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## SYMPOSIUM

# THE MOST DISPARAGED BRANCH: THE ROLE OF CONGRESS IN THE TWENTY-FIRST CENTURY

### EDITORS' FOREWORD

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.” The essays contained in this special symposium issue of the *Boston University Law Review* are developed from the conference, “The Most Disparaged Branch: The Role of Congress in the Twenty-First Century,” held at the Boston University School of Law on November 14-15, 2008. It is the third in a series of symposia published by the *Boston University Law Review* that began with “The Role of the Judge in the Twenty-First Century” and continued with “The Role of the President in the Twenty-First Century.”

In the midst of an economic downturn the likes of which have not been seen since the Great Depression, and with a new President seeking to fundamentally alter several significant American policies both foreign and domestic, Congress has assumed a crucial role in restoring the economy, deliberating about the new President’s agenda, and reinstilling confidence in the American public. But recent poll numbers indicate Americans are deeply unsatisfied with the performance of Congress. Given the current circumstances, the timing could not be more ripe for a symposium on Congress. Eminent political science and legal scholars in constitutional and legislative affairs came together to address the daunting problems facing Congress in the twenty-first century, as well as reforms that might better equip Congress to face these problems.

Professor Jeremy Waldron gave the keynote address on “Representative Lawmaking.” Professor Waldron is a world-renowned legal scholar, famously known for his work on legislation and judicial review. Building off his prior work, including books such as *Law and Disagreement* and *The Dignity of Legislation*, Professor Waldron argues that legislation by Congress is a more attractive mode of lawmaking than the alternative modes of lawmaking by the other branches of government.

Professor Lawrence Lessig concluded the conference with a captivating luncheon presentation, “On How A Congress Might Be Changed: The Politics of Fundamental Reform.” Professor Lessig is the founder of “Change

Congress,” a national movement to end corruption in 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.” In his presentation, Professor Lessig analyzed the potential of money for corruption. A video of his presentation can be accessed at <http://www.bu.edu/law/events/audio-video/role2008.html>.

The remaining compilation of essays contained in this issue are organized by the following panel discussions held during the conference.

*Panel I: Is Congress “The Broken Branch”?*

Many observers, including Thomas Mann and Norman Ornstein, have disparaged Congress as “the broken branch.” For example, in his recent book, *The Undemocratic Constitution*, Professor Sanford Levinson argues that Congress is an increasingly dysfunctional and ineffective institution, and calls for a constitutional convention to amend the institution failures of the legislative branch. 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? Professors Gary Lawson, Sanford Levinson, David Mayhew, Kenneth Shepsle, and Barbara Sinclair address the issue of Congress’s “brokenness” and possibilities for reform.

*Panel 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, undignified mess. A new journal founded by Luc Wintgens, *Legisprudence*, “aims at contributing to the improvement of legislation by studying the processes of legislation from the perspective of legal theory.” What might the legisprudence movement contribute to the improvement of legislation? What other solutions can we offer for the improvement of legislation? Professors Alan Feld, Vlad Perju, Robert Seidman, and Ann Seidman offer diverse improvements for legislation.

*Panel 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 twenty-first 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? What is the most defensible conception of Congress’s responsibilities with respect to

constitutional interpretation and of its capacities to carry out those responsibilities? Professors Hugh Baxter, Michael Gerhardt, Mark Tushnet, and Jeffrey Tulis offer insight into Congress's role as a constitutional interpreter.

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

Scholars commonly question whether *courts* can bring about social change, 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. The most recent piece in their project is Professor Guinier's Supreme Court foreword to the *Harvard Law Review* in 2008, *Demosprudence Through Dissent*. What are the possibilities and prospects of demosprudence? Professors Lani Guinier, Fredrick Harris, Linda McClain, Robert Post, and Gerald Rosenberg debate the potential of the demosprudence movement.

*Panel 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? Professors James Fleming, Stephen Macedo, Jane Schacter, and Adrian Vermeule discuss possibilities for institutional reform that might lead to a more democratic Congress.

*Panel VI: Toward a More Responsible Congress?*

How responsible (as distinguished from responsive) is 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? Professors Sotirios Barber, Jack Beermann, Douglas Kriner, and Nancy Rosenblum take up these issues of congressional responsibility.

*Panel 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 twenty-first century through comparative inquiry? Professors Michael Libonati, Kim Lane Scheppele, John Uhr, and Graham Wilson offer insight into comparative legislative institutions.

The *Boston University Law Review* is honored to publish the outstanding contributions of these professors. We would like to thank all the contributing scholars, including our own Boston University School of Law professors who participated in the conference panel discussions. Thank you to Dean O'Rourke for her continuing support of the *Law Review* and the annual symposium, and most especially to Professor James Fleming, *Law Review* faculty advisor, who organized the symposium and greatly assisted in this publication. This special symposium issue would not be possible without the hard work of our dedicated *Law Review* editorial board and staff.

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