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**COMPARING CONGRESS:  
BRYCE ON DELIBERATION AND DECLINE IN  
LEGISLATURES**

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INTRODUCTION .....	847
I. THE PROBLEM OF PARLIAMENTARISM .....	848
A. <i>Comparative Perspectives</i> .....	848
B. <i>The Parliamentary Turn</i> .....	849
II. TWO COMPETING SOLUTIONS .....	850
A. <i>Two Competing Doctrines</i> .....	850
B. <i>Wilson's Parliamentary Model</i> .....	853
III. REDEFINING THE PROBLEM .....	854
A. <i>Bryce on Australia</i> .....	854
B. <i>Bryce on the New World of Democracy</i> .....	857
IV. A SUGGESTED SOLUTION .....	858
A. <i>Party Is Not the Problem</i> .....	858
B. <i>Opinion Leadership Is the Real Problem</i> .....	860
CONCLUSION.....	861

INTRODUCTION

Whether Congress deserves to be regarded as “the most disparaged branch” has international implications in the analysis of legislative institutions. Some critics allege that Congress has taken something of a parliamentary turn as political parties seek more responsive instruments of representative government. Advocates of parliamentary government can appeal to the authority of Woodrow Wilson’s *Congressional Government*, which offers an idealised blueprint for the recent parliamentary turn.<sup>1</sup> My contribution here is to balance the Wilsonian perspective with an account of the limitations of the parliamentary model drawn from James Bryce (1838-1922), the British scholar-statesman who, as a contemporary of Wilson, was famous for his thesis about the rise of modern democracy and “the decline of legislatures” as deliberative institutions. I argue that a missing ingredient in the current debate over Congress’s disparaged state is something like Bryce’s standard or

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<sup>1</sup> See WOODROW WILSON, *CONGRESSIONAL GOVERNMENT: A STUDY IN AMERICAN POLITICS* (Johns Hopkins Univ. Press 1981) (1885).

measure of a “deliberative assembly,” which is an important forerunner to contemporary theories of deliberative democracy.

### I. THE PROBLEM OF PARLIAMENTARISM

I begin by placing my contribution within the context of this special collection investigating the role and reputation of Congress. The existing debate identifies an important parliamentary dimension in the way Congress approaches its role as a legislature. But I suggest that the problem is not so much a general trend towards “parliamentarism” as the adoption of a version of the parliamentary model that benefits the interests of political executives in parliamentary regimes.

#### A. *Comparative Perspectives*

Like Mayhew, Shepsle and Sinclair in this symposium, I am a political scientist inclined to moderate those critics who see Congress as “the most disparaged branch” and who want to fix the problem through constitutional change.<sup>2</sup> This Essay also supplements Graham K. Wilson’s work by assessing Congress from a parliamentary perspective.<sup>3</sup> Like Wilson, I rely on Westminster-derived categories of analysis which highlight the relative independence of Congress from the power of the executive branch – the branch of government that typically dominates legislatures in parliamentary systems. Also like Wilson, I note that the recent “parliamentarization” of Congress helps explain the debate over “the most disparaged branch,” as traditional forms of deliberative consensus have been challenged by new forms of partisan dissensus more typical of parliamentary systems. To foreign observers, the irony is that Congress is leaning towards parliamentary modes of legislative behaviour just as many parliamentary systems are leaning beyond cabinet government towards presidentialism, as illustrated by the interesting analysis of the so-called “British presidency.”<sup>4</sup>

Unlike Wilson, my comparison is not with contemporary Westminster and its presidential tendencies but with an older voice of British parliamentarism associated with the great statesman and legal scholar, James Bryce.<sup>5</sup> I argue

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<sup>2</sup> See David R. Mayhew, *Is Congress “the Broken Branch”?*, 89 B.U. L. REV. 357, 362 (2009); Kenneth A. Shepsle, *Dysfunctional Congress?*, 89 B.U. L. REV. 371, 371-72 (2009); Barbara Sinclair, *Question: What’s Wrong with Congress? Answer: It’s a Democratic Legislature*, 89 B.U. L. REV. 387, 388-90 (2009).

<sup>3</sup> See generally Graham K. Wilson, *Congress in Comparative Perspective*, 89 B.U. L. REV. 827 (2009).

<sup>4</sup> See, e.g., MICHAEL FOLEY, *THE BRITISH PRESIDENCY* 1-26 (2000) (highlighting certain ‘presidential’ features of the Blair premiership); MICHAEL FOLEY, *THE RISE OF THE BRITISH PRESIDENCY* 256-83 (1993) (comparing various dimensions of the British premiership generally with the American presidency).

<sup>5</sup> Bryce is one of the founders of the modern political science of comparative government, and something of a forgotten forerunner of theories of deliberative democracy.

that those wishing to understand the nature of the parliamentary turn that Congress is taking might do well to re-study Bryce's famous "decline of legislatures" argument in his *Modern Democracies*.<sup>6</sup> This work remains a classic warning about how the rise of strong-party forms of parliamentarism threatens modern democracy by weakening the legislature's capacity to act as an effective "deliberative assembly."<sup>7</sup> In important respects, Bryce's argument anticipates elements of contemporary theories of deliberative democracy, and deserves attention for its comparative analysis of not only the democratic value of deliberative processes associated with legislative checks and balances, but also of the deliberative deficit associated with strong-party forms of parliamentarism.

#### B. *The Parliamentary Turn*

Why is parliamentarism a relevant consideration in assessing the contemporary Congress? A convenient answer comes from Mann and Ornstein's *The Broken Branch*, which argues that one of the deeper structural reasons for Congress's ailments is that the House of Representatives increasingly represents "a neoparliamentary system."<sup>8</sup> By this term, the authors refer to a novel spirit of parliamentarism attracting the interest of both major political parties and encouraging them to subordinate "rules, precedents, and the norms of legislative behaviour in ways that left the institution in tatters."<sup>9</sup> American political parties have turned towards parliamentarism because they have been searching for two interrelated things: first, new ways for majority parties to mobilise support for presidential policy leadership; and second, new ways for minority parties to immobilise the majority party's presidential agenda.

This parliamentary turn has generated more bitter cross-party disagreement in the House than in the Senate, where the powers of the minority party remain relatively entrenched (and pose different problems in the form of delayed rather than hasty decision-making).<sup>10</sup> But the general trend is towards a polarised system of winners and losers resembling the relationships between governments and oppositions in parliamentary systems. Mann and Ornstein's outstanding example of what they term "the demise of regular order" comes

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See JOSEPH M. BESSETTE, *THE MILD VOICE OF REASON: DELIBERATIVE DEMOCRACY AND AMERICAN NATIONAL GOVERNMENT* 213-15, 221-22 (1994) (presenting Bryce's views on impediments to citizen deliberation in the late-nineteenth century, and testing these impediments in modern-day America).

<sup>6</sup> See 2 JAMES BRYCE, *MODERN DEMOCRACIES* 367-77 (London, Macmillan 1921) [hereinafter BRYCE, *MODERN DEMOCRACIES*].

<sup>7</sup> See 1 *id.* at 174.

<sup>8</sup> THOMAS E. MANN & NORMAN J. ORNSTEIN, *THE BROKEN BRANCH: HOW CONGRESS IS FAILING AMERICA AND HOW TO GET IT BACK ON TRACK* 213 (2d ed. 2008).

<sup>9</sup> *Id.*

<sup>10</sup> Filibustering is a prime example of such delayed decision-making.

from the battles over control of the House Rules Committee in the early 1990s.<sup>11</sup> Then the minority party, House Republicans claimed that the majority Democrats had marginalised the minority party, and wrecked the House's delicate structure of what the Republicans are quoted as labelling "deliberative democracy."<sup>12</sup>

Alas, actions often speak louder than words, even in relation to theories of deliberative democracy. When the two political parties switched roles after the 1994 election, the former minority leaders justified their own version of a lockdown of "deliberative democracy" with appeals to a newfound "responsibility to govern."<sup>13</sup> This alternative norm of a "responsibility to govern" reflects the creeping spirit of parliamentarism, modelled on an institutional norm of executive loyalty favoured by parliamentary parties, especially when their party holds executive office.<sup>14</sup> Mann and Ornstein contrast this new spirit of parliamentarism with the decline in due deliberation traditionally championed as a distinguishing mark of Congress, a distinctive type of legislature. Everything comes at a price and the price of the parliamentary turn is the slackening of due diligence in the deliberative process of Congress at its best. Mann and Ornstein rely on generalised benchmarks of deliberative democracy when evaluating such core topics as the "decline in deliberation," the "demise of deliberation," and the general decline of "responsible and deliberative lawmaking."<sup>15</sup>

## II. TWO COMPETING SOLUTIONS

In this Part, I review two doctrines about parliamentary government that feature prominently in the history of U.S. constitutional scholarship. I identify Woodrow Wilson's *Congressional Government* as providing a useful blueprint for advocates of the parliamentary model, and I place this against the background of an earlier critique of parliamentary systems found in *The Federalist Papers*. I suggest that Bryce can be best understood as standing between these two positions – closer to Publius than Wilson.

### A. *Two Competing Doctrines*

Standing back from the immediate heat of contemporary debate over disparaged branches, foreign observers ask: why would U.S. political parties look to parliamentary models of legislative behaviour? The parliamentary turn seems anti-historical considering the degree of attention, during the era of constitutional framing, to finding alternatives to the English parliamentary

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<sup>11</sup> MANN & ORNSTEIN, *supra* note 8, at 170-75.

<sup>12</sup> *Id.* For an analysis of deliberative democracy in a parliamentary setting, see JOHN UHR, *DELIBERATIVE DEMOCRACY IN AUSTRALIA: THE CHANGING PLACE OF PARLIAMENT* (1998).

<sup>13</sup> MANN & ORNSTEIN, *supra* note 8, at 170-75.

<sup>14</sup> *Id.* at 175.

<sup>15</sup> *Id.* at 169-79.

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system – alternatives which had promised so much in the eyes of theorists of liberal constitutionalism, but had delivered too little in the eyes of many American colonists. Exaggerating for effect, I suggest that U.S. constitutional history reveals at least two competing doctrines about the relevance of parliamentary models of government – two doctrines that have shaped U.S. constitutional history. A first and dominant doctrine can be traced back to *The Federalist Papers*' critique of the parliamentary model – which nicely illustrates the dominant theme of U.S. wariness towards parliamentary government. A second and distinctly dissenting doctrine can be illustrated by reconsidering what Woodrow Wilson a century later termed “the literary theory” of the Constitution. Wilson's *Congressional Government* reopens the case for the parliamentary model with his energetic advocacy, suggesting the parliamentary model to be superior in many respects to the Congressional system.<sup>16</sup> Wilson's critique is relevant because it provides an intellectual justification, should that be required, for the current parliamentary turn – a century or so since Wilson's initial advocacy.

I suggest that Bryce stands somewhere between the anti-parliamentary posture of *The Federalist Papers* and Wilson's pro-parliamentary posture. Of course, one can be situated in between two positions but facing in one particular direction – and I suggest that Bryce's *The American Commonwealth* is closer in spirit to *The Federalist Papers* than to Wilson's *Congressional Government*.<sup>17</sup> The larger point is that the institutional tensions in Congress, as identified by Mann and Ornstein, can be aligned with these exemplary constitutional theories. Mann and Ornstein themselves align their own preferred anti-parliamentary model of an effective legislature with *The Federalist Papers*.<sup>18</sup> The current parliamentary turn is then part of a tradition that draws on Wilson's theories of new forms of political leadership. Between these two extremes stands Bryce, who in his thesis about the fragility of deliberative assemblies articulates an important missing ingredient in the current debate over “the most disparaged branch.”

*The Federalist Papers* share with Bryce a wariness about parliamentary models of government. In many respects, *The Federalist Papers* stands in a class apart, as a fine sample of deliberative political rhetoric so unlike the drier academic works of the scholar-statesmen, Wilson and Bryce. The only example of the deliberative rhetoric of interest here is Madison's spirited critique of the “vicious ingredients in the parliamentary Constitution” – the power of the sovereign British parliament to extend the parliamentary term

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<sup>16</sup> See WILSON, *supra* note 1, at 57-162 (exposing many of the weaknesses of Congress when compared with a Parliamentary government).

<sup>17</sup> See generally JAMES BRYCE, *THE AMERICAN COMMONWEALTH* (London, Macmillan 1889) [hereinafter BRYCE, *THE AMERICAN COMMONWEALTH*]. On this work, see SANFORD LEVINSON, *OUR UNDEMOCRATIC CONSTITUTION: WHERE THE CONSTITUTION GOES WRONG (AND HOW WE THE PEOPLE CAN CORRECT IT)* 82 (2006).

<sup>18</sup> See MANN & ORNSTEIN, *supra* note 8, at 14-24.

(from three to seven years).<sup>19</sup> Later, when listing many other instances of parliament's legal power to alter the frame of British government, Madison rings out his theme that the British parliamentary system is a constitutional anomaly because "the authority of Parliament is transcendent and uncontrollable" and not limited by a higher constitutional authority.<sup>20</sup> As we might phrase it today, the constitution is not so much what the judges say as what parliament might say. But does the fusion of legislative and executive powers mean that parliament is really a constitutional cloak for the political executive? Put differently: although the unwritten constitution leaves parliament in a position of legal supremacy, this legal supremacy does not necessarily mean that parliament is an independent political institution. The British parliament might have been supreme but it has not necessarily been sovereign: Madison subsequently remarks that parliament is "an assembly exposed to the whole force of executive influence" emanating from the real sovereign – the British monarch and those government ministers exercising increasing influence over the use of monarchical power.<sup>21</sup> That the House of Commons has undermined elements of regal prerogative through its control of the power of the purse does not free parliament from the corrupting influence of executive powers closer at hand. As Madison crisply puts it: "[T]he electors are so corrupted by the representatives, and the representatives so corrupted by the Crown."<sup>22</sup>

This brief review of *The Federalist Papers'* critique of parliamentary systems illustrates part of the neglected background argument in the dominant American constitutional doctrine – a doctrine which defends the formal separation of legislative and executive powers over the parliamentary models. Mann and Ornstein summarise the more influential foreground argument advocating the merits of the proposed constitutional architecture of legislative power.<sup>23</sup> My purpose in this brief historical detour is to prepare the ground for my account of Bryce's constitutional theory – which I argue is closer to the original spirit of U.S. constitutionalism. Bryce was an elected member of the British House of Commons, and later an appointed member of the House of Lords. Bryce's perspective is from the inside of the parliamentary world. By contrast, Wilson's pro-parliamentary perspective is from the outside of the parliamentary world. Both are intensely political perspectives from two very experienced academic-politicians. Together the two perspectives provide us

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<sup>19</sup> THE FEDERALIST NO. 52, at 324-25 (James Madison) (Isaac Kramnick ed., 1987).

<sup>20</sup> THE FEDERALIST NO. 53 (James Madison), *supra* note 19, at 327.

<sup>21</sup> THE FEDERALIST NO. 56 (James Madison), *supra* note 19, at 342.

<sup>22</sup> THE FEDERALIST NO. 41 (James Madison), *supra* note 19, at 269-70; *see also* THE FEDERALIST NO. 58 (James Madison), *supra* note 19, at 350; THE FEDERALIST NO. 63 (James Madison), *supra* note 19, at 374; THE FEDERALIST NO. 71 (Alexander Hamilton), *supra* note 19, at 412.

<sup>23</sup> MANN & ORNSTEIN, *supra* note 8, at 14-24.

with richer fare for taking forward the debate over Congress as “the most disparaged branch.”

B. *Wilson’s Parliamentary Model*

Woodrow Wilson’s *Congressional Government*, published around the same time as Bryce’s *The American Commonwealth*, provides one of the classic U.S. accounts of parliamentarism as an alternative to the constitutional structures of Congressional government. In many ways, Wilson’s incisive comparison of Congress with the parliamentary model can serve as an inspiration for advocates of the creeping spirit of parliamentarism observed by Mann and Ornstein. Like Bryce, Wilson welcomes the existence of political parties.<sup>24</sup> Unlike Bryce, Wilson values parties as instruments of leadership exercised primarily by the political executive as head of government, modelled loosely along parliamentary lines.<sup>25</sup> Whereas Bryce notes the public benefit of parties participating in policy argument in the legislature, Wilson inclines generally to the alternative position, dismissed by Bryce, which values the role of parties as contestants in the wider battleground of elections.<sup>26</sup> For Wilson, the British parliamentary system is “perfected party government”: the responsibilities of national political leadership are concentrated, rather than dispersed as they tend to be in Congress, with the powers and privileges of executive office delegated to “the leaders of the party dominant in the state.”<sup>27</sup> Wilson sees the “evidently radical” defect of congressional government as the lack of “purposeful party organization,”<sup>28</sup> without which it is next to impossible to expect the U.S. ever to reach the goal of a “closely organized party government.”<sup>29</sup>

Again like Bryce, Wilson judges legislative debate according to its impact on “the instruction and elevation of public opinion.”<sup>30</sup> But Wilson rates Congress as inferior to parliamentary bodies in this vital public impact: in Wilson’s acerbic judgment, the U.S. congressional system lacks “the higher order of parliamentary debate.”<sup>31</sup> Congress fails in its highest role: “the great function of instructive and business-like debate of public questions.”<sup>32</sup> Parliamentary systems promote a clear-cut context between governing and opposing parties where the very fate of national government depends on the process and outcome of debate in the legislature, which inevitably becomes the

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<sup>24</sup> See WILSON, *supra* note 1, at 80.

<sup>25</sup> *Id.*

<sup>26</sup> Compare *id.* at 77-80, with 1 BRYCE, *THE AMERICAN COMMONWEALTH*, *supra* note 17, at 150-60 (contrasting the English system of organizing assemblies into well-defined parties with the American system of dividing the assembly into a number of much smaller bodies).

<sup>27</sup> WILSON, *supra* note 1, at 91.

<sup>28</sup> *Id.* at 147.

<sup>29</sup> *Id.* at 91, 147.

<sup>30</sup> *Id.* at 72.

<sup>31</sup> *Id.*

<sup>32</sup> *Id.* at 145.

central public forum for policy deliberation. What really distinguishes the parliamentary model is the effect it has on strengthening national political leadership to levels of capacity that can never be reached through the dispersed forms of “Committee government” facilitated by Congress.<sup>33</sup> The outstanding defect of the Congress of Wilson’s time is the power of invisible rulers exercising their rule behind relatively closed doors, preferring rather to cut deals than to engage in open debate and public deliberation. The picture is one of power dispersed with no focal point of public responsibility, illustrated for instance by the House’s decline into “a disintegrate mass of jarring elements.”<sup>34</sup> To quote one of Wilson’s leadership norms, “the more power is divided the more irresponsible it becomes.”<sup>35</sup> Congress is structured around the dispersed power of “many small chiefs”<sup>36</sup> with the result that, as a legislature, Congress provides comparatively little “legislative leadership.”<sup>37</sup> Wilson’s executive-centred perspective is revealed in his complaint that Congress has proven itself incapable of providing the nation with a “supreme executive ministry.”<sup>38</sup> But is executive authority the standard we should use when assessing a legislature’s performance?

### III. REDEFINING THE PROBLEM

This Part begins my recovery of an alternative constitutional doctrine from James Bryce. For two reasons, I draw on Bryce’s pioneering analysis of the Australian example of parliamentary government. First, it might be useful for U.S. audiences to hear how important a role Congress plays in far-flung international debates over the reform and restructuring of parliamentary legislatures. Second, federated Australia attracted Bryce’s attention as an experiment in blending parliamentary government with a rigid constitution so that Australia emerged as something of a test case for Bryce’s thesis about “the decline of legislatures” – the great theme in Bryce’s comparative constitutionalism.

#### A. *Bryce on Australia*

My first reason means that proponents of parliamentary strengthening look to Congress as their primary working model of a strong legislature, even in Westminster-derived parliamentary systems such as Australia. To put it simply: Congress does not look all that broken and does not deserve to be too disparaged when seen through parliamentary eyes. Australian supporters of

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<sup>33</sup> *Id.* at 24, 78-79 (“In a word, the national parties do not act in Congress under the restraint of a sense of immediate responsibility.”).

<sup>34</sup> *Id.* at 145.

<sup>35</sup> *Id.* at 77.

<sup>36</sup> *Id.* at 76.

<sup>37</sup> *Id.* at 142.

<sup>38</sup> *Id.*; *cf.* 1 BRYCE, *THE AMERICAN COMMONWEALTH*, *supra* note 17, at 205-24 (describing the relations of congress to the President).

parliamentary reform share this high regard for Congress with many international supporters of more effective parliamentarism. Australian debate over how best to strengthen domestic legislatures takes its inspiration from a blend of parliamentary theory, primarily drawn from British constitutionalism, and of institutional envy of the remarkable independence of Congress as an exemplary legislature, at least in terms of its institutional design if not in terms of its everyday practice. This Australian blending of British theory and U.S. practice might strike U.S. readers as puzzling – but the blend reflects even deeper strands of the blended constitutionalism found in Australia and probably other contemporary Westminster-derived political systems. Australian scholars take the blending for granted,<sup>39</sup> while curious U.S. scholars of comparative government note the blending with fascination.<sup>40</sup>

My second reason relates to the role and relevance of Bryce as interpreter of the Australian parliamentary system and of parliamentary systems more generally.<sup>41</sup> Bryce was perhaps the first and most influential international scholar to see the significance of the Australian constitutional system as it emerged officially at the inauguration of the federated Australian Commonwealth in 1901. The use of the title “Commonwealth” partly reflects the influence of Bryce in resurrecting that historic political term in his famous work on the U.S. polity, *The American Commonwealth*, published in the same decade as Wilson’s *Congressional Government*. Bryce’s interpretation of U.S. constitutionalism helped shape the political theory of Australian constitution-makers.<sup>42</sup> The Australian Constitution was written by Australian politicians meeting in a series of elected constitutional conventions in the 1890s and later ratified by Australian voters in constitutional referenda leading up to federation in 1901. The process was inspired in large part by the U.S. history of constitutional development. Although the Australian Constitution provides for a parliamentary system of government, the constitutional framework has many U.S. features that mark off the Australian experience from that of Great Britain: a written constitution; formal separation of powers across three

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<sup>39</sup> See, e.g., UHR, *supra* note 12, at 77-81 (“[O]ne can discern an approach to a federated Australia which holds out the possibility of . . . a new synthesis which overcomes some of the limitations of the antithesis between ‘responsible government’ and ‘federalism.’”).

<sup>40</sup> See, e.g., STANLEY BACH, PLATYPUS AND PARLIAMENT: THE AUSTRALIAN SENATE IN THEORY AND PRACTICE 326 (2003) (“Perhaps no other national assembly in a truly democratic nation rubs more strenuously up against the prevailing taxonomic categories that shape and underlie political and constitutional analysis.”); AREND LIJPHART, PATTERNS OF DEMOCRACY 204-09 (1999) (comparing various forms of bicameralism throughout the globe).

<sup>41</sup> See generally JAMES BRYCE, *The Constitution of the Commonwealth of Australia*, in 1 STUDIES IN HISTORY AND JURISPRUDENCE 391 (1901) (critiquing the Australian constitution and parliamentary system of government); Graham Maddox, *James Bryce: Englishness and Federalism in America and Australia*, 34 PUBLIUS: J. FEDERALISM 53, 53-54 (2004).

<sup>42</sup> Haig Patapan, *Melancholy and Amnesia: Toqueville’s Influence on Australian Democratic Theory*, 49 AUSTL. J. POL. & HIST. 1, 6-11 (2003).

branches of government;<sup>43</sup> an elected bicameral legislature;<sup>44</sup> federal division of powers between nation and states;<sup>45</sup> and constitutional alteration only through formal amendment procedure involving a national referendum.<sup>46</sup> Interestingly, the names for the two houses of the bicameral legislature reflect U.S. rather than British influences: the House of Representatives and the Senate.<sup>47</sup> Canada, by contrast, has a Senate (appointed) but also a House of Commons;<sup>48</sup> to take another Westminster-derived example, New Zealand has a House of Representatives but no upper house.<sup>49</sup> Thus, Australia stands out as being more like the U.S. than other Westminster systems.

The development of representative democracy in Australia provided Bryce with the material for one of the earliest formulations of his “decline of legislatures” thesis – a thesis which connected the weakening of legislatures in the modern era with the rise of strong party government increasingly willing to dominate legislatures.<sup>50</sup> Bryce was a nineteenth-century liberal British politician and a genuine friend of the new century of representative democracy. He was impressed with the extent to which constitutional government in Australia was biased in favour of parliamentary democracy. At a time when both Britain and the U.S. had restrictive adult franchises, Australia emerged as a model in microcosm of the world to come, with remarkably few restrictions – apart from those of race which went unlamented by Bryce<sup>51</sup> – on the democratic potential of the people to determine who governs. From Bryce’s perspective, Australia promised to test the compatibility of the restraints of constitutional government he admired and the power of democracy he learned to respect. The Australian constitutional order was an interesting experiment in framing parliamentary democracy, with a myriad of institutional checks and balances tempering the power of a democratic electorate to stamp its sovereignty on law and policy. At the time, few other nations had freely conferred so much constitutional power on the people, and few – if any other – nations had a political culture with such prominent anti-authoritarianism and such potential for egalitarianism. Bryce was neither a conservative nor a radical, but a liberal in the mould of J.S. Mill, with a hint of Mill’s democratic

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<sup>43</sup> AUSTRALIAN CONST. chs. I, II, III.

<sup>44</sup> *Id.* at ch. I.

<sup>45</sup> *Id.* at ch. V.

<sup>46</sup> *Id.* at ch. VIII.

<sup>47</sup> *Id.* at ch. I, § 1.

<sup>48</sup> Constitution Act, 1867, 30 & 31 Vict. Ch. 3, art. IV, § 17 (U.K.), *as reprinted in* R.S.C., No. 5 (Appendix 1985).

<sup>49</sup> NEW ZEALAND CONST. pt. III.

<sup>50</sup> *See infra* notes 62-64 and accompanying text.

<sup>51</sup> *See* 2 BRYCE, MODERN DEMOCRACIES, *supra* note 6, at 545-68; Maddox, *supra* note 41, at 65-68 (observing, *inter alia*, Bryce’s “blindness to the atrocities perpetrated by English settlers on Aborigines”).

elitism; he remained convinced that egalitarian theories would always be found wanting, given the persistent power of “oligarchies within democracies.”<sup>52</sup>

B. *Bryce on the New World of Democracy*

For patricians of Bryce’s progressive stamp, Australia was an appealing case study in the class politics of modern democracy: well before other international observers, Bryce anticipated the rise of laborist-parties representing the poor majority of the electorate, which could rise to power without having to do battle with established interests of privilege so entrenched in the political culture and institutions of Britain. Would the eventual arrival of laborist parties in government in Australia preview “the decline of legislatures” as independent “deliberative assemblies”? Or would the U.S.-inspired constitutional architecture of checks and balances temper democratic partisanship and allow political deliberation to take root in the new parliamentary setting?<sup>53</sup>

Bryce did not wait long to have his question answered. Appointed as British Ambassador to the U.S. in 1907, Bryce maintained his close interest in Australian constitutional development. With the 1910 election of the Fisher government as arguably the world’s first socialist government,<sup>54</sup> Bryce had a strong incentive to visit Australia to see first-hand the practical operations of the political system about which he had already written so much. As Bryce’s biographer put it: “For the first time in history apart from moments of revolution, the Hand-workers of a country had obtained effective control of the Executive.”<sup>55</sup> Bryce’s interest in one-party control of a national parliament should be seen against the background of wider international developments in bicameral relations. For instance, there were the recent clashes over “the people’s budget” between the liberal Asquith government (which had appointed Bryce to Washington) and the conservative parties in the House of Lords,<sup>56</sup> as well as the U.S. debate leading to the adoption in 1913 of the constitutional change to direct popular election of the Senate.<sup>57</sup> Thus, while planning for his later work *Modern Democracies*, Bryce realised that a visit to Australia was imperative because in Australia, “[m]odern Democracy . . . stalked open and unashamed in its native homespun.”<sup>58</sup>

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<sup>52</sup> See 2 BRYCE, *MODERN DEMOCRACIES*, *supra* note 6, at 597-604 (“[O]ligarchy springs up everywhere as by a law of nature . . .”).

<sup>53</sup> See *id.* at 223-29.

<sup>54</sup> DAVID DAY, *ANDREW FISHER: PRIME MINISTER OF AUSTRALIA 191-92* (2008).

<sup>55</sup> 2 HERBERT A. L. FISHER, *JAMES BRYCE* 76 (1927).

<sup>56</sup> For a detailed account of this struggle, see NEAL BLEWETT, *THE PEERS, THE PARTIES AND THE PEOPLE: THE BRITISH GENERAL ELECTIONS OF 1910* (1972).

<sup>57</sup> U.S. CONST. amend. XVII, § 1.

<sup>58</sup> 2 FISHER, *supra* note 55, at 75; see also Maddox, *supra* note 41, at 63-68 (documenting the development of Bryce’s interest in Australian democracy).

Bryce's Australian visit provided grist for the mill of *Modern Democracies*, where Australia is often used to illustrate advanced forms of popular government to be encountered by analysts of "the pathology of legislatures."<sup>59</sup> Australia is the democracy that "has travelled farthest and fastest along the road which leads to unlimited rule of the multitude."<sup>60</sup> As it turned out, the Fisher Labor government was surprisingly moderate in law and policy and in its use of traditional parliamentary processes.<sup>61</sup>

#### IV. A SUGGESTED SOLUTION

This Part examines the heart of Bryce's interpretation of the nature of deliberative assemblies in modern democracy. My aim is to show the contemporary relevance of Bryce's categories of constitutional and political analysis, and to suggest that Bryce's deliberative standard can contribute to the current debate over Congress's role and reputation by balancing the potential contribution that Woodrow Wilson can make to the advocacy of parliamentary-based executive leadership.

##### A. *Party Is Not the Problem*

The two volumes of Bryce's *Modern Democracies* spend many chapters investigating empirical workings of selected modern democracies (the U.S., France, Switzerland, Canada, Australia and New Zealand), and many chapters on the general qualities of modern democracies. Perhaps the most influential general argument is in the chapter succinctly titled "The Decline of Legislatures."<sup>62</sup> This thesis is frequently misunderstood as suggesting that the rise of political parties is the cause of the decline of legislatures. This view is clearly mistaken because Bryce, himself a prominent member of a political party, argued that parties are essential organizations for an effective representative body.<sup>63</sup> To be sure, Bryce contends that "parliamentary deliberations" have been undermined by the rise in "intensity of party spirit," but this refers to the spirit of partisan exclusiveness and not to the beneficial quality of party-spiritedness.<sup>64</sup> Political parties bring order and cohesion to the institutional life of representative politics – even to the extent of promoting a system of party government based on a clear public recognition of the party in

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<sup>59</sup> See 2 FISHER, *supra* note 55, at 75-79 (describing the context of Bryce's visit to Australia); see also 2 BRYCE, *MODERN DEMOCRACIES*, *supra* note 6, at 382, 390 (illustrating certain "perversions" or "defects" of representative government via the particular example of the Australian legislature).

<sup>60</sup> 2 BRYCE, *MODERN DEMOCRACIES*, *supra* note 6, at 181, 495-96.

<sup>61</sup> *Id.* at 281-84.

<sup>62</sup> See *id.* at 367-77.

<sup>63</sup> *E.g.*, 1 BRYCE, *THE AMERICAN COMMONWEALTH*, *supra* note 17, at 150-60.

<sup>64</sup> 2 BRYCE, *MODERN DEMOCRACIES*, *supra* note 6, at 371, 377; see also JAMES BRYCE, *THE HINDRANCES TO GOOD CITIZENSHIP* 75-104 (1909) (discussing party spirit as a hindrance to good citizenship).

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power and the equally important party or parties in opposition. Far from causing the decline of legislatures, political parties strengthen legislatures by providing a basis for orderly political competition within the constitutional arena of public deliberation. Further, political parties provide a platform for public leadership for those elected representatives participating in a legislature's structured and somewhat stylised debate over law and policy.

Political parties – and party government – are especially useful for modern democracy in structuring forms and processes of public deliberation. Single-party government would be an important exception, but the general rule is that carefully constituted party competition “is a sort of education for those willing to receive instruction.”<sup>65</sup> What is important is the presence of a representative deliberative assembly, with all parties contributing to and thereby leading public debate. To his critics, Bryce appears to look back to a golden age when legislatures acted as standard-setters for the national mind. But on a closer reading, we can see that Bryce is appropriating legislative history to construct a quite plausible narrative about the role of legislatures as “deliberative assemblies” in a democratic era where due political processes of public deliberation are at risk of being marginalised by impatient ruling interests.

There are two basic steps in Bryce's argument: first, an account of the norm or regulative ideal of what it means for legislatures to operate as “deliberative bodies whose debates would enlighten the people”;<sup>66</sup> and second, an account of the widespread decline of legislatures from this classical ideal of modern constitutionalism as propagated by the sort of moral authorities Bryce favours, such as Macaulay, Mill and Bagehot.<sup>67</sup>

The rhetoric of “decline” can sound conservative and nostalgic, and Bryce does indeed speak of legislatures as falling away from original “hopes once entertained of the services they were to render,” with a plausible suspicion that the authority expected of legislatures has been displaced by the unanticipated rise of the political executive, such as the governing cabinet in the British parliamentary system.<sup>68</sup>

So what then causes the decline in legislatures so celebrated by Bryce? The heart of the matter turns on Bryce's understanding of “decline,” which refers more to changes in the public environment in which legislatures operate rather than any particular institutional defect or limitation. Specifically, Bryce refers to the falling away of public respect for legislatures as vital deliberative assemblies.<sup>69</sup> A democracy is defined not solely by its political institutions but also by its wider public realm. To Bryce, legislatures provide the important role of opinion-leadership over the public mind, if and when the public look to the legislature as a worthy arena of public deliberation. Bryce is thus not

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<sup>65</sup> 1 BRYCE, MODERN DEMOCRACIES, *supra* note 6, at 134.

<sup>66</sup> 2 *id.* at 368.

<sup>67</sup> *Id.* at 367.

<sup>68</sup> *Id.* at 373-75.

<sup>69</sup> *Id.* at 337-39.

lamenting the passing away of formal legislative competence in relation to the legal process, but instead the falling away of public expectations about the value of legislatures as opinion-leaders and engines of community deliberation.<sup>70</sup>

This deliberative function of legislatures is an often-neglected background assumption of liberal constitutionalism that Bryce promotes to the foreground, almost ahead of the formal function of legislative authority. Classical modern constitutionalism promotes forms of self-government drawing on liberal doctrines of limited government, where government is limited in the range of legitimate institutional procedures for determining law and policy.<sup>71</sup> One foundational structural device that limits the power of government is the separation of powers, based on constitutional doctrines that elevate the legislature to pride of place as the first branch of government. To be sure, both other branches of government engage in forms of deliberation that are essential to good government. Nevertheless, neither the executive nor the judiciary is constituted to act as the focal point for public deliberation over law and policy, or is structured as a deliberative assembly to reflect competing political arguments about the public interest. I argue that Bryce's thesis about the imminent decline of legislatures reflects his understanding of this neglected norm of modern constitutionalism: the role of legislatures as deliberative assemblies which encourage competing political parties to participate in the legislative process in measured and perhaps mannered ways that serve to lead and thereby strengthen wider community deliberation over public affairs.

#### B. *Opinion Leadership Is the Real Problem*

If rising political parties does not offer the sole explanation for legislative decline, what does? The short answer is expanding executive power and the ambition of political parties to use parliamentary or legislative power to administer the state's steadily expanding governmental powers. The problem is not so much the existence of political parties, but the parties' wholesale adoption of majority "mandate" doctrines – doctrines devised to justify the rights of governing parties to override the deliberative process and to implement their allegedly-mandated agenda of law and policy. Mandate theories persuade elected representatives to see themselves as delegates responsively implementing their party's charter, rather than deliberators answering to the people. Typical of Bryce's colourful descriptions of mandate-reliant representatives are legislators who act as "a sort of conduit-pipe" or "a sort of telephone wire" delivering party policy rather than deliberating about public policy.<sup>72</sup>

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<sup>70</sup> *Id.* at 367-77.

<sup>71</sup> See UHR, *supra* note 12, at 37-55 (discussing republicanism and liberalism as theories of parliamentary power); JEREMY WALDRON, THE DIGNITY OF LEGISLATION 63-91 (1999) (discussing Locke's views on the role of the legislature and constraining legislative power).

<sup>72</sup> 2 BRYCE, MODERN DEMOCRACIES, *supra* note 6, at 384-90.

Given this rise in mandate theories of representation and their acceptance by most political parties, the public has less and less reason to look to legislatures as theatres of deliberation. The political parties defend this shift in underlying philosophies of party government by contrasting traditional norms of representative democracy with modern norms of participative democracy which replace the institutionalised legislative process with the looser (and relatively unregulated) electoral process as the preferred site for leadership in community deliberation. Arguing against too great a reliance on voting mechanisms to discover public opinion, Bryce contrasts noisy electoral campaigns with the more restrained deliberative processes of parliamentary debate – processes which can lead or shape or mould public sentiment and thus establish public opinion through “an educative process.”<sup>73</sup> Thus, the “decline of legislatures” refers not so much to the internal dimension of weakened institutional capacity as to the external dimension of diminished public respect, esteem, deference, prestige and authority, to use Bryce’s various categories.<sup>74</sup> Bryce was a pioneer in the political study of public opinion: for example, Part IV of *The American Commonwealth* is devoted to the political management of public opinion.<sup>75</sup> Of central interest is Bryce’s concern about the decline in “the dignity and moral influence of representative legislatures” in the public mind or the public’s judgment about the legislature’s diminished “reputation and moral authority.”<sup>76</sup> Bryce uses public tests of institutional competence: for example, public regard for the institutional integrity of a legislature. One shorthand for describing the decline of legislatures is the decline of public trust in legislatures relative to some other political body, typically the political executive (whether it be in the plural form of the British cabinet or in the singular form of the U.S. President). Legislative offices are then pursued not so much for their own sake, as in Bryce’s ideal, but are “desired chiefly by those who seek in them an avenue to executive power.”<sup>77</sup>

#### CONCLUSION

I have argued that the current U.S. debate over the role and reputation of Congress has important international implications. For many international observers, particularly observers in parliamentary systems, Congress stands out as an often odd but always distinctive legislative institution. Perhaps this perception is clouded by the “literary theory” of the Constitution and is not

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<sup>73</sup> 1 *id.* at 181 (“The discussion which forms opinion by securing the due expression of each view or set of views so that the sounder may prevail . . . is an educative process constantly in progress.”); 2 *id.* at 501-03.

<sup>74</sup> 2 *id.* at 337-38.

<sup>75</sup> See 2 BRYCE, *THE AMERICAN COMMONWEALTH*, *supra* note 17, at 209-334 (offering, inter alia, a thorough critique of the nature of public opinion, its particular varieties, its failures, and its successes).

<sup>76</sup> 2 BRYCE, *MODERN DEMOCRACIES*, *supra* note 6, at 391, 632.

<sup>77</sup> *Id.* at 634.

sufficiently appreciative of the everyday institutional reality. The point remains that, for many parliamentary observers, Congress holds out the promise of capacities for legislative deliberation that are rarely on display in parliamentary legislatures. The lesson for many international analysts is that Congress lets itself down when it leans towards parliamentary modes of legislative behaviour. The irony is that, as Graham K. Wilson shows, many parliamentary systems are going into the other direction by incorporating executive-strengthening elements of a presidential system.<sup>78</sup>

It is appropriate, then, to end this examination of declining legislatures on a note of elevated executives. In one of his revised "Prefaces" to *Congressional Government*, Woodrow Wilson noted that his book might be put "hopelessly out of date" by the action of a new President able to persuade congressional partisans to reform their obstructive ways.<sup>79</sup> Wilson knew many things about executive power, including using positions of party leadership to reshape legislators' incentives. That situation has not changed. For instance, one of Mann and Ornstein's most interesting observations is their concluding note that "only a president can alter the political climate in a way sufficient to encourage cross-party deliberations."<sup>80</sup> They suggest that the root problem behind the decline of Congress is the relatively recent adoption of a particularly entrenched form of Bryce's mandate doctrine by members of Congress when their own political party enjoys the presidency.<sup>81</sup> Admittedly, the problem of inappropriate legislative norms is caused to a considerable extent by party leaders' changed expectations of Congress. The solution thus rests with changed expectations accompanying the next President prepared to release his or her congressional members to return to the best of their traditional ways of what Mann and Ornstein term "regular order."<sup>82</sup> As Bryce liked to put it: great political leaders, whether they be in the White House or in Congress, "may do much to create a pattern for the people of what statesmanship ought to be."<sup>83</sup>

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<sup>78</sup> See Wilson, *supra* note 3, at 828 n.6.

<sup>79</sup> WILSON, *supra* note 1, at 23 ("[T]he new leadership of the Executive . . . may bring about . . . an integration which will substitute statesmanship for government by mass meeting. It may put this whole volume hopelessly out of date.").

<sup>80</sup> MANN & ORNSTEIN, *supra* note 8, at 263.

<sup>81</sup> *Id.* at 211-13.

<sup>82</sup> *Id.* at 170-75, 215.

<sup>83</sup> 2 BRYCE, MODERN DEMOCRACIES, *supra* note 6, at 614-15.