own making.

It is hard to imagine how it could have been otherwise. By the time of the New Deal, the country had been living a century of gradually expanding and nationalizing politics. It is no doubt true that in the early days of the New Deal, to deny the president authority because of a republican (meaning the theory, not the party) aversion to executive authority would have meant electoral death to members of Congress. The disastrous faring of congressional Republicans

(meaning the party, not the theory) in 1934 and 1936 was widely interpreted for the next generation as precisely such a verdict.

The shift in authority from Congress to the president was not unambiguously benign—congressional passage of the Tonkin Gulf Resolution is a case study in how presidential aggrandizement could feed on itself, leading to a national tragedy. And the American electorate's tendency to trust the president more than Congress has not been unwavering. The decade following the Tonkin Gulf Resolution is another case study of that.

The early 1970s, the so-called Watergate Era, is known for the throttling back of presidential prerogatives, as Congress passed the War Powers Resolution, over a presidential veto, and laws such as the Congressional Budget and Impoundment Control Act. The internal capacity of Congress was strengthened. The war in Vietnam was put on a short leash through the use of the oldest legislative trick in the book, appropriations restrictions. In the words of James Sundquist, who wrote the definitive book on the subject, a Congress once in decline was now resurgent.<sup>28</sup>

Still, it would be a mistake to view congressional resurgence in the 1970s as representing a permanent roll-back of the most important constitutional dynamic of the past two centuries, which has been the tendency to intertwine constitutional developments with partisan and electoral politics. The greatest strides bolstering congressional capacities against the president were made when the Republican President Nixon's popularity was on the decline and Democratic majorities in Congress were on the rise. It is hard to believe that the institutional resurgence of Congress in the 1970s would have been quite as vigorous had Hubert H. Humphrey won the 1968 election.

Thus, the Constitution designed two institutions, the Congress and the president, to be rivals. The rise of popular politics has complicated this rivalry enormously. On the one hand, members of Congress still have an electoral perspective that is different from the president's. On the other hand, the profile of the president has been raised to the point that much of congressional activity is reflected off the political standing of the president. For members of the president's party, a successful presidential program is a top legislative priority. For members of the opposition, opposing that program is the top order of the day. Any legislator would obviously prefer more power to less. Still, the sweep of history suggests that Congress as a body will usually trade a loss of autonomy or policy leadership in order to become more surely swept up in the president's protective electoral wings.

### Conclusion

The Constitution provided a substantial superstructure on which to construct a national legislature. If we compare the American Congress with other national legislatures, the differences are striking. The real test is what happens when the executive and the legislature disagree over policy. Elsewhere, if the disagreement is not deep or fundamental, the executive prevails, since the alternative is to vote "no confidence" in the government, threatening new elections in most cases. In the American case, at least one possibility is that the legislature will prevail, because Congress possesses formal mechanisms to pursue policies to its liking in the face of a recalcitrant executive. Even short of fundamental disagreements, Congress can significantly shape the ongoing administration of policy, through the activity of its committees

and provisions written into appropriations bills. These are substantively significant constitutional differences that persist more than two centuries after the Constitution was written and ratified.

Still, it is important to recognize that the Framers got the constitutional ball rolling, but they did not have the final word. The creation of national political parties and the knitting together of ambitious politicians into a network of shared fate knocked the feet out from under the political world view of the Constitutional Convention.

The politics of national security in the months after the 9/11 tragedies illustrates the ambivalent role the “Framers’ Constitution” plays in sustaining a national legislature that is both effective and capable of protecting the liberties of the people. Although Congress moved expeditiously in passing the USA PATRIOT Act, it did not capitulate entirely to the desires of the Bush Administration. Who doubts that had George W. Bush been prime minister rather than president, the USA PATRIOT Act would have been different?

Finally, a recurring theme of this essay has been the way in which the initial expectations and assumptions of the Framers have been superseded by subsequent political developments, particularly the rise of national political parties and the nationalization of politics. The cynic might come away from such an argument with the conclusion that the Constitution is simply an empty shell and irrelevant to the grand politics that occupy the Congress and the president. Such a cynical reading is possible only if one’s view of the Constitution is that of detailed instruction manual.

I would argue that the more optimistic, and realistic, view is that the Constitution has successfully provided two features of national political life that seem unassailable. The first is a Congress that is institutionally robust and capable of gathering information and seeking opinions

independently of the president. The second is that Congress is still linked directly to the people through elections. The president is a stronger popular rival than he once was, but he is not the only game in town. It is that unbreakable electoral link that provides its continuing legitimacy, ensuring real political power.



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1. John P. Roche, "The Founding Fathers: A Reform Caucus in Action," *American Political Science Review* 55, no. 4 (1961), p 799.
2. The account in this section draws heavily on Calvin C. Jillson and Rick K. Wilson, *Congressional Dynamics: Structure, Coordination, and Choice in the First American Congress, 1774-1789* (Stanford, Calif.: Stanford University Press, 1994), Calvin C. Jillson, *Constitution Making: Conflict and Consensus in the Federal Convention of 1787* (New York: Atherton Press, 1988), and Carol Berkin, *A Brilliant Solution: Inventing the American Constitution* (New York: Harcourt, 2002). For a more extended discussion along these lines that relies on the theory of rational choice to discuss the unfolding politics of the Constitutional Convention, see Charles Stewart, III, *Analyzing Congress* (New York: Norton, 2001).
3. Although it is a commonplace to express the conflict between large and small states in substantive terms, there is no major substantive issue of the time that split the nation along state population lines. Small-population Georgia had similar border perils to large-population Virginia. Small-population Rhode Island had as vigorous a coastal and international trade as large-population Pennsylvania. Large-population New York could block small-population Connecticut in coastal trade, but small-population New Jersey could block New York; Delaware could block Pennsylvania. More systematically, an analysis of the correlation between state size and political preferences, using the DNOMINATE measure of Pool and Rosenthal, reveals that there never has been a Congress when state size and political preferences have been significantly correlated. For an explanation of Pool and Rosenthal's methodology see Keith T. Poole and Howard Rosenthal, *Congress: A Political-Economic History of Roll Call Voting* (New York: Oxford University Press, 1991).
4. The close link between governmental partisans and the electoral process is seen in the life of the first Clerk of the House, John Beckley. On this linkage see Edmund Berkeley and Dorothy Berkeley, *John Beckley: Zealous Partisan in a Nation Divided* (Philadelphia: American Philosophical Society, 1973).
5. On the strategies of Democratic party building see John H. Aldrich, *Why Parties?* (Chicago: University of Chicago Press, 1995) and Robert Remini, *Martin Van Buren and the Making of the Democratic Party* (New York: Oxford University Press, 1959).
6. Michael J. Dubin, *United States Congressional Elections, 1789-1997: The Official Results* (Jefferson, N.C.: McFarland, 1998).
7. This requirement, which represented the first time Congress used its authority to "make or alter" state election laws pertaining to Congress, was in reaction to what was called the "Broad Seal War," the constitutional crisis the country was thrown into in 1839 resulting from New Jersey's continued insistence on using a general ticket to elect House members. In that instance, an electoral dispute involving just a few votes in a couple of New Jersey towns cast doubt on the rightful composition of the entire New Jersey House delegation. The resolution to this dispute would determine which party controlled the House. The dispute threw the House into such a

turmoil that it took more than two weeks to organize for business, John Quincy Adams seized the chair extra-legally to help facilitate organization, and the House seriously considered adjourning and calling new elections. Laurence F. Schmeckebier, *Congressional Apportionment* (Washington: Brookings Institution, 1941). is still the classic treatment of congressional apportionment, although he dismisses the importance of the Broad Seal War in forcing the issue of abolishing general ticket voting for representatives.

8.A uniform law regulating senatorial elections was not passed until 1862. Under that law, state legislatures were required to vote to fill expiring Senate seats on the second Tuesday after convening. While most state legislatures met biennially in odd-year Januaries, not all did—some met annually or triennially, while others convened in other months. So, a truly uniform senatorial Election Day did not emerge until popular election was established in 1914.

9.Gerald H. Kramer, "Short-Term Fluctuations in U.S. Voting Behavior, 1896-1964," *American Political Science Review* 65, no. 1 (1971); Gary C. Jacobson and Samuel H. Kernell, *Strategy and Choice in Congressional Elections* (New Haven, Ct.: Yale University Press, 1981).

10.This discussion relies heavily on Riker's classic examination of the pre-1914 contribution of the Senate to the development of American federalism, William H. Riker, "The Senate and American Federalism," *American Political Science Review* 49, no. 2 (1955).

11.Ibid., p. 462.

12.On the movement to institute the popular election of senators see George Henry Haynes, *Election of Senators* (New York: H. Holt, 1906), George Henry Haynes, *Senate of the United States* (Boston: Houghton Mifflin, 1938).

13.Charles Stewart, III and Barry Weingast, "Stacking the Senate, Changing the Nation," *Studies in American Political Development*.

14. Frances E. Lee, "Representation and Public Policy: The Consequences of Senate Apportionment for the Geographic Distribution of Federal Funds," *Journal of Politics* 60 (1998);R. Douglas Arnold, *Congress and the Bureaucracy: A Theory of Influence* (New Haven: Yale University Press, 1979).

15.My characterization of internal procedures in the Second Continental Congress relies on Jillson and Wilson, *Congressional Dynamics: Structure, Coordination, and Choice in the First American Congress, 1774-1789*.

16.Two recent examples illustrate this seemingly extreme parliamentary tactic. On November 22, 2003, the Republican-supported Medicare bill was going down to defeat on a roll call vote by a margin of 218–216. However, the House leadership decided not to gavel the roll call vote closed for almost three hours (the rules provide for roll call votes to last 15 minutes), so that they could twist arms and change three votes, ensuring passage. David Broder, "Time Was Gop's Ally on the Vote," *Washington Post*, November 23, 2003. On July 8, 2004, an amendment to a

spending bill was added by Rep. Bernie Sanders (I-Vt.), prohibiting the Justice Department from accessing library or bookstore records under the USA PATRIOT Act.. In a surprise to the Republican majority leadership, the amendment was on the way to passage, until the Republican majority leadership held the roll call vote open another 30 minutes, to induce enough Republicans to switch their votes to guarantee a tie, and a defeat for the amendment. Ben Pershing and Erin P. Billings, "Parties Gauge Fallout from Controversial Vote," *Roll Call*, July 12, 2004 2004.

17.Charles III Stewart and Timothy Groseclose, "The Value of Committee Seats in the United States Senate, 1946-91," *American Journal of Political Science* 43 (1999); Timothy Groseclose and Charles Stewart, III, "The Value of Committee Seats in the House, 1946-1991," *American Journal of Political Science* 42 (1998).

18.Charles III Stewart, "The Politics of Tax Reform in the 1980s," in *Politics and Economics in the Eighties*, ed. Alberto Alesina and Geoffrey Carliner (Chicago: University of Chicago Press, 1991).

19.John L. Hoffer, Jr., "The Origination Clause and Tax Legislation," *Boston University Journal of Tax Law* 2, no. May 1984 (1984); Thomas L. Jipping, "TEFRA and the Origination Clause: Taking the Oath Seriously," *Buffalo Law Review* 35, no. Spring 1986 (1986);James V. Saturno, *The Origination Clause of the U.S. Constitution: Interpretation and Enforcement* (Washington: Congressional Research Service, 2002).

20.James Sundquist, *Decline and Resurgence of Congress* (Washington: Brookings, 1981).; Louis Fisher, *Constitutional Conflict between Congress and the President* (1985).

21.Bruce Ackerman and David Golove, "Is NAFTA Constitutional?," *Harvard Law Review* 108, no. February 1995 (1995).

22.Sarah A. Binder, "The Dynamics of Legislative Gridlock, 1947-96," *American Political Science Review* 93 (1999), David R. Mayhew, *Divided We Govern* (New Haven, Conn.: Yale University Press, 1991).

23.Stewart and Weingast, "Stacking the Senate, Changing the Nation."

24.C.f. Wilfred E. Binkley, *President and Congress* (New York: A.A. Knopf., 1947) and Nolan McCarty, "Presidential Vetoes in the Early Republic: Changing Constitutional Norms or Electoral Reform?," in *History of Congress* (Stanford University: 2004).

25.Stewart, *Analyzing Congress.*, pp. 78–79.

26.Charles M. Cameron, *Veto Bargaining: Presidents and the Politics of Negative Power* (New York: Cambridge University Press, 2000).

27.Sundquist.

28.Ibid.