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# IS CONGRESS “THE BROKEN BRANCH”?

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### INTRODUCTION

How should we think about Congress’s role in the American system? Is the institution a “broken branch”? How might we decide whether it is broken? If it is broken, compared with what is it broken? What are the plausible counterfactuals? Is there a serious need for constitutional repair? Notwithstanding the none-too-attractive performance by Congress in recent times, I am skeptical about certain over-gloomy diagnoses and over-intrusive remedies. Below, I offer two arguments.

#### I. CONGRESS, IF CONSIDERED IN PERSPECTIVE, IS NOT ALL THAT BAD

Congress is an unlovely institution, but it has always been unlovely. In a contest for the “most disparaged” branch of the United States national government during the course of American history, there is little doubt that Congress would emerge the winner hands-down. The tradition of disparagement as well as the congressional behavior, actual or alleged, that has brought it on is well-known. The themes go way back. For example, Tocqueville wrote: “When one enters the House of Representatives at Washington, one is struck by the vulgar demeanor of that great assembly.”<sup>1</sup> Mark Twain famously quipped: “[T]here is no distinctly native American

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<sup>1</sup> ALEXIS DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* 200 (J.P. Mayer ed., George Lawrence trans., Anchor Books 1969) (1835).

criminal class except Congress”;<sup>2</sup> and “[S]uppose you were an idiot. And suppose you were a member of Congress. But I repeat myself.”<sup>3</sup> As a final example, recall how Frank Capra depicted Congress in his 1939 film, *Mr. Smith Goes to Washington*, possibly Hollywood’s leading statement on the institution: that fictional Congress was corrupt, pettifogging, self-centered, anti-democratic, and a procedural mess.<sup>4</sup>

A census of the offending behaviors said to be rampant in Congress would include a number of familiar complaints. The members bicker and fight with each other incessantly. They blather too much – the Senator Claghorn image.<sup>5</sup> They let obstruction get in the way of action. They weave awkward compromises into law. They are prone to particularism – as in the growing custom of earmarks.<sup>6</sup> They surrender to special-interest boondoggles – as in the agricultural subsidy bills.<sup>7</sup> They are bought by campaign donors and pushed around by lobbyists. They do not do their homework. Perhaps as much as anything, they participate in arguments and decisions that all too often seem unintelligent: Why do they lean toward protectionism? Why did they intrude into the Terry Schiavo case the way they did?<sup>8</sup> Why can’t they think and act right about global warming?

Indexing the disparagement, perhaps, is Congress’s low rating in public opinion surveys. Recently in this realm, a Republican Congress scored a record low in 2006.<sup>9</sup> But then a Democratic Congress scored even worse, below fifteen percent, in 2008.<sup>10</sup>

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<sup>2</sup> MARK TWAIN, *FOLLOWING THE EQUATOR: A JOURNEY AROUND THE WORLD* 99 (1897).

<sup>3</sup> 2 ALBERT BIGELOW PAINE, *MARK TWAIN: A BIOGRAPHY* 724 (1912).

<sup>4</sup> See *MR. SMITH GOES TO WASHINGTON* (Columbia Pictures Corp. 1939).

<sup>5</sup> The fictional and braggadocious southerner, Senator Claghorn, was a popular radio persona in the 1940s, and was the model for the Warner Brothers cartoon character, Foghorn Leghorn. See JOHN DUNNING, *ON THE AIR: THE ENCYCLOPEDIA OF OLD-TIME RADIO* 268 (1998).

<sup>6</sup> As an example of its growth, Congress passed appropriations bills including more than \$16.5 billion for earmarks in fiscal year 2008. Office of Management and Budget, *Earmarks in 2008 Appropriations Bills*, [http://earmarks.omb.gov/2008\\_appropriations\\_home.html](http://earmarks.omb.gov/2008_appropriations_home.html) (last visited Feb. 7, 2009).

<sup>7</sup> See, e.g., *A Harvest of Disgrace; The Farm Bill*, *ECONOMIST*, May 24, 2008, at 46, 46; David E. Sanger, *Bush Signs Farm Bill over Some Republican Protests*, *CHI. TRIB.*, May 14, 2002, at 10.

<sup>8</sup> See, e.g., Charles Babington & Mike Allen, *Congress Passes Schiavo Measure; Bush Signs Bill Giving U.S. Courts Jurisdiction in Case of Fla. Woman*, *WASH. POST*, Mar. 21, 2005, at A1 (reporting the rushed passage of a bill giving federal courts the ability to overturn a Florida court decision allowing the removal of the brain-damaged Schiavo’s feeding tube).

<sup>9</sup> See Richard Morin & Dan Balz, *Confidence in GOP Is at New Low in Poll*, *WASH. POST*, May 17, 2006, at A1.

<sup>10</sup> Lydia Saad, *Congressional Approval Hits Record-Low 14%*, *GALLUP*, July 16, 2008, <http://www.gallup.com/poll/108856/Congressional-Approval-Hits-RecordLow-14.aspx>

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In the face of an indictment like this, what could be the redeeming perspective? Perhaps the best argument is a familiar one: Congress is just one of the three governmental branches. It complements the others. Each sector of the government offers, or at least can offer, a distinctive menu of services. The presidency offers opinion leadership as well as, in its chief executive role, speed, coordination, and secrecy. The bureaucracy, also a component of the executive branch, offers technical expertise and hierarchical organization. The judiciary traffics in coherence, consistency, and justice.

Congress is the country’s representative body. In this capacity, it offers certain services that often bring it into disagreement or conflict with the other branches as well as with the country’s intelligentsia. The latter dissonance is relentless and important. In certain respects, Congress and the country’s intelligentsia are natural enemies. This is not a new thing. At many junctures in American history, it would have been easy to assemble academics, journalists, and others into a conference to roast Congress.

One of those congressional services is the integration necessary for any action to occur. On Capitol Hill, the country’s jangling tastes, as indexed in House and Senate constituencies, need to be woven into majority coalitions – in the Senate, often super-majority coalitions. This weaving is not easy – hence the frequent bickering, blathering, delay, and awkward compromises. Consider the recent \$700 billion bailout of the financial industries, which entered Congress as a three-page blueprint yet exited as a 451-page enactment laden with expensive ornaments.<sup>11</sup> The op-ed pieces assailing this kind of performance almost write themselves. Crisp, clear, decisive, theoretically elegant action is not ordinarily the congressional way.

Yet Congress’s labored process is not entirely pointless. Matthew S. Shugart and John M. Carey have presented an interesting argument in a comparative study of presidential systems.<sup>12</sup> In legislative terms, compared with chambers in other countries, the U.S. Congress is unusually powerful vis-à-vis its executive branch.<sup>13</sup> Happily, such relative strength seems to correlate with the overall long-term legitimacy of a governmental system.<sup>14</sup> This seems to be because elected assemblies, which are heterogeneous and multi-member, tend to be better than single-person presidencies at arranging compromises and accommodating a country’s diversity.<sup>15</sup> In this sense, the messiness and the

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(stating that the current low is the lowest congressional approval rating in the thirty-four-year Gallup Poll history of asking the question).

<sup>11</sup> See, e.g., Jay Fitzgerald, *Bailout Showdown; Porked-Up Bill Faces New House Vote*, BOSTON HERALD, Oct. 3, 2008, at 20.

<sup>12</sup> MATTHEW SOBERG SHUGART & JOHN M. CAREY, PRESIDENTS AND ASSEMBLIES: CONSTITUTIONAL DESIGN AND ELECTORAL DYNAMICS 131-66 (1992).

<sup>13</sup> Cf. *id.* at 156 fig.8.1 (displaying how U.S. Presidents have weak legislative powers compared to presidents in other democratic regimes).

<sup>14</sup> *Id.* at 165.

<sup>15</sup> *Id.*

other un-niceties associated with assemblies are functional. Assemblies may be untidy, but presidential systems that have strong ones seem to work better.

In a second kind of service, Congress exhibits a particular kind of popular democracy. It tends to incorporate popular ways of thinking – the tropes, the locutions, the moralisms, the assumptions, the causal stories and the rest that structure the meaning of political life in the mass public. Whether this is a service at all can be contested. But there it is. Generation after generation, Congress has juxtaposed popular styles of thinking to the thrusts of rationalization or high-mindedness often favored by the executive branch, the judiciary, or the intelligentsia. Congress offers an often-exasperating dose of average thinking. A couple of years ago, I remember seeing on television a panel of congressional pages where one of the youngsters remarked wide-eyed about Congress: “It’s just like high school!”

In this vein, for example, presidents of both parties have ordinarily positioned themselves on the free-trade side of Congress.<sup>16</sup> Congress has tended to be more protectionist.<sup>17</sup> There are several reasons for this, but a better reach of the rationalizing logic of Economics 101 into the executive branch is probably one of them. In the area of agricultural policy, Democratic and Republican presidents of the last sixty years, working respectively from regulatory and free-market designs, have tried to impose rationalizing efficiency schemes. They have been met with indifferent success on Capitol Hill, where “let’s help the farmers” seems to be a sufficient theme. In 1997, the Senate, unbowed over by the evolving science, voted ninety-five to zero to steer clear of the Kyoto Accord regarding global warming.<sup>18</sup> Soon afterward, President Clinton signed on to the Accord in a symbolic gesture.<sup>19</sup>

There are other examples of how Congress reflects ideas of popular democracy. The minimum wage, which has a simple accessible logic, is a congressional favorite notwithstanding its (at best) mixed reputation among economists.<sup>20</sup> In the realm of crime control, including capital punishment, experts who advance rehabilitative theories encounter more of a bent for punitiveness on Capitol Hill. In general Congress, compared with the judiciary, seems to lean toward a common-sense utilitarianism as opposed to often newly-minted rights theories. All this can cause handwringing and

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<sup>16</sup> See, e.g., Gwen Ifill, *Clinton Recruits 3 Presidents to Promote Trade Pact*, N.Y. TIMES, Sept. 15, 1993, at B12 (describing the support of two Republican and two Democratic presidents for the North America Free Trade Agreement).

<sup>17</sup> Cf. Cato Center for Trade Policy Studies, *Free Trade, Free Markets: Rating Congress*, <http://www.freetrade.org/congress> (last visited Feb. 9, 2009) (tracking voting records on trade issues for the 105th through 110th Congresses).

<sup>18</sup> See James Bennet, *Warm Globe, Hot Politics*, N.Y. TIMES, Dec. 11, 1997, at A1.

<sup>19</sup> See Joby Warrick, *Administration Signs Global Warming Pact*, WASH. POST, Nov. 13, 1998, at A26.

<sup>20</sup> Daniel Shaviro, *The Minimum Wage, the Earned Income Tax Credit, and Optimal Subsidy Policy*, 64 U. CHI. L. REV. 405, 406-07 (1997).

despair. Yet it is probably true that the battle between the popular and the high-minded needs to be fought out somewhere. In any society, common sense versus expertise is an opposition that will not go away. In the American system, it is up for grabs how much we are willing to trust scientific, bureaucratic, legal, or moral experts. Congress helps supply an assurance that their ideas need to be sold, not just proclaimed.

It is a paradox, to be sure, that Congress can at once purvey popular thinking and yet be unpopular itself. This is, however, by no means a new behavior. As far as I know, there has never existed an era when Congress rode particularly high in public opinion. A mid-1960s high in the congressional ratings statistics is often deployed as a baseline to highlight its dramatic subsequent decline.<sup>21</sup> But that, however, was probably a local high, as no earlier golden age seems to exist.<sup>22</sup> Mark Twain’s old take on Congress is probably indicative.<sup>23</sup>

Nonetheless, other evidence points to a more textured view of the institution. In a 2004 national survey conducted by the Annenberg Institutions of American Democracy Project, respondents strongly endorsed Congress’s place in the system.<sup>24</sup> The survey asked: “When it comes to making important policy decisions, do you think that decisions should be made by the Congress or by the president?” In response, 59.4% preferred Congress, 20.5% the President, and 13.9% desired joint decision-making.<sup>25</sup> The respondents also emphatically endorsed the idea of checks and balances in answering the question: “Which view is closer to yours – legislative checks are good, or legislative checks cause gridlock and inaction?”<sup>26</sup> In response, 69.9% chose “checks are good,” with only 19.8% choosing “cause gridlock and inaction.”<sup>27</sup> Furthermore, a shrewd appreciation of the vagaries of the legislative process emerged. A question was posed: “Which one do you agree with most? (A) Conflict is a natural part of the legislative process, or (B) Members create conflict where there need not be any.”<sup>28</sup> Here, the (A) response handily beat out the (B) response, 62.7% to 31.5%.<sup>29</sup>

These results do not necessarily conflict with the recurrent bad Gallup ratings on the question of whether Congress is doing a good job right now.

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<sup>21</sup> DAVID R. MAYHEW, *AMERICA’S CONGRESS: ACTIONS IN THE PUBLIC SPHERE, JAMES MADISON THROUGH NEWT GINGRICH* 228 (2000).

<sup>22</sup> *See id.* at 228-30.

<sup>23</sup> *See supra* notes 2-3 and accompanying text.

<sup>24</sup> David R. Mayhew, *Actions in the Public Sphere*, in *THE LEGISLATIVE BRANCH* 63, 93-94 (Paul J. Quirk & Sarah A. Binder eds., 2005). For a guide to the Annenberg survey, see *THE LEGISLATIVE BRANCH*, *supra*, app. at 551-53.

<sup>25</sup> Mayhew, *supra* note 24, at 93-94.

<sup>26</sup> *Id.* at 94.

<sup>27</sup> *Id.*

<sup>28</sup> *Id.*

<sup>29</sup> *Id.*

Yet easily understandable comebacks to this latter question might be: Compared with what? What is the plausible counterfactual? What plausible alternative institutional setup would do better?

## II. THERE IS NO COMPELLING CASE FOR REVISING THE CONSTITUTION TO SOLVE ANY PROBLEMS

At square one, back in the late-eighteenth century, perhaps it would have been a good idea to institute a parliamentary system in the United States rather than a presidential one. That question can be argued endlessly, and it has been.<sup>30</sup> But it does not seem a productive line of inquiry. We are stuck, or gifted, with a presidential system featuring separation of powers. As a theoretical matter, the Burke card is playable against any sweeping overhaul move.<sup>31</sup> As a practical matter, no significant desire seems to exist in the American public for any constitutional redesign of Congress. There is no modern analogue to the drive for popular elections of senators a century ago.<sup>32</sup> At the level of constitutional design, nothing seems to be seriously wrong – or at least widely thought to be seriously wrong.

Undoubtedly, this quiescence has many causes. In this part of the Essay, I suggest certain reasons for it, all centering on the actual place or operation of Congress in the system. The three reasons are: (1) Congress can accomplish many goals even when there is divided control of government; (2) the Senate's malapportionment does not cause the problems it is purported to cause; and (3) elections act as the favored American avenue for change.

### A. *Divided Party Control Is Not a Great Problem*

First, the familiar “gridlock” case is flawed. Gridlock is the case that the American electoral system all too often produces divided party control of the national government, and so, little or nothing can get done (at least on the legislative front) in that circumstance. The case is weak.<sup>33</sup> Granted, the laws enacted under divided party control are a heterogeneous lot, and they are often compromises rather than exhibits of pure ideology, but that is what one would expect. Yet substantial menus of laws are enacted. Consider the following list

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<sup>30</sup> See generally Bruce Ackerman, *The New Separation of Powers*, 113 HARV. L. REV. 633 (2000) (arguing that a model of “constrained parliamentarianism” offers a better path to constitutional development than the current American approach).

<sup>31</sup> Edmund Burke is commonly associated with an argument for obeying the ingrained traditions of a political system. See David A. Strauss, *Common Law Constitutional Interpretation*, 63 U. CHI. L. REV. 877, 891-94 (1996).

<sup>32</sup> Popular election for senators was established in 1913 through the ratification of the Seventeenth Amendment to the Constitution. U.S. CONST. amend XVII.

<sup>33</sup> For an extended argument that the case is weak, see generally DAVID R. MAYHEW, *DIVIDED WE GOVERN: PARTY CONTROL, LAWMAKING, AND INVESTIGATIONS, 1946-2002* (2d ed. 2005).

of legislation passed during the 2007-08 congressional term as a newly-elected Democratic Congress faced the Bush presidency:

Legislation Passed in 2007:

- \$70 billion in additional funding for the wars in Afghanistan and Iraq<sup>34</sup>
- Minimum wage increase to \$7.25 per hour<sup>35</sup>
- Implementation of the security recommendations of the 9/11 Commission, including tightening security on air and sea cargo<sup>36</sup>
- Ethics and lobbying reform<sup>37</sup>
- Student-loan relief<sup>38</sup>
- \$23.2 billion for water projects (enacted over Bush veto)<sup>39</sup>
- Free trade pact with Peru<sup>40</sup>
- Increase in auto fuel-efficiency standards<sup>41</sup>
- Overhaul of pharmaceutical regulations<sup>42</sup>

Legislation Passed in 2008:

- \$168 billion economic stimulus package (February 13, 2008)<sup>43</sup>
- \$307 billion agricultural subsidy package (enacted over Bush veto)<sup>44</sup>
- \$162 billion in additional funding for the wars in Iraq and Afghanistan, and \$63 billion for a new GI bill of rights<sup>45</sup>
- Authorization of terrorism surveillance powers (the FISA fix)<sup>46</sup>
- Up to \$300 billion in mortgage relief (July 30, 2008)<sup>47</sup>

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<sup>34</sup> Consolidated Appropriations Act, 2008, Pub. L. No. 110-161, § 6, 121 Stat. 1844, 2446-56 (2007).

<sup>35</sup> Fair Minimum Wage Act of 2007, Pub. L. No. 110-28, § 3, tit. VIII, 121 Stat. 188.

<sup>36</sup> Implementing Recommendations of the 9/11 Commission Act of 2007, Pub. L. No. 110-53, 121 Stat. 266.

<sup>37</sup> Honest Leadership and Open Government Act of 2007, Pub. L. No. 110-81, 121 Stat. 735.

<sup>38</sup> College Cost Reduction and Access Act, Pub. L. No. 110-84, 121 Stat. 784 (2007).

<sup>39</sup> Water Resources Development Act of 2007, Pub. L. No. 110-114, 121 Stat. 1041.

<sup>40</sup> United States-Peru Trade Promotion Agreement Implementation Act, Pub. L. No. 110-138, 121 Stat. 1455 (2007).

<sup>41</sup> Ten-in-Ten Fuel Economy Act, Pub. L. No. 110-140, tit. I, 121 Stat. 1498 (2007).

<sup>42</sup> Food and Drug Administration Amendments Act of 2007, Pub. L. No. 110-85, 121 Stat. 823.

<sup>43</sup> Economic Stimulus Act of 2008, Pub. L. No. 110-185, 122 Stat. 613.

<sup>44</sup> Food, Conservation, and Energy Act of 2008, Pub. L. No. 110-246, 122 Stat. 1651.

<sup>45</sup> Supplemental Appropriations Act, 2008, Pub. L. No. 110-252, 122 Stat. 2323.

<sup>46</sup> Foreign Intelligence Surveillance Act of 1978 Amendments Act of 2008, Pub. L. No. 110-261, 122 Stat. 2436.

<sup>47</sup> Housing and Economic Recovery Act of 2008, Pub. L. No. 110-289, 122 Stat. 2654.

- Overhaul of consumer-product-safety regulation<sup>48</sup>
- Civil rights protection for the disabled<sup>49</sup>
- Mental health parity mandate in health insurance<sup>50</sup>
- Protection of the Great Lakes<sup>51</sup>
- \$700 billion financial rescue package<sup>52</sup>
- Nuclear trade pact with India<sup>53</sup>

Legislative politics during the 2007-08 term was certainly contentious, and many proposals from all sides were left on the cutting-room floor. But much legislating was done, sometimes by way of versatile coalitions. In the House, a minority rump of Democrats joined with the bulk of Republicans to approve the Bush Administration's war funding (twice)<sup>54</sup> and Foreign Intelligence Surveillance Act ("FISA") fix.<sup>55</sup> "I'm the Speaker of the House," reflected Nancy Pelosi as she presided over a "roll" of her own party in the Iraq funding controversy of 2007. "I have to take into consideration something broader than the majority of the majority in the Democratic Caucus."<sup>56</sup> Yet there was a contrasting pattern. Also in the House, the costly mortgage bailout in July 2008, as well as the \$700 billion financial rescue package in October 2008, both backed by the White House, drew the support of a majority of House Democrats yet only a minority of Republicans.<sup>57</sup>

More angles could be explored here. Yet, in general, the American public does not seem to get upset about the idea or the circumstance of divided party control as such and probably for good reason.

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<sup>48</sup> Consumer Product Safety Improvement Act of 2008, Pub. L. No. 110-314, 122 Stat. 3016.

<sup>49</sup> ADA Amendments Act of 2008, Pub. L. No. 110-325, 122 Stat. 3553.

<sup>50</sup> Paul Wellstone and Pete Domenici Mental Health Parity and Addiction Equity Act of 2008, Pub. L. No. 110-343, div. C, tit. V, 122 Stat. 3881.

<sup>51</sup> Great Lakes-St. Lawrence River Basin Compact, Pub. L. No. 110-342, 122 Stat. 3739 (2008).

<sup>52</sup> Emergency Economic Stabilization Act of 2008, Pub. L. No. 110-343, div. A, 122 Stat. 3765.

<sup>53</sup> United States-India Nuclear Cooperation Approval and Nonproliferation Enhancement Act, Pub. L. No. 110-369, 122 Stat. 4028 (2008).

<sup>54</sup> See, e.g., Paul Kane, *Domestic Spending Intact as House Passes War Bill*, WASH. POST., June 20, 2008, at A3.

<sup>55</sup> See, e.g., Gail Russell, *Congress Wrestles over Spying Bill*, CHRISTIAN SCI. MONITOR, June 23, 2008, at 3.

<sup>56</sup> Susan Davis, *Pelosi Brings End to "Hastert Rule,"* ROLL CALL, May 29, 2007, [http://www.rollcall.com/issues/52\\_132/news/18700-1.html?type=printer\\_friendly](http://www.rollcall.com/issues/52_132/news/18700-1.html?type=printer_friendly).

<sup>57</sup> See, e.g., Lori Montgomery & Paul Kane, *Bush Enacts Historic Financial Rescue; House Passes Plan by Wide Margin, but Stocks Keep Falling*, WASH. POST, Oct. 4, 2008, at A1; Richard Simon, *Bush Yields on Housing Bill, Which Now Goes to Senate*, L.A. TIMES, July 24, 2008, at A1 ("Among House Republicans, 45 voted for the bill and 149 against it. All but three Democrats voted in favor.").



B. *The Senate's Malapportionment Is Not a Serious Problem*

Second, the U.S. Senate, which could be causing serious outlier problems due to its composition, does not in fact seem to cause these problems. As is well known, the Senate is one of the most malapportioned legislative chambers in the world.<sup>58</sup> In the 2000 Census, California registered sixty-nine times the population of Wyoming, but has equal representation in the Senate.<sup>59</sup> This representational unfairness is obvious and unrelenting. But hardly anyone seems to care. In the United States, posters are plastered all over the place, all the time, promoting many causes, but I have not seen any attacking the Senate. Why is that?

Apparently, we have lucked out.<sup>60</sup> In terms of Democratic and Republican partisanship, the propensities of the fifty states are nearly, albeit not perfectly, orthogonal to their population sizes. As a result the Senate, the House, and the presidency tend to move in a tight cluster in a Democratic or Republican direction all at once. One way to illustrate this propensity is with a cross-institution comparison for the presidential election years from 1948 through 2004. It involves the party share, say the Democratic share, of the major-party presidential vote – for example, the Kerry percentage of the Bush-Kerry vote in 2004. The comparison is between the Democratic share of the national popular presidential vote on the one hand, and the Democratic share of the presidential vote in the *median* House district (when the 435 districts are arrayed according to their presidential popular vote shares) and in the *median* Senate district (that is, state).<sup>61</sup> Across the fifteen elections, in these calculations, the median House district placed an average of 1.1% to the Republican side of the Democratic national-level vote share.<sup>62</sup> The median Senate district (that is, state) placed 1.3% to the Republican side.<sup>63</sup> In short, a

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<sup>58</sup> See David Samuels & Richard Snyder, *The Value of a Vote: Malapportionment in Comparative Perspective*, 31 BRIT. J. POL. SCI. 651, 658 (2001).

<sup>59</sup> See U.S. CENSUS BUREAU, 2000 CENSUS OF POPULATION AND HOUSING: SUMMARY POPULATION AND HOUSING CHARACTERISTICS 2 (2002), available at <http://www.census.gov/prod/cen2000/phc-1-1-pt1.pdf>.

<sup>60</sup> The following calculations are from David R. Mayhew, *Partisan Balance: Why Doesn't the American System Fly Apart?* (2008) (unpublished manuscript, on file with author). In making these calculations, election statistics were taken from the *Congressional Quarterly Weekly*.

<sup>61</sup> The reason I am using the presidential vote-share statistic is because it is a plausible guide to the basic ideological texture of a constituency, even if presidential landslides like those of 1964 or 1972 do bring, in a sense, temporary party-share distortions upward or downward that extend across the whole universes of House and Senate constituencies. The statistic is widely used by political scientists as an indicator. *Id.* at 8.

<sup>62</sup> *Id.* at 21.

<sup>63</sup> *Id.* at 22. One can also make a calculation for the Electoral College. There, the relevant value is the presidential vote share in the median Electoral College unit, with the units weighted according to their numbers of electors. Across the fifteen elections, the

slight Republican bias, in this sense, has existed in both of Congress's electoral universes, but the House and Senate biases are virtually indistinguishable.

When we think of the malapportioned Senate, we tend to think of small-state Idaho, Wyoming, and Alaska. But we should also think of small-state Vermont, Rhode Island, and Delaware. In the face of these figures, there is no good reason to expect the Senate to behave as a distinct partisan or ideological outlier from the other elected institutions, and in fact, it does not. It has in the past. In the late-nineteenth century, for example, it leaned Republican.<sup>64</sup> Two generations ago, a scholarship addressed the question: "Why is the Senate more liberal than the House?"<sup>65</sup> A good bet for that latter time is that the answer lay in the political texture of the House before the districting revolution of the 1960s.<sup>66</sup> But those days are past. In recent times, I have not seen any credible scholarship attributing any alleged policy, partisan, or ideological outlier status of the Senate to its curious Wyoming-through-California composition. Owing apparently to a fortuitous distribution of Democratic and Republican voters across the fifty states, we have lucked out.

Yes, there is also a distributive consideration. It is indeed true that the federal government, chiefly it seems at the behest of the Senate, tends to distribute more resources per capita, controlling for other relevant variables, to the small-population states than to the large-population states.<sup>67</sup> But there is an

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average difference between the Democratic share of the national popular vote and the Democratic share of that vote in the median Electoral College unit is: zero. *Id.* at 18-20.

<sup>64</sup> See Charles Stewart III & Barry R. Weingast, *Stacking the Senate, Changing the Nation: Republican Rotten Boroughs, Statehood Politics, and American Political Development*, 6 *STUD. AM. POL. DEV.* 223, 226-29 (1992).

<sup>65</sup> LEWIS A. FROMAN, JR., CONGRESSMEN AND THEIR CONSTITUENCIES 69-84 (1963); Sam Kernell, *Is the Senate More Liberal Than the House?*, 35 *J. POL.* 332, 333-42 (1973). In the area of civil rights, of course, the relation between the two chambers was different. There, a striking gap in intensity between southerners and northerners seems to have played into the Senate's rules with the result that filibusters blocked action. See generally KEITH M. FINLEY, *DELAYING THE DREAM: SOUTHERN SENATORS AND THE FIGHT AGAINST CIVIL RIGHTS, 1938-1965* (2008) (exploring the ways southern senators developed a concerted plan of action to thwart civil rights legislation). But note that the Senate cloture rule is not a constitutional matter.

<sup>66</sup> See Samuel Issacharoff & Pamela S. Karlan, *Where to Draw the Line?: Judicial Review of Political Gerrymanders*, 153 *U. PA. L. REV.* 541, 543-54 (2004) (offering a concise summary of the political entrenchment that eventually lead to the redistricting revolution).

<sup>67</sup> See, e.g., FRANCES E. LEE & BRUCE I. OPPENHEIMER, *SIZING UP THE SENATE: THE UNEQUAL CONSEQUENCES OF EQUAL REPRESENTATION* 158-59, 173-77 (1999); Cary M. Atlas, Thomas W. Gilligan, Robert J. Hendershott & Mark A. Zupan, *Slicing the Federal Government Net Spending Pie: Who Wins, Who Loses, and Why*, 85 *AM. ECON. REV.* 624, 628 (1995) ("The implication for federal budget allocations is that, all else equal, congressional contingents from less populous states secure a significantly higher level of per capita federal net spending for their constituents."); William R. Hauk, Jr. & Romain Wacziarg, *Small States, Big Pork*, 2 *Q.J. POL. SCI.* 95, 105 (2007); Benjamin E. Lauderdale,

emollient. The per capita cost to the residents of the large-population states seems to be rather small because it is spread over a large number of individuals. There are many donors, so to speak, in California, but far fewer recipients in Wyoming. In one careful estimate for the 1980s, Californians would have received roughly ten dollars more per capita a year from the government – that’s all – if the sum of all federal discretionary and nondiscretionary benefits had been delivered on a national per capita basis absent any small-state skew.<sup>68</sup> In another estimate for the 1970s and 1980s, people in the seventeen larger-population states underrepresented in the Senate forsook some thirty-five dollars per capita a year to subsidize people in the thirty-three smaller-population states overrepresented there.<sup>69</sup> Burdens like these may be unfair, but they do not seem of a nature to spur reform action at the constitutional level. One analyst has reflected, after reciting a familiar litany of arithmetic downsides that *might in theory* accrue from the Senate’s quite odd geographic base: “New Yorkers, Californians, et al. seem to just shrug.”<sup>70</sup> The shrugging is understandable.

### C. *Americans Look to Elections for Change*

Third, there is the electoral universe. Generally speaking, Americans who hanker for change focus on the next election, not on a chance to revise the Constitution. Elections to the presidency, the Senate, and the House, backed up by party primaries that are more or less freely enterable, are a wondrous legitimizing device as well as a source of considerable flux in policies and personnel. Since World War II, the party holding the White House has held it eight times in presidential elections and lost it in eight.<sup>71</sup> A closer match in results is not imaginable. Granted, party control in the congressional universe has been stickier. Most notably, Democrats held the House for a consecutive forty years between 1954 and 1994.<sup>72</sup> A surge in the value of personal incumbency advantage in the mid-1960s, which favored chiefly Democrats,

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*Pass the Pork: Measuring Legislator Shares in Congress*, 16 POL. ANALYSIS 235, 248 (2008).

<sup>68</sup> See LEE & OPPENHEIMER, *supra* note 67, at 175-76. These particular results steer clear of entitlements policies like Social Security and Medicare, and of defense. See *id.* at 171-73 (finding that the small-state advantage does not apply to redistributive policies).

<sup>69</sup> See Atlas et al., *supra* note 67, at 625 tbl.1. The amount in Table 1 is \$-70 on a biennial basis; it has been halved to provide a yearly figure. The calculations include entitlements and defense. *Id.* at 627.

<sup>70</sup> DANIEL LAZARE, *THE FROZEN REPUBLIC: HOW THE CONSTITUTION IS PARALYZING DEMOCRACY* 298 (1996).

<sup>71</sup> Cf. Susan Page, *5 Reasons the GOP Faces an Uphill Climb in '08*, USA TODAY, May 3, 2007, at 1A (discussing the back and forth in presidential elections since World War II).

<sup>72</sup> David M. Drucker, *Democratic Dominance Could Be Short-Lived*, ROLL CALL, Nov. 4, 2008, [http://www.rollcall.com/issues/54\\_53/politics/29730-1.html?type=printer\\_friendly](http://www.rollcall.com/issues/54_53/politics/29730-1.html?type=printer_friendly) (discussing past Democratic dominance of the House and other periods of long-lasting political party control).

might have helped ensure that consecutiveness.<sup>73</sup> Yet the House midterm sweeps of 1994 and 2006 have shown again how much of a force for change the electorate can be.<sup>74</sup>

On the Senate side, the sizes of seat swings in elections, when a third of the chamber's seats are up each time, can be astonishing: thirteen in 1958,<sup>75</sup> twelve in 1980, eight in 1986, and eight in 1994.<sup>76</sup> Surprisingly, given its staggered terms, the Senate does not seem to lag behind the House in political texture. Since the Seventeenth Amendment was ratified in 1913, the Senate has switched party control every time the House has done so<sup>77</sup> – and twice more, to boot, in 1980 and 1986.<sup>78</sup> At the level of individual senators, the partisan flux

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<sup>73</sup> See Stephen Ansolabehere, David Brady & Morris Fiorina, *The Vanishing Marginals and Electoral Responsiveness*, 22 BRIT. J. POL. SCI. 21, 33-34 (1992).

<sup>74</sup> See Carl Hulse & David M. Herszenhorn, *Democrats See Risk and Reward if Party Sweeps*, N.Y. TIMES, Oct. 26, 2008, at A1 (comparing the potential 2008 Democratic sweep with the past events of the Democrats losing control of the House in 1994 and the Republicans losing control of the House in 2006).

<sup>75</sup> Of these thirteen seats wrested from Republicans in the 1958 election, one was a West Virginia seat that had been held briefly by a Republican appointee. See U.S. Senate, Appointed Senators, [http://www.senate.gov/artandhistory/history/common/briefing/senators\\_appointed.htm](http://www.senate.gov/artandhistory/history/common/briefing/senators_appointed.htm) (last visited Feb. 16, 2009). Also in this time vicinity, the Democrats gained a Republican seat in a special 1957 election in Wisconsin. Mark Shields, *Wisconsin's Maverick Liberal*, CNN.COM, Dec. 19, 2005, <http://www.cnn.com/2005/POLITICS/12/19/proxmire.shields/index.html>. They gained two fresh Alaska seats in the election of November 1958 as Alaska entered statehood. CLAUS-M NASKE & HERMAN E. SLOTNICK, ALASKA: A HISTORY OF THE 49TH STATE 161 (1994). Each party gained a Senate seat when Hawaii later entered statehood in 1959. U.S. Senate, State Information, Hawaii, [http://www.senate.gov/pagelayout/senators/one\\_item\\_and\\_teasers/hawaii.htm](http://www.senate.gov/pagelayout/senators/one_item_and_teasers/hawaii.htm) (last visited Feb. 14, 2009).

<sup>76</sup> See U.S. Senate, Party Division in the Senate, 1789-Present, [http://www.senate.gov/pagelayout/history/one\\_item\\_and\\_teasers/partydiv.htm](http://www.senate.gov/pagelayout/history/one_item_and_teasers/partydiv.htm) (last visited Feb. 11, 2009) [hereinafter U.S. Senate] (listing Senate party divisions immediately following the election).

<sup>77</sup> Compare *id.* (listing Senate party divisions following elections), with Office of the Clerk, House of Representatives, House History, [http://clerk.house.gov/art\\_history/house\\_history/partyDiv.html](http://clerk.house.gov/art_history/house_history/partyDiv.html) (last visited Feb. 11, 2009) [hereinafter Office of the Clerk] (listing House party divisions following elections). This switching calculation counts both chambers as staying Republican as a consequence of the 1930 midterm election, when the immediate post-election result on the Senate side was forty-eight Republicans, forty-seven Democrats, and one Farmer-Laborite from Minnesota, and on the House side was 218 Republicans, 216 Democrats, and one Farmer-Laborite from Minnesota. *Id.*; U.S. Senate, *supra* note 76. Once the new House met for the first time in December 1933, special elections ensuing from member deaths had tipped the majority to the Democrats. Office of the Clerk, *supra*, at n.1. Going by November election results alone, both chambers switched to Democratic in 1932. *Id.*; U.S. Senate, *supra* note 76; .

<sup>78</sup> Compare U.S. Senate, *supra* note 76 (listing the Senate party divisions), with Office of the Clerk, *supra* note 77 (listing the House party divisions).

is especially striking. Among the 100 senators serving in October 2008, fifty-five of them on initially taking their seats had succeeded members of the opposite party.<sup>79</sup> Random draws would have yielded only fifty.

In this country, elections are the favored venue for political change. There is a lot if it. Consider the election of 2008. Ordinarily, revision of the Constitution does not rank high as a competing lever.

#### CONCLUSION

These are my two arguments. First, Congress is not all that defective an institution once its role is properly considered. To appraise it, we should appreciate the separation-of-powers complementarities of the American system, and we should consult real-world standards, not fanciful counterfactuals. Second, a compelling case does not exist for constitutional reform of Congress. Certainly, the American public is not worked up about any such need. Luckily, the odd and jangling aspects of the institutional universe that the presidency, the Senate, and the House add up to are not, in fact, causing the kinds of problems that they might.

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<sup>79</sup> By members of the opposite party I mean, strictly speaking, members who had been elected in their immediately preceding elections as members of the opposite party. Thus Senator James Jeffords of Vermont counts as a Republican electee in 2000. *See* U.S. Senate, *Senators Who Changed Parties During Senate Service (Since 1890)*, [http://www.senate.gov/artandhistory/history/common/briefing/senators\\_changed\\_parties.htm#16](http://www.senate.gov/artandhistory/history/common/briefing/senators_changed_parties.htm#16) (last visited Feb. 15, 2009). Senators Joseph Lieberman of Connecticut and Bernard Sanders of Vermont are counted as Democrats in 2008 because they were caucusing with that party in the Senate albeit technically as independents. Republican Richard Shelby of Alabama, an odd case, is counted as an instance of party change. His immediate predecessor was elected to the Senate as a Democrat, and so was Shelby, initially, but he later converted to the Republican side and has since won election as a Republican. *Id.*