

The Most Disparaged Branch: The Role of Congress in the 21st Century

Boston University School of Law
November 14-15, 2008



The Most Disparaged Branch: The Role of Congress in the 21st Century

FRIDAY, NOVEMBER 14

9:15 a.m.-9:30 a.m.

Welcome and Introduction

9:30 a.m.-11:00 a.m.

I. Is Congress “The Broken Branch”?

Gary Lawson, Boston University School of Law

Sanford Levinson, University of Texas School of Law

David Mayhew, Yale Department of Political Science

Kenneth Shepsle, Harvard University Department of Government

Barbara Sinclair, UCLA Department of Political Science

11:15 a.m.-12:30 p.m.

Keynote Address: Representative Law Making

Jeremy Waldron, New York University School of Law

12:30 p.m.-2:00 p.m.

Lunch

2:00 p.m.-3:15 p.m.

II. Is Legislation an Unprincipled, Incoherent, Undignified Mess?

Alan Feld, Boston University School of Law

Vlad Perju, Boston College Law School

Robert Seidman & Ann Seidman, Boston University School of Law

Luc Wintgens, K.U. Brussels Centre for Legislation, Regulation and Legisprudence

3:30 p.m.-4:45 p.m.

III. Is Congress Capable of Conscientious, Responsible Constitutional Interpretation?

Hugh Baxter, Boston University School of Law

Michael Gerhardt, University of North Carolina School of Law

Walter F. Murphy, Princeton University Department of Politics

Mark Tushnet, Harvard Law School

5:00 p.m.-6:30 p.m.

IV. Beyond Legislatures: Social Movements, Social Change, and the Possibilities of Demosprudence

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Lani Guinier, Harvard Law School
Fredrick Harris, Columbia University Department of Political Science
Linda McClain, Boston University School of Law
Robert Post, Yale Law School
Gerald Rosenberg, University of Chicago Department of Political Science

6:30 p.m.

Reception

SATURDAY, NOVEMBER 15

9:30 a.m.-10:45 a.m.

V. Toward a More Democratic Congress?

James Fleming, Boston University School of Law
Stephen Macedo, Princeton University Department of Politics
Jane Schacter, Stanford Law School
Adrian Vermeule, Harvard Law School

11:00 a.m.-12:30 p.m.

VI. Toward a More Responsible Congress?

Sotirios Barber, University of Notre Dame Department of Government
Jack Beermann, Boston University School of Law
Douglas Kriner, Boston University Department of Political Science
Nancy Rosenblum, Harvard University Department of Government
Jeffrey Tulis, University of Texas Department of Government

12:30 p.m.-2:00 p.m.

Lunch Address: On How A Congress Might Be Changed: The Politics Of Fundamental Reform

Lawrence Lessig, Stanford Law School

2:00 p.m.-3:30 p.m.

VII. Congress in Comparative Perspective

Michael Libonati, Temple University School of Law
Michel Rosenfeld, Cardozo School of Law
Kim Lane Scheppele, Princeton University Program in Law and Public Affairs
John Uhr, Australian National University
Graham Wilson & Virginia Sapiro, Boston University Department of Political Science

About the Conference

Boston University School of Law will hold a conference on *The Most Disparaged Branch: The Role of Congress in the 21st Century* on November 14-15, 2008. It will be the third in a series of conferences at BU that began with *The Role of the Judge in the 21st Century* and continued with *The Role of the President in the 21st Century*. Jeremy Waldron will give the keynote address on November 14 and Lawrence Lessig will give a lunch address on November 15. The *Boston University Law Review* will publish the papers and proceedings.

If the judiciary has been called “the least dangerous branch,” and the executive “the most dangerous branch,” then surely Congress has been “the most disparaged branch” (or “the least respected branch”). What is more, there is considerable talk of failure in the air these days – including constitutional failure, moral failure, political failure and institutional failure – and criticisms of Congress figure prominently in this discourse. Is Congress up to the challenge of meeting the daunting problems that it will face in the 21st Century? Are there plausible and attractive reforms that might better equip it to face these problems? The conference will include the following panels, taking up issues of the sort described below.

I. Is Congress “The Broken Branch”?

Many observers have disparaged Congress as “the broken branch” (e.g., Thomas Mann and Norman Ornstein’s book of that name) or portrayed it as an increasingly dysfunctional and ineffective institution (e.g., Sanford Levinson’s book, *Our Undemocratic Constitution*). What about Congress is broken? What are the most feasible and desirable proposals for repairing and improving Congress to make it a more effective institution (e.g., Larry Sabato’s book, *A More Perfect Constitution*)?

II. Is Legislation an Unprincipled, Incoherent, Undignified Mess?

Just as Congress is viewed as “the broken branch,” legislation itself is commonly disparaged as an unprincipled, incoherent, and undignified mess (to recall Jeremy Waldron’s book, *The Dignity of Legislation*). Are there other plausible pictures of legislation that portray it as more defensible? A new journal, *Legisprudence*, “aims at contributing to the improvement of legislation by studying the processes of legislation from the perspective of legal theory.” What are the aspirations and prospects of “legisprudence”? What has it contributed, and might it contribute, to the improvement of legislation?

III. Is Congress Capable of Conscientious, Responsible Constitutional Interpretation?

In 1893, James Bradley Thayer presumed that Congress was the primary constitutional interpreter and that it had the institutional capacity to discharge that responsibility. He warned that aggressive judicial review would debilitate the political process and, by implication, the capacities of Congress to engage in conscientious, responsible constitutional interpretation. By the 21st Century, has what Mark Tushnet has called “judicial overhang” so stunted Congress’s capacities in this respect that courts should no longer defer to Congress? Indeed, can widespread disparagement of Congress’s capacities for constitutional interpretation readily coexist with judicial deference to Congress? Or does it lead to more aggressive judicial review (as may have

been the case with the Rehnquist Court and perhaps now the Roberts Court)? What is the most defensible conception of Congress's responsibilities with respect to constitutional interpretation and of its capacities to carry out those responsibilities?

IV. Beyond Legislatures: Social Movements, Social Change, and the Possibilities of Demosprudence

Scholars commonly question whether *courts* can bring about social change (e.g., Gerald Rosenberg's *The Hollow Hope*, Ran Hirschl's *Towards Juristocracy*, and Michael Klarman's *From Jim Crow to Civil Rights*), perhaps implicitly assuming that *legislatures* can do so. But is Congress capable of bringing about social change? Some scholars have argued for shifting the focus beyond legislatures (or "electocracy") to reviving the role of the people, especially mobilized constituencies, through social movements in pursuing social change. Along these lines, Lani Guinier and Gerald Torres have begun to develop a "demosprudence" of social movements. What are the possibilities and prospects of demosprudence?

V. Toward a More Democratic Congress?

Scholars frequently fret about how undemocratic *courts* are, perhaps implicitly assuming that *legislatures* are adequately or appropriately democratic. But how democratic is Congress? And what is the best theory of how democratic Congress should be? Are there plausible and attractive changes in institutional design that might make it more appropriately and defensibly democratic (consider, e.g., the criticisms and proposals in Levinson's *Our Undemocratic Constitution* and in Sabato's *A More Perfect Constitution*). (Here we should distinguish between institutional design writ small (e.g., Adrian Vermeule's book, *Mechanisms of Democracy*) and institutional design writ large (e.g., Levinson's and Sabato's books).

VI. Toward a More Responsible Congress?

How responsible (as distinguished from responsive) is the Congress? What is the best theory of the democratic responsibility of Congress? Are there plausible and desirable reforms that might make Congress more responsible? Vis-a-vis the President? Vis-a-vis the courts? Vis-a-vis the people themselves? Do arguments for a more responsible Congress presuppose realistic or feasible conceptions of how Congress operates and is likely to operate?

VII. Congress in Comparative Perspective

Do legislatures in other countries suffer disparagement similar to that of Congress? What about state legislatures within the United States? Do these other legislatures have features that make them more democratic? More effective? More responsible? What can we learn about improving Congress and legislation in the 21st century through comparative inquiry?

**For more information about the conference, contact
Professor James E. Fleming, jfleming@bu.edu**

About the Speakers

Keynote Speaker

Jeremy Waldron is University Professor at New York University School of Law, where he teaches courses in legal, political and social philosophy. He has published widely in jurisprudence and political theory, including books and articles on theories of rights, constitutionalism, democracy, property, and torture. Professor Waldron is best known to American audiences for his tireless criticism of and outspoken opposition to judicial review of legislation. He has famously developed such criticism in his book, *Law and Disagreement* (Oxford University Press, 1999) and, most recently, in "The Core of the Case Against Judicial Review," 115 *Yale Law Journal* 1346 (2006).

Professor Waldron's work that is most centrally related to the topic of our conference is *The Dignity of Legislation* (Cambridge University Press, 1999), which attempts to restore the good

name of legislation in political theory. Building on the writings of Aristotle, Locke, and Kant, his work presents legislation as a dignified mode of governance and a respectable source of law. In emphasizing the positive features of democracy and representative assemblies, Waldron's arguments are of great significance today, especially in countries considering the adoption of a bill of rights and judicial review.

Professor Waldron has given distinguished public lectures around the world, including the Storrs Lectures at Yale Law School, the Seeley Lectures at Cambridge University, the Carlyle Lectures at Oxford University, and the F.W. Guest Memorial Lecture at University of Otago in his native New Zealand. He writes regularly for *The New York Review of Books*.

Lunch Speaker

Lawrence Lessig is C. Wendell and Edith M. Carlsmith Professor of Law at Stanford Law School and founder of the school's Center for Internet and Society. Best known as the leading figure in the world in cyberlaw, Lessig has recently launched "Change Congress," a national movement to end corruption in America's Congress. The movement urges candidates to make four commitments: "no money from lobbyists or PACs," "vote to end earmarks," "support reform to increase Congressional transparency," and "support publicly-financed campaigns."

Professor Lessig is the author of *Code: And Other Laws of Cyberspace, Version 2.0* (Basic Books, 2006), *Free Culture: How Big Media Uses Technology and the Law to Lock Down Culture and Control Creativity* (Penguin Books, 2004),

and *The Future of Ideas: The Fate of the Commons in a Connected World* (Random House, 2001). He represented web site operator Eric Eldred in the ground-breaking case, *Eldred v. Ashcroft*, an unsuccessful challenge to the 1998 Sonny Bono Copyright Term Extension Act. He also has written extensively in constitutional theory, developing a well-known theory of fidelity (in interpretation) as translation.

Professor Lessig has won many awards, including the Free Software Foundation's Freedom Award and was named one of *Scientific American's* Top 50 Visionaries for arguing "against interpretations of copyright that could stifle innovation and discourse online."

About BU's Faculty in Constitutional Theory, Jurisprudence and Legislation

Hugh W. Baxter clerked for Justice Ruth Bader Ginsburg of the United States Supreme Court. His works include "Habermas's Discourse Theory of Law and Democracy," 50 *Buffalo Law Review* 205 (2002); "Managing Legal Change: The Transformation of Establishment Clause Law," 46 *UCLA Law Review* 343 (1998); and "Bringing Foucault into Law and Law into Foucault," 48 *Stanford Law Review* 449 (1996). He is working on a book on Habermas's theory of law and democracy.

Jack M. Beermann is Harry Elwood Warriner Scholar. He has co-authored *Administrative Law: Cases and Materials* (Aspen, 5th ed., 2006 with R.A. Cass and C.S. Diver) and published many articles including "Congressional Administration," 43 *San Diego Law Review* 61 (2006); "The Constitutional Law of Presidential Transitions," 84 *North Carolina Law Review* 1253 (2006 with William Marshall); and "The Supreme Court's Narrow View on Civil Rights," 1993 *Supreme Court Review* 199 (1993).

Alan L. Feld is Maurice Poch Faculty Research Scholar. He is co-author of *Federal Income Taxation of Corporate Transactions* (Aspen, 3rd ed., 1994 with William D. Andrews). He has testified before a number of congressional committees on tax laws. His articles include "Rendering Unto Caesar or Electioneering for Caesar? Loss of Church Tax Exemption for Participation in Electoral Politics," 42 *Boston College Law Review* 931 (2001), and "Congress and the Legislative Web of Trust," 81 *Boston University Law Review* 349 (2001).

James E. Fleming is The Honorable Frank R. Kenison Distinguished Scholar of Law. He is author of *Securing Constitutional Democracy: The Case of Autonomy* (University of Chicago Press, 2006) and co-author of *Constitutional Interpretation: The Basic Questions* (Oxford University Press, 2007 with Sotirios A. Barber) and *American Constitutional Interpretation* (Foundation, 4th ed., 2008 with Walter F. Murphy, Sotirios A. Barber, and Stephen Macedo). He is working on a book entitled *Rights and Responsibility* with Linda C. McClain.

Gary S. Lawson is Abraham & Lillian Benton Scholar. He clerked for Justice Antonin Scalia of the United States Supreme Court. He is co-author of *The Constitution of Empire: Territorial Expansion and American Legal History* (Yale University Press, 2004 with Guy Seidman) and author of *Federal Administrative Law* (West, 4th ed., 2006). His recent articles include "The Unitary Executive, Jurisdiction Stripping, and the *Hamdan* Opinions: A Textualist Response to Justice Scalia," 107 *Columbia Law Review* 1002 (2007 with Steven Calabresi).

Linda C. McClain is Paul M. Siskind Scholar of Law. She is author of *The Place of Families: Fostering Capacity, Equality, and Responsibility* (Harvard University Press, 2006), co-editor of *Gender Equality: Dimensions of Women's Equal Citizenship* (Cambridge University Press, forthcoming 2009 with Joanna Grossman), and author of a book in progress entitled *Free and Equal Association*. Her many articles include "Constitutionalism, Judicial Review, and Progressive Change," 84 *Texas Law Review* 433 (2005 with James E. Fleming).

Robert B. Seidman is co-author (with Ann Seidman) of a number of books relating to legislation, including *Legislative Drafting for Democratic Social Change: A Manual for Drafters* (Kluwer Law International, 2001) and *State and Law in the Development Process: Problem Solving and Institutional Change in the Third World* (Macmillan, 1994). The Seidmans also co-edited *Making Development Work: Legislative Reform for Institutional Transformation and Good Governance* (Kluwer Law International, 1999).

We are pleased to include three members of BU's Department of Political Science.

Douglas L. Kriner is working on two books, *The Casualty Gap: The Causes and Consequences of American Wartime Inequalities* (with Francis Shen) and *After the Rubicon: Congressional Checks on Presidential War-Making*. His articles include "Divided Government and Congressional Investigations," *Legislative Studies Quarterly* (forthcoming with L. Schwartz) and "Dynamics of Vice Presidential Selection," *Presidential Studies Quarterly* (forthcoming with M. Hiller).

Virginia Sapiro is Dean of the College and Graduate School of Arts and Sciences. She is the author of *The Political Integration of Women: Roles, Socialization, and Politics* (University of Illinois Press, 1983); *A Vindication of Political Virtue: The Political Theory of Mary Wollstonecraft* (University of Chicago Press, 1992); and *Women in American Society: An Introduction to Women's Studies* (McGraw-Hill, 5th ed., 2003). She has published many articles on gender and politics, including the role of gender in electoral politics and representation.

Graham K. Wilson is the author of many books, including *Business and Politics: A Comparative Introduction* (Palgrave Macmillan, 3d ed., 2002); *Only in America? American Politics in Comparative Perspective* (Chatham House, 1998); *Interest Groups in the United States* (Oxford University Press, 1993); and *Unions in American National Politics* (Macmillan, 1979).



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