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## DYSFUNCTIONAL CONGRESS?

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### INTRODUCTION

It is easy to pick on the United States Congress. Low in the public's esteem, the American legislature has suffered through aged and out-of-touch committee chairs, gridlock-inducing filibusters, financial corruption, lobbying and sexual scandals, partisan strife and an accompanying decline in comity and civility, incumbent protection, earmarking and pork barreling, continuing resolutions and omnibus appropriations reflecting an inability to finish tasks on time, and a general sense that the "people's business" is not being done (well). Pundits, politicians, and professors advocate reforms ranging from the small (e.g., attaching the name of a sponsoring legislator to any earmark in an appropriations measure) to the large (e.g., increasing the terms of House members to four years and electing them in presidential election years). Few, however, reflect seriously on the query of the late economist, George Stigler: When you jump from the frying pan, do you land in the fire or a soft feather bed?<sup>1</sup>

This is a demanding consideration. First, 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

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<sup>1</sup> GEORGE J. STIGLER, *The Economists' Traditional Theory of the Economic Functions of the State*, in *THE CITIZEN AND THE STATE: ESSAYS ON REGULATION* 103, 113 (1975) ("We may tell the society to jump out of the market frying pan, but we have no basis for predicting whether it will land in the fire or a luxurious bed."). For other similar bits of wisdom, see generally GEORGE J. STIGLER, *THE ECONOMIST AS PREACHER AND OTHER ESSAYS* (1982).

created?<sup>2</sup> These questions accentuate the logic of *equilibrium*. The facets of an institutional arrangement are not independently moving parts; ordinarily you cannot alter one without affecting others. They comprise a system of relationships; all are in flux when any one of them is perturbed. Change the term structure of House members to coincide with presidential terms, as some have suggested,<sup>3</sup> and you may well promote joint interests and joint fates for the President and his or her fellow House partisans – something the pundits believe will ameliorate Washington gridlock and provide a basis for cohesive, if not responsible, parties. But the reform may also exacerbate partisanship in the House. Perhaps worse, it may permit, or even encourage, the House to proceed at a snail's pace early in its four-year term, as its members no longer face an assessment at the President's mid-term, and thus produce a logjam in the last two years as members hasten to impress constituents and answer their "what have you done for me lately?" demands. Divided government may well become less problematic as the executive and much of the legislature share a common judgment day, and thus fellow partisans receive a correlated judgment from the voters. But, while some of the disagreeable consequences of divided government will certainly ebb, the likelihood of legislative holdup increases – a different flavor of gridlock to be sure, but gridlock just the same. Reform is not a one-off affair. It has knock-on effects, some good but some bad. These knock-on effects are a consequence of *strategic* politicians maneuvering under the changed circumstances – they are the engines of institutional adaptation. In assessing proposed reforms, therefore, close attention must be paid to strategic behavior and equilibrium adaptations. One's assessment must allow for the dust – all the dust – to settle.

The objective of this brief Essay is to respond to some of the claims, criticisms, and proposals from reformers concerning the legislative process. An exemplar in this literature is Sanford Levinson's *Our Undemocratic Constitution: Where the Constitution Goes Wrong (and How We the People Can Correct It)*.<sup>4</sup> My response is mainly a reaction to the tone and reformist zeal in this literature. Even if one concurs in principle with many of Levinson's assertions, one must still be sure to understand how the world works in order to advance proposals that will avoid disappointing results. We can all agree that the feather bed is where we want to land and the fire is what we want to avoid, but will the implementation of a reform proposal, together with its subsequent ramifications, get us to the one or to the other?

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<sup>2</sup> See, e.g., Edmund L. Andrews & Robert Pear, *With New Rules, Congress Boasts of Pet Projects*, N.Y. TIMES, Aug. 5, 2007, at A1 (describing how legislative reform opening earmarks to public scrutiny has had the unintended effect of raising the value of earmarks as a measure of members' clout).

<sup>3</sup> See, e.g., WILLIAM YANDELL ELLIOT, *THE NEED FOR CONSTITUTIONAL REFORM* 234-35 (1935).

<sup>4</sup> SANFORD LEVINSON, *OUR UNDEMOCRATIC CONSTITUTION: WHERE THE CONSTITUTION GOES WRONG (AND HOW WE THE PEOPLE CAN CORRECT IT)* (2006).

## I. A DYSFUNCTIONAL CONGRESS?

We live in unhappy times. Catastrophe has struck our shores and, more than seven years after 9/11, we still struggle with that tragedy and how best to respond to it. Lives and loot are spent on unpopular wars. The market economy, roiled by a financial crisis that exaggerates the peaks and valleys of the business cycle, has left many of our citizens insecure.<sup>5</sup> Jobs and capital are moving overseas;<sup>6</sup> unemployment is rising;<sup>7</sup> inflationary pressures, exacerbated by the world-wide demand for natural resources, have grown stronger in some periods and transitioned into deflationary threats in others;<sup>8</sup> credit markets are contracting;<sup>9</sup> and the purchasing power of our currency rises and falls with volatility in currency trading markets.<sup>10</sup> And there are other sources of unhappiness as well. The environment is threatened. Our nation's infrastructure is in disrepair. The current state of the health and education systems supporting our citizens is a matter of grave concern. Natural disasters – hurricanes, tornadoes, earthquakes, forest fires, floods, winter storms, and the like – occur with alarming regularity. Income and wealth are unequally distributed with disparities growing. Public finances are in disarray – deficits, debt, and tax inequity drain our resources and threaten legitimacy and confidence, now and for generations to come.

The institutions of our advanced industrial society bear the brunt of this unhappiness. Evidence alluded to by Levinson,<sup>11</sup> but available daily in the news, suggests as much. Private institutions – firms, universities, unions, churches – are trending downward in the public's esteem. George W. Bush ended his tenure as President with an approval rating near an all-time low.<sup>12</sup>

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<sup>5</sup> See, e.g., Jon Hilsenrath, Serena Ng & Damian Paletta, *Worst Crisis Since '30s, with No End Yet in Sight*, WALL ST. J., Sept. 18, 2008, at A1.

<sup>6</sup> See, e.g., Louise Story, *Leaving Wall Street for a Job Overseas*, N.Y. TIMES, Aug. 11, 2008, at C1.

<sup>7</sup> See, e.g., Edmund L. Andrews, *Economy Shed 598,000 Jobs in January*, N.Y. TIMES, Feb. 6, 2009, at B1.

<sup>8</sup> Cf. INT'L MONETARY FUND, WORLD ECONOMIC OUTLOOK 5 fig.1.4 (2005), available at <http://www.imf.org/external/pubs/ft/weo/2005/02/pdf/chapter1.pdf> (showing rises and falls in global headline inflation).

<sup>9</sup> See, e.g., Peter S. Goodman, *Credit Enters a Lockdown*, N.Y. TIMES, Sept. 25, 2008, at A1.

<sup>10</sup> Cf. INT'L MONETARY FUND, *supra* note 8, at 4 fig.1.3 (displaying global exchange rate developments from February 2002 to December 2004).

<sup>11</sup> LEVINSON, *supra* note 4, at 7-9.

<sup>12</sup> Lydia Saad, *Bush Presidency Closes with 34% Approval, 61% Disapproval*, GALLUP, Jan. 14, 2009, <http://www.gallup.com/poll/113770/Bush-Presidency-Closes-34-Approval-61-Disapproval.aspx> (stating that George W. Bush's thirty-four percent approval rating at the end of his presidency was slightly higher than the lowest rating during his tenure and higher only than Richard Nixon and Harry Truman).

The popularity of the Congress is even lower.<sup>13</sup> Government policy generally is thought to be on the wrong track.<sup>14</sup> 'Twas ever thus, but it does seem worse today.

Levinson's *Our Undemocratic Constitution* is a call to arms – an urgent challenge to engage in a thoroughgoing reassessment of our political institutions, especially those hard-wired in the Constitution. In chapter two, he is particularly concerned with the glut of veto points stitched into the fabric of our legislative institutions: bicameralism; the presidential veto; the distorting consequences of malapportioned assemblies, especially the Senate; and the dysfunctionality of the separation of powers, aggravated by divided government.<sup>15</sup> I will address some of these topics below, but here I want to raise the possibility that the unhappiness we observe with our institutions is in fact unhappiness with *any* institutions.<sup>16</sup>

Citizen unrest and unhappiness is not uniquely American. Canada regularly submits the question to popular referendum of whether it should remain whole.<sup>17</sup> Australia every few years decides whether to abandon recognition of the monarchy.<sup>18</sup> The Irish are discontented with a divided island. Eastern Europeans are disillusioned with capitalist institutions, having only just rid themselves of an unhappy association with collectivist ones. Opinion firms in Great Britain, which do not poll citizens about the popularity of the House of Commons (or more generally the government), routinely assess the popularity of its leaders. The English are none too pleased with the latter at present,<sup>19</sup> and if asked more generally about the government, would not, I suspect, rank it very highly either. Unhappiness with institutions, like much else, has been globalized. And, if that proposition is accepted, then it strains credulity to point to local conditions as an explanation. In particular, while our uniquely

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<sup>13</sup> Frank Newport, *111th Congress Begins in Very Disapproving Environment*, GALLUP, Jan. 6, 2009, <http://www.gallup.com/poll/113656/111th-Congress-Begins-Very-Disapproving-Environment.aspx> (including an all-time Gallup low approval of fourteen percent in July 2008, the 2008 congressional approval averaged only nineteen percent).

<sup>14</sup> *See id.*

<sup>15</sup> LEVINSON, *supra* note 4, at 25-77.

<sup>16</sup> It is also a reluctance to take personal responsibility. As Cassius famously put it, “[t]he fault, dear Brutus, is not in our stars, [b]ut in ourselves.” WILLIAM SHAKESPEARE, *JULIUS CAESAR* act 1, sc. 2 (John Dover Wilson ed. 1964).

<sup>17</sup> *See, e.g.*, Christina Spencer, *Why They Still Want a Country*, TORONTO SUN, Feb. 4, 2009, at 24 (discussing Quebec sovereigntists and their desires for independence from Canada).

<sup>18</sup> *Cf., e.g.*, No Republic! Australians for Constitutional Monarchy, <http://www.norepublic.com.au/> (last visited Feb. 11, 2009) (stating a mission to defend the role of the crown in the Australian constitutional system).

<sup>19</sup> *E.g.*, James Krikup, *Gordon Brown's Personal Popularity Hits Historic Low, Poll Shows*, DAILY TELEGRAPH (London), Aug. 1, 2008, <http://www.telegraph.co.uk/news/2481215/Gordon-Browns-personal-popularity-hits-historic-low-poll-shows.html>.

American structure of governance surely affects performance and, in turn, happiness, there is much more going on. Targeting our institutions or the Constitution for blame, without noticing unhappiness with other institutions and constitutions, seems wide of the mark. Winston Churchill might well have said of it what he observed about democracy more generally – it is the worst form of government, except for all the rest.<sup>20</sup>

## II. REFORM AND ITS KNOCK-ON EFFECTS

Tinkering with the institutional structure of government is something on which the U.S. Constitution is permissive. Amending the document is made difficult, to be sure, and the guarantee of equality of representation in the Senate for the several states is a permanent institutional feature. But much institutional detail is left unconstrained by the Constitution. For the legislative branch, the House and Senate are quite free to structure their respective chambers as their members wish. The Constitution requires a presiding officer in each chamber (Speaker of the House and President of the Senate),<sup>21</sup> a supermajority in a chamber in order to expel a member,<sup>22</sup> and the keeping of a journal and publication “from time to time publish the same”<sup>23</sup> – transparency of a minimal sort.<sup>24</sup> But the structure of decision making – the committee system, floor procedure for debate and deliberation, resolution of differences between the chambers – is left entirely unconstrained. Every two years the House has the explicit opportunity to reinvent itself: in each new Congress it must adopt its own rules and arrangements (often those of the previous Congress).<sup>25</sup> The Senate, as a continuing body, may (but not must) do so if it chooses. Even the smallest changes in detail have consequences that reverberate throughout the system. I will provide two illustrations.

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<sup>20</sup> See Winston Churchill, Speech to the House of Commons (Nov. 11, 1947), *quoted in* THE OXFORD DICTIONARY OF QUOTATIONS 221 (6th ed. 2004) (“No one pretends that democracy is perfect or all-wise. Indeed, it has been said that democracy is the worst form of Government except all those other forms that have been tried from time to time.”).

<sup>21</sup> U.S. CONST. art. I, § 2, cl. 5; *id.* § 3, cl. 2.

<sup>22</sup> *Id.* § 5, cl. 2.

<sup>23</sup> *Id.* at cl. 3.

<sup>24</sup> On the value of transparency, see generally Abhinay Muthoo & Kenneth A. Shepsle, Information, Institutions and Constitutional Arrangements (Oct. 12, 2008) (unpublished manuscript, available at [http://scholar.iq.harvard.edu/files/scholar/uploads/3/Muthoo\\_and\\_Shepslesubm\\_EJ\\_10.13.08-2.pdf](http://scholar.iq.harvard.edu/files/scholar/uploads/3/Muthoo_and_Shepslesubm_EJ_10.13.08-2.pdf)).

<sup>25</sup> U.S. CONST. art. I, § 5.

A. *Reform in the House: Standing Committees*

In the House, the use of standing committees grew incrementally during the first two decades under the new Constitution.<sup>26</sup> By 1816, a system for using standing committees had been established, and would remain essentially intact for one hundred years.<sup>27</sup> There were significant changes in the first two decades of the twentieth century,<sup>28</sup> and another major period of reform just after World War II, resulting in the Legislative Reorganization Act of 1946.<sup>29</sup> With the Republican takeover of the House in 1995, after nearly a half century of Democratic dominance, there was a major revamping of the system,<sup>30</sup> the first major reorganization since the 1946 Act.<sup>31</sup> But even before the major changes made in 1995, there were minor changes.

One such minor change occurred while the Democrats were in the majority. To review some general background, House committees are partitioned into three categories – exclusive, major, and minor. Each party has rules on how its members may be distributed among committees in these categories. Democratic committee assignment rules allow a member to have an exclusive assignment (and no others), or a major committee assignment (with the possibility of a second on a minor committee), or a minor committee assignment (with the possibility of a second on another minor committee).<sup>32</sup> The Committee on Post Office and Civil Service (“POCS”) was a major committee, but by the Ninety-fourth Congress (1975-76) had been moved into the minor-committee category.<sup>33</sup> Before the change, new assignments to POCS consisted mainly of representatives from the Maryland and Virginia suburbs of Washington, D.C. – it was an attractive committee for those whose districts contained many civil servants – and fairly junior members who were not eager for the assignment but could not otherwise be accommodated by the

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<sup>26</sup> See Gerald Gamm & Kenneth Shepsle, *The Emergence of Legislative Institutions: Standing Committees in the House and Senate, 1810-1825*, 14 LEGIS. STUD. Q. 39, 50 tbl.1 (1989).

<sup>27</sup> *Id.* at 53-57. If Rip Van Winkle had fallen asleep in 1790 and awakened in 1815, he would not have recognized Congress. If, on the other hand, he had fallen asleep in 1815 and woke up a century later, he would have been in familiar territory.

<sup>28</sup> See STEVEN S. SMITH & CHRISTOPHER J. DEERING, COMMITTEES IN CONGRESS 32-36 (2d ed. 1990).

<sup>29</sup> Legislative Reorganization Act of 1946, Pub. L. No. 79-601, 60 Stat. 812; see SMITH, *supra* note 28, at 38-39.

<sup>30</sup> See JOHN BAUGHMAN, COMMON GROUND: COMMITTEE POLITICS IN THE U.S. HOUSE OF REPRESENTATIVES 18 (2006) (listing some of the Republican changes in 1995).

<sup>31</sup> There had been another major reorganization in 1970, focusing mainly on the management of committee business. *Id.* at 46-49.

<sup>32</sup> For a list of the congressional rules governing committee assignments, see KENNETH A. SHEPSLE, THE GIANT JIGSAW PUZZLE: DEMOCRATIC COMMITTEE ASSIGNMENTS IN THE MODERN HOUSE 158-59 (1978).

<sup>33</sup> *Cf. id.* at 130 (stating that in the Eighty-seventh Congress, POCS was still a “semi-exclusive” committee).

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party committee on committees on some other panel.<sup>34</sup> The change of POCS's status from a major to a minor committee had a ripple effect on requests for committees. Many members serving on both major and minor committees now sought membership on POCS as a second assignment. Why? Membership offered them the opportunity to extract campaign contributions and volunteer workers from the main claimants of the committee – postal workers, third-class mail users, and public-employee unions – something valuable to members but requiring too great a sacrifice when POCS was classified as a major committee.<sup>35</sup> This, in turn, affected committees and committee assignments throughout the committee system: for those who secured appointment to POCS, it improved their ability to finance reelection campaigns, enhanced their security, and thus worked to increase their seniority on the major committees on which they also served. For other legislators, new demand for POCS reduced demand for other minor committees, thus improving *their* chances for acquiring additional assignments. In short, the change in status in one relatively insignificant committee – a *minor* reform – reverberated throughout the committee system, as members recalculated their optimal responses to the changed system.

The point of this otherwise trivial illustration is that perturbations have ripple effects. One misses the general equilibrium effects if he or she focuses narrowly and exclusively on the target of a reform. The general equilibrium effects may be far more significant than the effect on the target. This applies, as we have just seen, to minor tweaks in an institutional arrangement. A fortiori, this warns against a narrow treatment of changes of the magnitude proposed by constitutional reformers. The next illustration reinforces this point.

#### B. *Reform in the Senate: Earmarks*

Earmarking – the practice of creating a line item in an appropriations bill for a location-specific public project – is widely denounced these days, yet widely practiced. A plum project to one legislator is a “bridge to nowhere” to others.<sup>36</sup> The system of earmarks is thought to be the quintessential symptom of congressional dysfunctionality.

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<sup>34</sup> For general background on the activities and strategies of committees and committee members, see generally RICHARD F. FENNO, JR., *CONGRESSMEN IN COMMITTEES* (1973).

<sup>35</sup> *See id.* at 5-9.

<sup>36</sup> The “bridge to nowhere” – an earmark for Alaska in 2005 – is used by Levinson to illustrate congressional dysfunctionality, a prescient choice in light of the selection of the governor of Alaska as the Republican vice-presidential nominee in 2008 and the conviction of Alaska's senior senator, responsible for the earmark, on corruption charges. LEVINSON, *supra* note 4, at 25.

Bicameralism has an interesting effect on pork barreling.<sup>37</sup> A location-specific earmark has three elected officials clamoring for credit – the congressperson representing the location and the two senators from the state. For example, regardless of whether an earmark improving the post office in Wellesley, Massachusetts originated in the House or the Senate, Congressman Barney Frank, Senator Ted Kennedy, and Senator John Kerry will likely all issue press releases to local media outlets announcing the project's funding, and all may even attend the ribbon-cutting ceremony and jostle for credit when it is completed. Credit-claiming is a contact sport and all three legislators will compete for and ultimately share in the glory.

All legislators are eager to shine in the eyes of voters, especially in the run-up to their respective reelection campaigns. Voters make *retrospective* judgments about a legislator's performance, judgments typically characterized by *recency bias* – that is, voters assess past performance with greater weight given to more recent activity (as in “what have you done for me lately?”). Pursuit of reelection is a full-time job for members of the House, who have less than twenty-two months between the opening of a Congress and the next election date. Senators, however, have six-year terms and their elections are staggered. Only a third of the Senate seats are up for election – “in cycle” in the argot of the Hill – in any given election year. As a consequence, senators are able to cut an intertemporal deal with their colleagues – accepting only limited bites at the earmark apple early in their terms in exchange for very big bites in the last two years when it will do them the most good electorally. Empirical studies make clear that, in two out of every three elections, states with a senator in cycle are the beneficiaries of an extraordinary number of earmarks in all of the appropriations subcommittee jurisdictions that engage in earmarking in the Senate.<sup>38</sup> States without a Senate contest, on the other hand,

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<sup>37</sup> See Abhinay Muthoo & Kenneth A. Shepsle, *The Constitutional Choice of Bicameralism*, in INSTITUTIONS AND ECONOMIC PERFORMANCE 249-91 (Elhanan Helpman ed., 2008) (providing a detailed theoretical argument about the effects of bicameralism on pork barreling).

<sup>38</sup> For an empirical exploration of these remarks, see generally Kenneth A. Shepsle, Robert P. Van Houweling, Samuel J. Abrams & Peter C. Hanson, *The Senate Electoral Cycle and Bicameral Appropriations Politics*, 53 AM. J. POL. SCI. (forthcoming Apr. 2009) [hereinafter Shepsle et al., *Senate Electoral Cycle*], available at [http://scholar.iq.harvard.edu/files/scholar/uploads/3/ajps\\_final\\_revision\\_11.05.08.pdf](http://scholar.iq.harvard.edu/files/scholar/uploads/3/ajps_final_revision_11.05.08.pdf). For other research and empirical studies on this point, see DIANA EVANS, GREASING THE WHEELS: USING PORK BARREL PROJECTS TO BUILD MAJORITY COALITIONS IN CONGRESS 162-222 (2004); FRANCES E. LEE & BRUCE I. OPPENHEIMER, SIZING UP THE SENATE 83-122 (1999); Michael H. Crespin & Charles J. Finocchiaro, *Distributive and Partisan Politics in the U.S. Senate: An Exploration of Earmarks*, in WHY NOT PARTIES? PARTY EFFECTS IN THE UNITED STATES SENATE 229, 235-50 (Nathan W. Monroe, Jason M. Roberts & David W. Rohde eds. 2008); William R. Hauk, Jr. & Romain Wacziarg, *Small States, Big Pork*, 2 Q.J. POL. SCI. 95, 96-105 (2007).

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receive fewer earmarks in the appropriations bills that pass the Senate.<sup>39</sup> This differential survives conference as well. But there is a noteworthy caveat: the House appropriations subcommittees, anticipating that states with a Senate election will be treated favorably on the Senate side of the Capitol, and that House members from those states (like Barney Frank in the example above) will be able to share some of the credit for those earmarks, systematically allocate a *fewer* number of earmarks to House delegations from benefiting states.<sup>40</sup> Nearly forty percent of the disproportionate advantage in Senate earmarks enjoyed by states with senators seeking reelection is clawed back by the House – not by eliminating Senate earmarks (for that would hurt House members who share in the credit) – but rather by redeploying House earmarks that might otherwise have gone to delegations from advantaged states to those disadvantaged by the Senate’s staggered term.<sup>41</sup>

The point of this illustration is to emphasize that institutional features hardwired in the Constitution – e.g., bicameralism, simultaneous terms in the House, and staggered terms in the Senate – form an interconnected strategic setting. Senate members, exploiting the staggered-term structure of their incumbencies, engage in intertemporal cooperation to the electoral advantage of each of them; they game the system. House members, in light of their simultaneous terms and their expectations about strategic behavior in the staggered-term Senate, respond strategically as well. Although earmarks are small beer in the larger world of government outlays, where entitlements and interest payments on the debt swamp project spending by many orders of magnitude, they are a revealing picture of the strategic thrust and counterthrust of savvy political agents doing the best they can for their states and districts (and themselves) in the institutional environment in which they find themselves. Change the institutional environment – for example, amend the Constitution to eliminate the staggered Senate terms – and this will have strategic spillovers onto bicameral relationships generally. Better? Worse? Hard to say. But strategic adaptations surely will occur.

A constitution is, in the language of game theory, a *game form*. It specifies the players, the required or forbidden actions based on the rules of the game, the permissible but not required, and ultimately the payoffs or consequences of various mixes of behavior. Any game form induces strategic behavior. What we must ask is not whether we can invent a strategy-free institutional arrangement to replace the one we have (answer: no), but rather whether reforms constitute an improvement, *once the full strategic consequences are appreciated*.

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<sup>39</sup> See Shepsle et al., *Senate Electoral Cycle*, *supra* note 38 (manuscript at 32).

<sup>40</sup> *Id.*

<sup>41</sup> *Id.*

## III. CHANGING VETO POWER

Consider veto power in the legislature.<sup>42</sup> Playing defense is easy in American politics because there are so many veto points to block positive action. And veto points empower gatekeepers. "It is very hard to believe," Levinson writes, "that we are well served by all of these gates."<sup>43</sup> But are these gates bad things? Always? What consequences would flow if the number of veto points was reduced or eliminated?

A now-respectable body of theory, most forcefully presented by Gary Cox and Matthew McCubbins, suggests that it is this arrangement of veto points that promotes responsible parties in the legislature.<sup>44</sup> Political parties, warts and all, are an integral part of the body politic in the United States. The parties are often internally heterogeneous, because the country is heterogeneous and there are, in effect, only two national parties into which to pour all this heterogeneity, a product of our first-past-the-post electoral system. Cox and McCubbins liken the majority party that organizes a legislative chamber to a coalition government in a parliamentary regime.<sup>45</sup> It takes work to hold the disparate elements of such a coalition together.

On rare occasions, elections homogenize the bases of the parties, so that the majority party can forge a positive plan and execute it without many internal stresses or strains. The years 1932,<sup>46</sup> 1964,<sup>47</sup> 1974,<sup>48</sup> and perhaps 1994<sup>49</sup> may have been such occasions. Much of the time, however, the majority party is a variegated collection of policy positions and preferences held together by a

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<sup>42</sup> For a critical assessment, see LEVINSON, *supra* note 4, at 29-38.

<sup>43</sup> *Id.* at 44.

<sup>44</sup> See GARY W. COX & MATTHEW D. MCCUBBINS, *SETTING THE AGENDA: RESPONSIBLE PARTY GOVERNMENT IN THE U.S. HOUSE OF REPRESENTATIVES* 37-49 (2005).

<sup>45</sup> *Id.* at 9. Cox and McCubbins also liken a majority party in Congress to a private partnership – say an accounting or law firm – managed by its senior partners each of whom has his or her own axe to grind. *Id.* at 18-19.

<sup>46</sup> Democrat Franklin Delano Roosevelt won the presidency in a landslide and the Democratic Party won majorities in both houses of Congress. JOHN M. BLUM ET AL., *THE NATIONAL EXPERIENCE: A HISTORY OF THE UNITED STATES* 668 (5th ed. 1981).

<sup>47</sup> Democrat Lyndon B. Johnson handily defeated Senator Barry Goldwater, winning over sixty-one percent of the popular vote. The Democrats also had a two-thirds majority in both the House and the Senate. MARY BETH NORTON ET AL., *A PEOPLE AND A NATION: A HISTORY OF THE UNITED STATES* 946 (1986).

<sup>48</sup> Held in the wake of the Watergate scandal, Republicans lost forty-three seats in the House, ending up with fewer than a third of the seats. Adam Clymer, *Buoyed by Resurgence, G.O.P. Strives for an Era of Dominance*, N.Y. TIMES, May 25, 2003, at A1.

<sup>49</sup> In the middle of President Clinton's first term, the Republican Party gained a majority of the seats in the House for the first time since 1954. Republicans also captured eight seats from Democrats in the Senate, gaining control for the first time since 1986. Dan Balz, *A Historic Republican Triumph: GOP Captures Congress; Party Controls Both Houses for the First Time Since '50s*, WASH. POST, Nov. 9, 1994, at A1.

common party label.<sup>50</sup> In these “normal” circumstances the majority party is, in the language of Cox and McCubbins, a *procedural cartel* – it organizes the legislature in a manner that discourages the promotion of policies that would damage any significant part of the cartel.<sup>51</sup>

A system of gatekeepers and veto points institutionalizes this arrangement. When functioning properly, it prevents the majority from being *rolled* – that is, it prevents the harm to the cartel that would happen if some faction of the majority party could, by conspiring with the minority, pass legislation opposed by a majority of the majority party.<sup>52</sup> The system of authorizing and appropriating committees directed by the majority, the regulatory role played by the majority-dominated Rules Committee, and the recognition and scheduling powers of the majority’s choice of Speaker are the manifestations of a system that, via checks on positive agenda power, holds the procedural cartel together. This does not prevent *all* policy changes; it prevents only policy changes that harm a large portion of the majority party. As Cox and McCubbins conclude:

[T]he key events of the legislative process do not occur on the floor of Congress, when members vote for or against the bills that are put on the floor agenda. Rather, the key events occur beforehand, when senior members of the majority party determine which bills will be considered on the floor and which will not. Parties matter, in our view, not so much because they influence how their members vote on bills (although they do), but rather because the majority party controls which bills their (and other) members have an opportunity to vote on to begin with.<sup>53</sup>

This arrangement does not always function as one might wish. The costs of positive actions denied by gatekeepers that would have been beneficial to the majority party may outweigh the benefits of denying actions that would have been costly to the majority party. An out-of-step committee chair may prevent a popular change. For many years, for example, civil rights legislation was bottled up by a conservative coalition on the House Rules Committee, preventing a House vote until 1964 when landmark legislation was enacted into law.<sup>54</sup> Such legislation may well have been favored by a majority of the majority party in earlier years, and possibly even a majority of the whole House. Such occasions agitate Levinson, leading him to conclude that the

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<sup>50</sup> Continuing with the coalition government analogy, in multiparty parliaments it is rare that a single party acquires a majority of the seats. In such circumstances that party may prosecute its party manifesto relatively unfettered. More typical is several parties combining to form a coalition government. Its very heterogeneity makes the prosecution of a common plan more difficult.

<sup>51</sup> COX & MCCUBBINS, *supra* note 44, at 17-34.

<sup>52</sup> *Id.* at 41-43.

<sup>53</sup> *Id.* at 221.

<sup>54</sup> See MICHAEL FOLEY, *THE NEW SENATE: LIBERAL INFLUENCE ON A CONSERVATIVE INSTITUTION 1959-1972*, at 37-51 (1980).

public interest is not well served by the structure of veto power; the collective reputation of the Congress is tarnished as well.<sup>55</sup> The question, however, is that, with all its flaws, is it a *net* disadvantage for a procedural cartel mainly to be empowered to *prevent* things from getting to the chamber's agenda?<sup>56</sup>

Cox and McCubbins demonstrate a strong empirical regularity over more than a century of roll call votes in the House: rarely does the House pass a bill that a majority of the majority party does not prefer, and it is even rarer for such a bill to be enacted into law.<sup>57</sup> Thus, the negative agenda power possessed by the majority-party-as-procedural-cartel is highly effective. The cost, of course, as the civil rights example reveals, is that this sort of cartel has limited *positive* agenda power. As the membership of the majority party becomes more homogenous in terms of policy preferences, however, the majority party transforms some of these negative powers into positive ones. In the last two decades of the twentieth century, the effects of the Voting Rights Act of 1965<sup>58</sup> became apparent as voters sorted themselves among the parties on ideological grounds.<sup>59</sup> The Democrats, the party of the left, became more cohesive around a policy agenda; the same was true for the Republicans as the party of the right. This intra-party homogeneity was translated into a much greater centralization of power in the hands of party leaders (at the expense of committee leaders). In effect, power was transferred from those possessing negative agenda power to those who could exercise positive agenda power. Again, Cox and McCubbins write:

[C]hanges in the homogeneity of preference within the majority party have driven the mix of positive and negative powers. The more heterogeneous are preferences within the majority party, the more dangerous it is for the party to distribute positive agenda power, since the possessors of that power may push bills to the floor that will then displease substantial portions of their copartisans. The more homogenous are preferences within the majority party, the more dangerous it is for the party to distribute negative agenda power, since the possessors of that power may block bills that would please substantial portions of their copartisans. Thus, *as the majority party becomes more homogeneous, it*

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<sup>55</sup> See LEVINSON, *supra* note 4, at 29-38.

<sup>56</sup> It should be noted that under extreme pressure, the Democratic leadership in 1961 supported a temporary enlargement of the Rules Committee in order to overcome the committee's conservative bias, a change made permanent in 1963. This paved the way for the civil rights legislation that emerged in 1964. The 1961 vote approving an enlarged Rules Committee, pitting Speaker Sam Rayburn against Rules Committee Chair Howard Smith, was a knife-edge 217-212 in favor. See FOLEY, *supra* note 54, at 38-40.

<sup>57</sup> COX & MCCUBBINS, *supra* note 44, at 221.

<sup>58</sup> 42 U.S.C. § 1973 (2000).

<sup>59</sup> See DAVID W. ROHDE, PARTIES AND LEADERS IN THE POSTREFORM HOUSE 3-16 (1991).

*is more likely to adjust the balance of positive and negative agenda powers in favor of the former.*<sup>60</sup>

Negative agenda power – the ability of the majority party to control the floor agenda by controlling access to it – holds a heterogeneous coalition together by inhibiting efforts to achieve policy change at the expense of a majority of the majority. Party leaders and senior members exercise this fiduciary responsibility in order to preserve the party label untarnished. The price of heterogeneity, however, is a limitation on what can be achieved in terms of positive policy change. Even this can be made workable as a consensus grows within the majority as to the appropriate direction of change. So, veto points come at a cost, but it provides benefits as well. It is very wide of the mark to represent veto power as the monster that devoured democracy.

#### IV. THE MALAPPORTIONED SENATE

Then there is the U.S. Senate, which may very well be the monster that devoured democracy. At the constitutional convention, a failure to provide Article V assurance to small states of equal representation in an upper chamber was in all likelihood a deal breaker.<sup>61</sup> So, our democracy has had, unlike virtually every other bicameral legislature in the world, both an unrepresentative upper chamber and one with enormous legislative influence.

Without disputing the disparities in representation associated with the equal representation of states in the Senate, let me invite the reader to conduct the following *gedanken* experiment. Imagine two classes of corporate stock. The first, called common stock, entitles its bearer to a proportionate share in the real value of the corporation (realized when he or she sells in the market) *and* a voting right on issues that come before its stockholders (a right that transfers with a sale). This joint right – a financial right and a voting right – determines share value. Consider a second class of corporate stock, called common stock without voting rights. Bearers of this second class enjoy only a financial right, not a voting right. There are examples of corporate stock of each type and, when both types are available, the price commanded by a share of common stock exceeds that enjoyed by common stock without voting rights.<sup>62</sup> Often the price differential is small (though positive).<sup>63</sup> But it may grow when financially important issues are on the corporate agenda for shareholder choice,

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<sup>60</sup> COX & MCCUBBINS, *supra* note 44, at 223; *see* ROHDE, *supra* note 59, at 93-105 (explaining how the Speaker's increased powers fostered the resurgence of partisanship in the House).

<sup>61</sup> *See, e.g.*, THE FEDERALIST NO. 62, at 377-78 (James Madison) (Clinton Rossiter ed., 1961).

<sup>62</sup> *See, e.g.*, Ronald C. Lease, John J. McConnell & Wayne H. Mikkelson, *The Market Value of Control in Publicly-Traded Corporations*, 11 J. FIN. ECON. 439, 469-70 (1983).

<sup>63</sup> *Id.*

such as when the company is the target of a merger transaction.<sup>64</sup> The main point is that the value of the voting right (or its absence) is *impounded* into share value.

Imagine, now, a range of common stock types, called common  $x$ -stock. A share of  $x$ -stock carries a proportionate share of financial value, as before, plus  $x$  votes (in the case of common stock with no voting rights,  $x = 0$ ). Though I do not know of such arrangements in the real world, I think it fair to expect a monotonic relationship between the price of a share of  $x$ -stock and  $x$  – more votes translate into a higher price.

Now let us shift our attention back to the Senate. Imagine an acre of rural land in Wyoming and an acre of rural land, essentially identical in productive potential, in neighboring Colorado. Although Coloradans have representation in the House (nearly) proportional to population, they have fewer votes per person in the Senate than residents of Wyoming. On net, Coloradans are underrepresented relative to those in Wyoming. By analogy to  $x$ -stock (and fixing the populations of the two states), we can think of an acre of land in Colorado carrying less voting power for a resident than an acre of land in Wyoming. The sale of an acre in Colorado transfers the productive capacity of that land from seller to buyer, but also reflects the lower political power. The landowner in Colorado, for example, must compete with many more Coloradans for the attention of their two senators than a comparably situated landowner in Wyoming. Controlling for all other factors, land should sell at a differential owing to this inequality. That is, in exchange for less influence in Washington, Coloradans will pay a lower price per acre for land than a resident of Wyoming would for a comparable parcel of land.

This is a cute little model at best (and the analogy is not perfect). What it says is that political power, to the extent it has economic value, will be impounded into the price of fixed assets like land. A Coloradan can sell his acre in that state and move to Wyoming and buy an equivalent acre there, but because the latter carries with it additional political power, he or she must pay a higher price. This does not neutralize the per capita advantage the citizens of small states have in the Senate relative to those in large states. But, it does capture a kernel of truth. A rancher in the small state of North Dakota probably has greater access to one of his senator's legislative assistants for help in dealing with the regional office of the Department of Agriculture, and even the ear of the senator from time to time, than his counterpart in the large state of California. There is *real* economic value to malapportionment and, like other things with real economic value (e.g., access to water, long growing season, proximity to markets), it will be impounded into land values.<sup>65</sup>

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<sup>64</sup> Steven R. Cox & Dianne M. Roden, *The Source of Value of Voting Rights and Related Dividend Promises*, 8 J. CORP. FIN. 337, 350 (2002) (“The presence of a control threat significantly increases the voting premium . . .”).

<sup>65</sup> The economics-inclined reader may appreciate that those who owned land when a territory became a state enjoyed a windfall gain (or loss, respectively) depending on whether

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The larger point, one which I have emphasized throughout this Essay, is a word of caution in assessing arrangements at face value: it is important to ask how some specific feature's effects reverberate throughout the political economy. In the case of representation, the respective local economies of the largest and smallest states adjust in part to the disparity in representation in the Senate (and to a lesser extent, the House).

#### V. CONGRESSIONAL REFORM: A WORD OF CAUTION

Let me draw this menu of topics on the dysfunctionality of the legislative branch to a close. Caution about constitutional reform is not fear of change. It is a prudent respect for risks, an appreciation of the general equilibrium effects that can result from even the smallest perturbation, an admiration for the strategic adaptability of professional politicians, and recognition of our relative ignorance in forecasting what their adaptations will be. One's views on these matters may reflect temperament as much as anything and, at the end of the day, may be the mark that distinguishes, philosophically, a conservative from a progressive.

David Brady and Craig Volden, in a superb study of the gridlock inherent in our political institutions, reflect my view on exercising caution about the viability of reform:

The predicament of contemporary politics in America could be relieved by lowering public expectations about what government is able to achieve, given the diversity of views held by Americans and the complexity of the problems with which the country is faced. Some commentators point to political reform – campaign finance reform, balanced budgets, and electoral reform – as ways to improve the overall situation. In general, we do not believe that political reforms will solve these more fundamental problems. Democratic countries from Japan and Korea in the Far East to Europe and Canada all face the same problems – corporate downsizing, high wages in the face of competition from the third world, exorbitant entitlements, electorates unhappy with high tax rates, aging populations, and questions about foreign policy in an unsafe world. Forms of government in these countries range from strong parliamentary systems to decentralized American-style governments. None has the answer . . . .<sup>66</sup>

My own take on the possibility of “fixing” Congress is to embrace many of the sentiments articulated in reform manifestos. In expressing ambivalence about a call for action, however, I am not convinced that all difficulties are evidence of dysfunctionality. And even where I do agree with reformers like

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their state had less (or more, respectively) population than the average state. Future buyers of land, however, will pay the market price reflecting all factors (including the political) that have been impounded into the value of the asset.

<sup>66</sup> DAVID W. BRADY & CRAIG VOLDEN, *REVOLVING GRIDLOCK* 208-09 (2d ed. 2006).

Levinson about a dysfunctional Congress, 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. Ultimately then, the feather bed to which George Stigler referred remains elusive.