STILL COMPLACENT AFTER ALL THESE YEARS: SOME RUMINATION ON THE CONTINUING NEED FOR A "NEW POLITICAL SCIENCE"

(NOT TO MENTION A NEW WAY OF TEACHING LAW STUDENTS ABOUT WHAT IS TRULY MOST IMPORTANT ABOUT THE CONSTITUTION)

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Perhaps it is worth noting at the outset that although my primary affiliation is with the University of Texas Law School, my "first degree," so to speak, was a Ph.D. in political science; my formal legal training and J.D. came afterward. In much of my recent work, including thinking about the title of this panel – "Is Congress 'the Broken Branch'?" – I find myself reverting to my original disciplinary identity. Indeed, I find myself also thinking of my status as one of the founders in 1968 of the Caucus for a New Political Science,[1] because some of the arguments from that era, inasmuch as they revealed a certain discontent with the "old" political science, remain alive and well today. I will turn to those discontents presently.

My dissatisfaction with certain aspects of political science, both then and now, is matched with equal dissatisfaction, if not outright dismay, at the way that we within the legal academy teach our students – and, for that matter, speak to one another – about the United States Constitution. By our obsessive, almost fetishistic, concentration on those aspects of the Constitution that are the subject of litigation, especially before the United States Supreme Court, we ignore, and thus fail to make our students aware of, the unlitigated, "structural" aspects of the Constitution. I have come to believe the latter are far more important, with regard to explaining the actualities of American politics, than the relatively small part of the Constitution on which we focus.

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[1] *See* Clyde W. Barrow, *The Intellectual Origins of New Political Science*, 30 NEW POL. SCI. 215, 223 n.43 (2008).

Among the most important of these structural aspects are those dealing with the basics of Congress that we learned about perhaps in seventh-grade civics – such as the fact that Congress is divided into two chambers, the House and the Senate, which operate under distinctively different bases of representation, and which have the absolute power to veto legislation passed by the other chamber. Whether Congress functions effectively should be of concern to every American, regardless of political affiliation, and the *Boston University Law Review* is much to be commended for organizing this excellent conference.

My desire that students learn more about the "unlitigated hard-wired" Constitution is not entirely disinterested. In fact, I believe our Constitution is not only seriously undemocratic, but also dysfunctional.[2] Our Constitution makes it considerably harder than it should be for our basic institutions to respond to the exigencies that face the American polity. John Marshall once wrote that any enduring Constitution must inevitably be "adapted" in order to "respond to the various crises of human affairs."[3] He was almost certainly correct, and the challenge facing us as American citizens – and as constitutional analysts – is to determine whether our Constitution is up to the challenge or, indeed, whether it constitutes a barrier to effective responses to the crises that face us.

The standard narrative taught in American law schools is precisely a tale of such adaptation with regard, say, to the development of congressional power to regulate the national economy (however unhappy that might make an "originalist" like my friend Gary Lawson).[4] In their zeal to emphasize what I have come to call "narratives of change," law professors avoid the accompanying "narrative of stasis," which would require focusing on aspects of our Constitution that in important ways are remarkably *unchanged* since their origins some 220 years ago.[5] To tell only one of the two stories is to present a seriously distorted view both of our institutional realities and of the possibilities for successful adaptation today.

With regard to assessing Congress, and determining whether it is "broken,"[6] one is to some extent presented with a choice. On the one hand, one can focus

[2] *See* SANFORD LEVINSON, OUR UNDEMOCRATIC CONSTITUTION: WHERE THE CONSTITUTION GOES WRONG (AND HOW WE THE PEOPLE CAN CORRECT IT) 9 (2006) (contending that the current Constitution is "both insufficiently democratic . . . and significantly dysfunctional," and calling for a "new constitutional convention").

[3] McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 415 (1819) (emphasis omitted).

[4] *See* Gary Lawson, *The Constitution's Congress*, 89 B.U. L. REV. 399, 406 (2009) (lamenting the deterioration of the doctrine of enumerated powers).

[5] *See generally* Sanford Levinson, *Our Schizoid Approach to the United States Constitution: Competing Narratives of Constitutional Dynamism and Stasis*, 42 IND. L. REV. (forthcoming 2009) (arguing that current legal instruction on the Constitution focuses on its dynamic elements to the neglect of its more constant features).

[6] *See generally* THOMAS MANN & NORMAN ORNSTEIN, THE BROKEN BRANCH: HOW CONGRESS IS FAILING AMERICA AND HOW TO GET IT BACK ON TRACK (2006).

on aspects of congressional behavior that *have* already been changed,[7] and *could* be changed without raising any constitutional questions. Or, on the other hand, one could instead choose to focus on those facets of Congress that are constitutionally determined, and thus impervious not only to ordinary change, but also, because of the terrible hurdles to amendment set up by Article V,[8] to constitutional change as well.

Professor Sinclair focuses on a number of issues and problems that are in the former category.[9] She notes, for example, the weakening in both parties of what had been well-established seniority norms for heading congressional committees, and exercising the considerable power attached to such positions, changes that I suspect strike most of us as on balance desirable.[10] Less benevolent is another important change, the ever-increasing importance of filibusters in the Senate; it has simply become standard-operating procedure for forty-one senators to block the consideration of bills that, by definition, have the support of a majority of the Senate (and have often handily passed the House of Representatives).[11] But no one has ever argued that the Constitution *requires* the possibility of filibusters; indeed, some argue that filibusters are unconstitutional.[12] In 2006, of course, the then-Republican majority in the Senate threatened the so-called "nuclear option" with regard to eliminating filibusters involving George W. Bush's nominees to the judiciary.[13] There was, at the time, some heated debate about the wisdom of doing this, but no one seriously suggested it would be unconstitutional. The same is true with regard to many proposals for reining in earmarks, though the Supreme Court,

[7] Admirably discussed by Professor Sinclair. *See generally* Barbara Sinclair, *Question: What's Wrong with Congress? Answer: It's A Democratic Legislature*, 89 B.U. L. REV. 387 (2009).

[8] U.S. CONST. art. V.

[9] *See* Sinclair, *supra* note 7, at 388-89.

[10] *See id.* at 391-92.

[11] *See id.* at 388 (pointing out that "there were thirty-six filibusters in the 109th Congress . . . and fifty-two in the just-ended 110th Congress"). Interestingly enough, the *New York Times* on March 1, 2009, published (at least electronically) two pieces on the dysfunctionality of the contemporary filibuster. *See* David E. RePass, *Make My Filibuster*, N.Y. TIMES, Mar. 1, 2009, at A23 (calling on Majority Leader Harry Reid to force Republicans to engage in a "real" filibuster by having to keep the floor during all night sessions and the like); Jean Edward Smith, *Filibusters: The Senate's Self-Inflicted Wound*, N.Y. TIMES, Mar. 1, 2009, http://100days.blogs.nytimes.com/2009/03/01/filibusters-the-senates-self-inflicted-wound/ (containing a good history of the development of the modern "trivialized" filibuster that has become an almost perfunctory method of delaying or preventing legislation desired by the majority).

[12] *See, e.g.*, Michael J. Gerhardt, *Non-Judicial Precedent*, 61 VAND. L. REV. 713, 729 (2008) (explaining how Republicans claimed that the cloture requirement for overcoming filibusters was unconstitutional).

[13] Charles Babington, *Acrimony over Bush Judicial Nominations Resurfaces: Senate Democrats Threaten to Filibuster Conservative Duo*, WASH. POST, May 3, 2006, at A5.

of course, did invalidate the rather remarkable grant, by a Republican Congress, of line-item veto authority to a Democratic President.[14]

Contrast eminently malleable aspects of congressional procedures with, for example, the "hard-wired" ability, even putting the filibuster to one side, of a one-vote majority in the indefensibly, albeit constitutionally required, mal-apportioned Senate to kill legislation backed by perhaps hefty majorities in the House of Representatives and senators who represent by any calculation a majority of the American people. And, of course, even if the legislation is not killed outright, the compromises necessary to gain the approval of both houses of Congress might well diminish the practical importance of the legislation. There is nothing in "the nature" of bicameralism that requires such veto power. Many systems around the world are able to enjoy some of the genuine benefits of bicameralism without giving each of the two houses a complete veto power over the other.[15] Often, the "lower," more popularly accountable house is given the ultimate power to break deadlocks.[16] Such a change in the American political system would, of course, dramatically transform the way that American politics are conducted.

So this is where the long-ago debates of 1968 – and the desire to encourage a "new political science" – become relevant. What was wrong with the "old political science"? Some of the debates might have been methodological, and those are certainly not absent today. One can find contemporary political science departments that are riven by debates over the centrality of, say, rational choice theory, formal modeling, statistical analysis, or intense field study of given political institutions, as against, say, more historically focused study of the development of American (or other) political institutions – even if we set aside disputes about the comparative merits of normative, instead of so-called positive, political theory. But it would be a mistake to reduce the turmoil of four decades ago – or my criticisms now – to methodological disputation.

At least part of the impetus for the rejection of what was viewed as "mainstream" political science involved what was viewed by some of us as the complacence its practitioners exhibited toward what seemed to us obvious deficiencies in the American political system. In 1968, of course, the focus was on such issues as the Vietnam War and the urban unrest sparked by the intersection of racial and class injustice. Today, we would focus on different crises, but crises there most certainly are, whatever one's politics.

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[14] *See* Clinton v. City of New York, 524 U.S. 417 (1998).

[15] *See, e.g.*, GEORGE TSEBELIS & JEANNETTE MONEY, BICAMERALISM 44-70 tbls. 2.2A, 2.2B (1997) (describing the institutional features of the world's senate bodies, including who has "final decision" power); Samuel C. Patterson & Anthony Mughan, *Senates and the Theory of Bicameralism*, *in* SENATES: BICAMERALISM IN THE CONTEMPORARY WORLD 1, 24-26 tbl.1.3 (Samuel C. Patterson & Anthony Mughan eds., 1999) (comparing the powers of the senates of nine different nations).

[16] TSEBELIS & MONEY, *supra* note 15, at 56-68 tbls.2.2A, 2.2B.

If you are on the left, you might be concerned about the millions of Americans without adequate health insurance or a "safety net" in the event of losing their jobs, not to mention concern about the actual job losses themselves. If you are on the right, you might well be concerned about the prospective bankruptcy of the American economy should certain "entitlement programs," the most important of which is probably Medicare, not be brought under some kind of effective cost-controls. Many other examples could obviously be given. In any event, one cause for the rise of the "broken branch" debate is that Congress has proven itself incapable of generating an adequate response to practically *any* of these issues. They either remain unaddressed, or power inexorably moves toward the executive (or occasionally, the judiciary), which acts more-or-less independently of any traditional notion of congressional authority.[17]

A central theme of the Caucus for New Political Science was that ostensibly descriptive "political science" was inextricably connected to the "scientist's" normative views of politics.[18] To evaluate Congress (or any other political institution) requires adopting an inevitably *political* stance as to what constitutes success or failure. Professor Sinclair is absolutely correct, therefore, when she says that "most of us inevitably evaluate [Congress's] performance, at least in part, in terms of our own notions of what is good public policy – that is, through an ideological lens."[19] I do not know how one can have discussions of dysfunctionality, or for that matter functionality, without having, as Gary Lawson points out in his own remarks, some sort of baseline as to what satisfies us – what we count as a Congress that is doing its job well enough.[20] One obviously need not share a given baseline: for all of my admiration of Professor Lawson, we are far apart in our ideological preferences. But we both agree that any evaluation requires a candid recognition of what those preferences are.

One potential preference is for a perfectly just society, one that lives up in every conceivable way to the great aspirations set out in the Preamble to the United States Constitution. I am in full agreement with all of the panelists, however, that it is foolish in the extreme to make such utopian demands on Congress (or any other political institution). What we must first ask, then, is what count as *reasonable* demands on Congress (or any other political institution). To expect to achieve Utopia is obviously unreasonable, but it is equally unreasonable to be satisfied with performance that falls far short of serious confrontation with deep and real problems. Utopianism is one danger,

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[17] *See, e.g.*, Elena Kagan, *Presidential Administration*, 114 HARV. L. REV. 2245, 2383-84 (2001) (describing the emergence of a far more presidentially-controlled executive bureaucracy).

[18] *See* Barrow, *supra* note 1, at 221.

[19] Sinclair, *supra* note 7, at 389.

[20] Lawson, *supra* note 4, at 399.

but an equal danger is thoughtless veneration of the Constitution and acceptance of the status quo that it bequeaths us.

As I have written elsewhere: "To the extent that we continue thoughtlessly to venerate, and therefore not subject to truly critical examination, our Constitution, we are in the position of the battered wife who continues to profess the 'essential goodness' of her abusive husband."[21] One might hear the battered partner describing the batterer – though not always, the husband – as not *that* bad. He gets drunk and beats up his spouse (or the children) "only" once or twice a month. Otherwise, he's often a "good father" and a "good provider." No marriage is perfect, after all, and some hard-headed (and hearted) analysts might say that the complaining spouse should be grateful for her blessings instead of dwelling on the infrequent, though admittedly indefensible, misconduct. Some of these statements might even be true. But, for better or (doubtfully) for worse, we simply have higher standards these days as to what constitutes an acceptable marriage. Being beaten up, even "infrequently," or being otherwise abused, no longer meets even minimal criteria of acceptability. So we talk to victims of spousal abuse about the importance of changing things. Perhaps it will be sufficient to seek therapeutic counseling. Ultimately, though, one might encourage the envisioning of a brand new institutional reality that could be produced by slamming the door on the way out of such a dysfunctional marriage.[22]

So here we come to what perturbs me most about the otherwise interesting and illuminating essays by Professors Sinclair and Mayhew.[23] Both present what are undoubtedly true and accurate lists of what the Congress has been able to pass, even during times of divided government, when the opportunities for partisan mischief are presumably maximized. What I want to say, though, is that they are *only* numbers. The real task is to *evaluate* the quality of the legislation. And this, as already suggested, is ultimately *political* (rather, presumably, than *scientific*) to the core. Yes, a divided government gave us the prescription drug bill.[24] That is undoubtedly correct. But we could spend the rest of our time together debating whether it represented the best, or even a truly adequate, way of responding to the economic exigencies facing an increasing number of elderly (or at least late-middle-age) Americans or, rather, whether it operated primarily as a gigantic corporate welfare program to politically well-connected "big pharma."

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[21] *See* LEVINSON, *supra* note 2, at 20.

[22] *Cf. id.* ("Similarly, that there are good features of our Constitution should not be denied. But there are also significantly abusive ones, and it is time for us to face them rather than remain in a state of denial.").

[23] *See generally* David R. Mayhew, *Is Congress "the Broken Branch"?*, 89 B.U. L. REV. 357 (2009); Sinclair, *supra* note 7.

[24] Medicare Prescription Drug, Improvement, and Modernization Act, Pub. L. No. 108-173, 117 Stat. 2066 (2003).

And then we could talk about the subset of bills that are passed against a far larger subset of bills that never had a chance of passing. And here again we go back to some of the basic political science debates of the 1960s dealing with what sorts of issues and legislation actually get on the congressional agenda and which are simply consigned to oblivion.[25] Youngsters are often taught, in so-called civics courses, "how a bill becomes a law." The more relevant lesson might well be why most bills, whatever their merits, are doomed to failure. So any full consideration of Professor Sinclair's and Mayhew's data would require at least equal attention to the proposals that did not get passed or, indeed, were never even seriously considered. Then one would have to determine to what extent such "legislative failures" were attributable to defects in the organization of Congress (or the Constitution) that might, if reformed, lead to happier results in the future or, rather, were destined to occur for reasons having nothing to do with such institutional factors.

I now turn to Professor Shepsle's essay,[26] which is also interesting and illuminating, but which also leaves me with some equal, if somewhat different, levels of concern. I think it is fair to say, at least from reading their respective essays, that he is probably more concerned than his two colleagues, especially Professor Mayhew, about the adequacy of congressional performance.[27] But the ultimate thrust of his essay, I am afraid, is as depressingly conservative, in a deep sense, as I find the others.[28] The good news, from my point of view, is that apparently Professor Shepsle does "agree," at least in part, "with reformers like Levinson about a dysfunctional Congress."[29] But the bad news is that Shepsle also believes "proposals for constitutional reform are not sufficiently informed by or respectful of the ripple effects of reform on the one hand, and the strategic capacities of politicians on the other."[30] From my perspective, the promise of the first clause is vitiated by the conservatism of the second.

In offering these observations, it is perhaps relevant to say that I had never met Professors Shepsle or Sinclair prior to this conference and only once had a very pleasant dinner with Professor Mayhew in New Haven. I have, therefore,

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[25] A classic article, extremely influential in the debates of the 1960s, and not irrelevant today, is Peter Bachrach & Morton S. Baratz, *Two Faces of Power*, 56 AM. POL. SCI. REV. 947, 947 (1962) (discussing the opposing ideological perspectives of "[s]ociologically oriented researchers" and political scientists).

[26] Kenneth A. Shepsle, *Dysfunctional Congress?*, 89 B.U. L. REV. 371 (2009).

[27] *Compare id.* at 375-79 (examining Congress's constantly-changed committee structures and the structural explanations for pork-barrel politics), *with* Mayhew, *supra* note 23, at 362-67 (arguing against the notions that Congress is inherently gridlocked, and that the Senate's makeup is somehow to blame), *and* Sinclair, *supra* note 7, at 388-89 (claiming that Congress is actually *more* efficient than in the past, and that it is not gridlocked in the context of its mandate to pass "responsible" and "responsive" legislation in a transparent manner).

[28] *See* Shepsle, *supra* note 26, at 385.

[29] *See id.*

[30] *Id.*

no real idea of their "politics," in the ordinary sense of that word. When I suggest that all of them are "conservative" in the tilt of their arguments, this in no way means that I suspect they are devotees of the present Republican Party. They may, for all I know, be active and committed Democrats as elated as I am by the election and inauguration of Barack Obama (the first of which occurred only shortly before our conference). Rather, the "conservatism" I am emphasizing has to do with their degree of confidence that any desirable change can take place without any fundamental reform of our existing institutional structures.

I should begin by emphasizing that I share Professor Shepsle's caution that one should always be aware of the potentially unanticipated, and negative, consequences attached to what one believes will bring about desirable change.[31] Thus I think it is important to ask, as he does, "even if a state of affairs is dysfunctional, does the proposed reform improve the situation or make it worse? Second and more subtle, even if one problem is fixed, are others created?"[32] But perhaps it is always worth asking, as lawyers might put it, who has the burden of persuasion, regarding the necessity of change, and, even more to the point, how high is that burden? Does one, for example, have to prove beyond a reasonable doubt that the status quo is dysfunctional and that a change is sure to work, or is it enough for one to prove that dysfunctionality is likely and that change might help – even as one recognizes that it might not?

I detect overtones – especially in Professor Shepsle's presentation – of a wonderful book by the economist Albert Hirschman, *The Rhetoric of Reaction: Perversity, Futility, and Jeopardy*,[33] which analyzes the rhetorical structure of conservative/reactionary arguments going back at least to the eighteenth century. They involve an admixture of the fear of unintended consequences (the perversity) that will in fact leave us no better, and perhaps even worse, off than we were in the first place (the futility), and perhaps even place in jeopardy the existing achievements of the political order.[34] What this adds up to, then, is that the optimal solution to any problem is to do nothing. It is not simply "if it ain't broke, don't fix it." Rather, even if we agree that it *is* broken, we must

[31] *See id.* at 371-72.

[32] *Id.*

[33] *Compare id.* at 371-72, 385 (cautioning against calls for congressional change, though sympathetic to them, because of the unintended negative consequences change could create), *with* ALBERT HIRSCHMAN, THE RHETORIC OF REACTION: PERVERSITY, FUTILITY, AND JEOPARDY 7, 11-12 (1991) (detecting in reactionary political thought the common argument, even among those that appear to endorse the proposal, that "any purposive action to improve some feature of the political . . . order only serves to exacerbate the condition one wishes to remedy").

[34] *See* HIRSCHMAN, *supra* note 33, at 1-7 (setting out these "three principal reactive-reactionary theses" to explain political rhetoric dating back to the French Revolution).

leave it alone unless we are really highly confident that the proposed solution will work.[35]

I do not mean to disparage such cautions completely. They may be a good antidote to utopian strains in politics that may indeed present dangers of tearing down adequate, even if not perfect, temples in the zeal to achieve some unattainable perfection. Still, one should recognize the decidedly political tilt of such advice, inasmuch as it places a perhaps insurmountable burden of proof on the advocate of change and leaves the defender of the status quo unscathed.

So let me conclude with a couple of concrete examples of the kinds of changes that I think we should be discussing if we want to make Congress a more effective institution than it currently is (or is capable of being without reform). One might begin with the Senate. My own view is that the equality of voting power of senators from Wyoming and California is absolutely illegitimate in a society that professes to take seriously the norm of one person, one vote. After all, the source of this equality of voting power in the Senate was the felt necessity by James Madison and others to submit to the extortionate demands of small states like Delaware in order to forestall an even worse evil of collapse of the Constitutional Convention and the dire consequences attending that possibility.[36] Consider only Madison's awkward attempt to defend the equal allocation of voting power in *The Federalist No. 62*:

> The equality of representation in the Senate is another point, which, being evidently the result of compromise between the opposite pretensions of the large and the small states, does not call for much discussion. . . . [I]t is superfluous to try by the standards of theory, a part of the constitution which is allowed on all hands to be the result not of theory, but "of a spirit of amity, and that mutual deference and concession which the peculiarity of our political situation rendered indispensable." . . . A government founded on principles more consonant to the wishes of the larger states, is not likely to be obtained from the smaller states. The only option then for the former lies between the proposed government and a government still more objectionable. Under this alternative the advice of prudence must be, to embrace the lesser evil . . . .[37]

A "lesser evil," of course, remains an evil, even if one justified by its forestalling an even worse development. Moreover, the small states were able

[35] *Id.* at 7 (examining two theses that explain how common reactionary thought advocates against a proposal for change due to its possible unintended consequences).

[36] *See* JACK RAKOVE, ORIGINAL MEANINGS 75-81 (1996) (detailing the debate at the Philadelphia Convention on allocation of voting power in the Senate); *see also* LEVINSON, *supra* note 2, at 62 (discussing the Connecticut Compromise of 1787, which forced Madison and others to approve the equality of voting power in the Senate because "small states would simply refuse to agree to any constitution that did not include equal voting power in the Senate").

[37] THE FEDERALIST NO. 62, at 416-17 (James Madison) (Jacob E. Cooke ed., 1961).

to achieve, in Article V, a truly insurmountable barrier to any change of this allocation of voting power inasmuch as it requires unanimous consent, which is unthinkable on the part of small states faced with losing their disproportionate power in the Senate.[38] We are, altogether unfortunately, stuck with a situation that was hard to defend at its time of origin and is even less defensible today. The Senate, along with slavery, was one of the two "great compromises" that enabled the proposal and ratification of the Constitution. No one would think of praising the values undergirding chattel slavery today; one wonders exactly why the Senate is any different. Still, to suggest changing the allocation of power in the Senate would probably strike most readers as utopian, precisely because there is no good reason to believe that it is possible without a revolution, which I do not in fact advocate. So both Professor Sinclair and I agree that we "would redo the Senate if [we] could. . . . But that is not going to happen."[39]

But consider a proposal inspired by another political scientist, University of Virginia Professor Larry Sabato, who in his book, *A More Perfect Constitution: 23 Proposals to Revitalize Our Constitution and Make America a Fairer Country*, suggests that the number of senators be increased.[40] Sabato would also give larger states at least a bit more representation in the Senate,[41] but, as already indicated, achieving that is scarcely imaginable. But imagine a proposal consistent with equal representation: each state could have three senators instead of the present two, thus increasing the membership of the Senate by fifty. Why would anyone object to this? Consider that the last time the membership of the Senate increased was 1959, when Hawaii was added to the Union. Since then the population of the United States has increased from approximately 175 million to over 300 million.[42] Even more to the point, the actual range of issues facing the Congress of 1959 is not remotely similar to the Congress of 2009. One might lament this, as Gary Lawson does,[43] but he does not in the least deny the truth of the basic point that in 1959 Congress was not worried about such issues as medical care, education, the environment,

[38] *See* U.S. CONST. art. V ("[N]o State, without its Consent, shall be deprived of its equal Suffrage in the Senate.").

[39] Sinclair, *supra* note 7, at 396.

[40] LARRY SABATO, A MORE PERFECT CONSTITUTION: 23 PROPOSALS TO REVITALIZE OUR CONSTITUTION AND MAKE AMERICA A FAIRER COUNTRY 26 (2007) (proposing to enlarge the Senate to 135 members by apportioning additional Senators to the largest states).

[41] *See id.*

[42] U.S. CENSUS BUREAU, HISTORICAL NATIONAL POPULATION ESTIMATES 1 (2003), *available at* http://www.census.gov/statab/hist/HS-01.pdf (estimating that the United States population was 177,830,000 on July 1, 1959); Press Release, U.S. Census Bureau, Census Bureau Projects Population of 305.5 Million on New Year's Day (Dec. 29, 2008), http://www.census.gov/Press-Release/www/releases/archives/population/013127.html (estimating that the U.S. population would be 305,000,000 on January 1, 2009).

[43] *See* Lawson, *supra* note 4, at 406 (lamenting that "[t]he doctrine of enumerated powers, of course, is long gone").

nuclear proliferation, or energy policy, not to mention the complexities posed by a decidedly multi-polar international situation and the rise of modern terrorist groups. It is not that earlier Congresses did not pass important legislation, such as the federal highway bill passed during the Eisenhower Administration that transformed the country.[44] But can anyone doubt that today's Congress has an incredibly increased workload relative to that facing the 100 senators in 1959? Generally, when an organization takes on many new onerous tasks, it hires additional workers. One can certainly be confident that the number of senatorial staff and committee aides has expanded, perhaps exponentially, since 1959. But it is not clear that this automatically translates into better informed senators, who are charged with actually having to decide and to vote; each of the present 100 senators has necessarily limited time to absorb the information produced by the most conscientious of staffs.[45] Even if one assumes a kind of division of labor among the senators, there still may be too much on the plate of any given senator. Thus the call by Sabato for an increase in the number of senators (and, he argues as well, in the House of Representatives).[46]

Still, the achievement of such a sensible change, which has no perceptible partisan tilt, would require the amendment of Article I, Section 3, which establishes that each state shall have *two* senators.[47] And, sadly, no political figure within what might be called "the respectable mainstream" of American politics has been willing to call for such a sensible and non-radical proposal. Why not? Even if it might indeed have some unforeseen consequences, is it really so likely that they would be sufficiently perverse to erase the benefits of having senators who might be able to spend marginally more time developing some relative expertise on vital issues of the day and thus help to counterbalance administrative agencies and entrenched bureaucracies?

One might offer a similar analysis of retaining our present delay between election day, in early November, and the arrival of the newly elected Congress almost two months later and, in presidential-election years, the inauguration of the winner a full two weeks later. To be sure, it used to be much worse, prior to the Twentieth Amendment in 1933. Then a new Congress did not necessarily meet until thirteen months after the election, and lame-duck Congresses possessed full power for at least four full months,[48] assuming that a new President called the newly elected Congress into special session on March

[44] *See* Federal-Aid Highway Act of 1956, Pub. L. No. 84-627, 70 Stat. 374 (1956) (codified as amended at 23 U.S.C. §§ 101-166 (2006)).

[45] Assuming that the contested election in Minnesota has been resolved by the time this Essay is actually published. *See* Perry Bacon Jr., *Would-Be Senators From Minn. Describe Life in Election Limbo; Democrat Leans About Capital; Republican Goes to Court*, WASH. POST, Feb. 15, 2009, at A8.

[46] *See* SABATO, *supra* note 40, at 23-32.

[47] U.S. CONST. art. I, § 3.

[48] *Id.* § 4, cl. 2, *amended by* U.S. CONST. amend. XX, § 1.

4, the old inauguration day. Thus FDR's mythic "100 Days" of legislative achievement were made possible only because he had called Congress into special session. Similarly, Abraham Lincoln was able to govern much like a "dictator"[49] during the first four months of the war initiated at Fort Sumter because of his unilateral decision to delay the special session of Congress until July 4, 1861.[50]

One should applaud the insight of the framers of the Twentieth Amendment in recognizing that the existing inauguration day, March 4, had become dysfunctional, and that the time of lame-duck service should be considerably shortened. Indeed, no special session has been called by a President since the ratification of the Amendment. But we should recognize that the times they established seventy-five years ago are equally unsuitable for us today as the earlier times were for the generation of 1933. The United States deserves a fully-functioning and legitimate government at the earliest possible moment following elections, and our Constitution most definitely does not provide that, especially when, as in 2008, the government in power was thoroughly and unequivocally repudiated by the electorate. Why would anyone believe this to be desirable? "Lengthy presidential transitions rank among the oddest of America's political traditions," writes *Washington Post* columnist Jim Hoagland.[51] "In the 21st century, they are also among the most dangerous."[52] One could say this as well about the continuation of lame-duck Congresses during most of the "transition." One can only wonder what the costs of the present way of doing – or, more accurately, not doing – business were because of the only minimally functioning Congress that existed between November 4, 2008 and the new Congress that came into session on January 6, 2009.

One might have thought that the almost self-evident dysfunctionality generated by the post-election hiatus before the newly elected officials took power would lead to suggestions for amending the Constitution to save us from such problems in the future, but that most certainly did not occur. As I have already suggested, one of the most awful parts of the Constitution is Article V, which has made constitutional change of *any* serious kind basically unthinkable because any proposals, even if completely sensible, appear doomed to fail.[53]

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[49] *See* CLINTON ROSSITER, CONSTITUTIONAL DICTATORSHIP 224 (1948).

[50] *See* PAUL BREST ET AL., PROCESSES OF CONSTITUTIONAL DECISIONMAKING 273-74 (5th ed. 2006) (questioning whether a President committed to democratic governance would have put off the new session as long as Lincoln did).

[51] Jim Hoagland, *Obama's 77-Day Spring*, WASH. POST, Dec. 7, 2008, at B7.

[52] *Id.*

[53] I note that Senator Russell Feingold, responding to the fiasco in Illinois regarding now-impeached Illinois Governor Rod Blagojevich's appointment of Senator Roland Burris to succeed Barack Obama, *has* introduced a proposed amendment to strip governors of their power, authorized by the Seventeenth Amendment, to make such appointments. *See* Bernie Becker, *A Call for Elections to Vacant Senate Seats*, N.Y. TIMES, Jan. 28, 2009, http://thecaucus.blogs.nytimes.com/2009/01/28/a-call-for-elections-to-vacant-senate-seats/.

Thus the attraction for many – perhaps most – readers of Professor Sinclair's point, no doubt with the agreement of Professors Mayhew and Shepsle, that "we need to be hard nosed in our analysis and modest about our proposals."[54] I, indeed, agree with the first – who could object to "hard nosed" analysis? – but I fear that confining ourselves to only "modest" proposals will prevent the kind of critical thought of which we are much in need. Political scientists have much to offer us, more, I often think, than do legal academics whose perception of what is truly important about our Constitution is sadly limited. But even after forty years, I fear that the elements of complacence fed by emphasis on the potential dangers presented by any proposals for significant deviation from the institutional status quo vitiate some of what we might otherwise learn from political science. It all depends, I suppose, on the degree to which we feel endangered by the status quo. For many of us the victory of Barack Obama is indeed a harbinger of morning in America. But we will find out, in the next few years, whether even he can surmount the institutional obstacles placed in the way of those who believe that truly significant – even radical – changes are necessary to prevent the political equivalent of driving over the cliff.

We are currently in the midst of almost society-wide discussions of the need to reorganize the basics of the American economic system, especially with regard to financial services, in order to respond adequately not only to immediate crises of 2008-09, but also to the more systemic challenges posed by globalization. No serious person of any political persuasion believes that decisions made in the 1930s, during the last Great Depression, should necessarily be treated as sacrosanct today. Similarly, anyone interested in making the United Nations more effective in the future must confront the peculiar allocation of veto power in the Security Council, which is explicable entirely by reference to the particular winners of a struggle that ended now

Though one might easily sympathize with Senator Feingold's views with regard to what might be termed "retail" vacancies (i.e., one or two empty senate seats, where it may well be worth the time it would take to hold a special election and thus gain the added legitimacy that comes through choice by the electorate), his proposal is out-and-out dangerous should the Senate be faced with "wholesale" vacancies as the result, say, of a catastrophic attack on Washington that kills or even disables many senators. For further discussion of this, see LEVINSON, *supra* note 2, at 69-75 (discussing the desirability of assured continuity in government following catastrophic attack). In any event, Senator Feingold's suggestion is a perfect illustration of Professor Shepsle's point, for Feingold is remarkably indifferent to the potential consequences of his proposal in the case of "wholesale" vacancies where reconstitution of the Senate as soon as possible, which gubernatorial appointment would allow, would be an absolute necessity. It is almost enough to lead one to absolute despair with regard to the ability even of extremely intelligent legislators – Feingold, after all, was a Rhodes Scholar – to think cogently about structural reform.

[54] Sinclair, *supra* note 7, at 395.

over six decades ago.[55] Again, no sensible person would say that because Franklin Roosevelt, Harry Truman, and their compatriots in Great Britain and the Soviet Union agreed to give France the veto power – and because no one in 1945 would have proposed giving Japan or Germany such power – that should necessarily remain unchanged in a radically different twenty-first century.[56]

It is only with regard to the United States Constitution, drafted 220 years ago, that what I am sometimes tempted to call a "cult of stasis" stifles our imaginative faculties. What makes it even worse is that relatively few members of this cult might agree with the particular notion of "originalism" preached by, say, Justices Thomas or Scalia. Rather, it is the product of the all-too-correct perception that Article V makes amendment extraordinarily difficult if not functionally impossible, together with overemphasizing the cautionary notes about unanticipated consequences that Professor Shepsle especially brings to our attention. As important as it is to be aware of the teachings of eminent political scientists like Professors Shepsle, Mayhew, and Sinclair, it is equally important to liberate ourselves from the stultifying caution their analyses ultimately embrace. We must be willing to engage in a genuine public conversation about whether we can in fact envision necessary modifications – or transformations – of our political institutions in order to navigate the particular challenges posed by life in the twenty-first century.

[55] *See, e.g.*, HAROLD STASSEN, UNITED NATIONS: A WORKING PAPER FOR RESTRUCTURING 42-45 (1995) (proposing to reform the Security Council in light of the new global structure by increasing it from five to seven permanent members and providing only the United States and Russia with veto power).

[56] *See, e.g.*, *id.* (proposing to reform the Security Council in light of the new global structure by adding German and Japan as permanent members, but providing that neither they nor France would have veto power).