

# THE PLACE OF CONGRESS IN THE CONSTITUTIONAL ORDER

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It is no accident that the Constitution begins with Congress. The Founders understood that the legislature would be central to the new constitutional project. Congress would be the foundation stone upon which the rest of the governmental edifice would be constructed, and so it necessarily came first in the constitutional document and absorbed the bulk of the delegates' attention at the Philadelphia Convention in the summer of 1787. Getting the national legislature right, they believed, was their most important task if the government they were constructing was to be successful.

Beginning with Congress was the natural choice for those designing a new government for the American republic. The first American constitution, the Fundamental Orders of the Connecticut colony, began by establishing two general assemblies.<sup>1</sup> Even the royal charters granted to the colonists settling the North American wilderness tended to begin by setting out a council for the "ruling, ordering, and governing" of the inhabitants, as the Charter of Massachusetts Bay put it.<sup>2</sup> When the revolutionaries announced, as in Virginia, that "the government of the country, as formerly exercised under the crown of Great Britain, is TOTALLY DISSOLVED," their plans for new state governments began with the legislative branch.<sup>3</sup> The Articles of Confederation government consisted of nothing but a legislature.<sup>4</sup>

In Britain, the power of Parliament had to be wrested from the king. The growth of parliamentary authority gradually transformed the British kingdom and secured new liberties for Englishmen. Britain was not a republic, but the English colonists who

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1. FUNDAMENTAL ORDERS OF CONN. of 1639, art. I.

2. CHARTER OF MASSACHUSETTS-BAY of 1629.

3. VA. CONST. of 1776.

4. ARTICLES OF CONFEDERATION of 1781, art. V.

crossed the Atlantic Ocean were nurtured on republican ideas. And at the heart of any republic would be an assembly of the people. It was that body that made it the people's government.<sup>5</sup>

There was little question that when the Federalists gathered in Philadelphia to reconstitute the federal government and put it on stronger footing, the design of Congress would be the first priority. They knew that Congress could not be the whole of the government, but they expected Congress to be the driving force of any government they created, with all the promise and danger that that entailed. It would be the repository of national powers, and the channel of popular energy.<sup>6</sup>

The Founders were clear-eyed about the national legislature. They recognized both its potential virtues and its potential vices. Finding a place for Congress within the constitutional order meant appreciating both those virtues and those vices, and finding ways to help realize and take advantage of the benefits that a legislature can bring and of finding ways to curtail the damage that it might do.

#### I. CONGRESSIONAL VIRTUES

Congress serves a particular role within the constitutional system. That role exploits the particular virtues of a representative assembly. Congress is constituted so as try to build up those virtues, and it is empowered to perform duties that exploit those advantages.

There are four interrelated political virtues associated with Congress. Congress is the primary vehicle by which the citizenry is *represented* in government. Congress is the government institution most directly *accountable* to the people. Congress embodies *deliberation* in the making of government policy. The work of Congress is relatively *transparent* to the public. This is not to say that the other branches of the federal government are completely lacking in these virtues, but simply that Congress has a comparative advantage when it comes to these features of the political system. The design of Congress is meant to bring

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5. See EDMUND S. MORGAN, *INVENTING THE PEOPLE* 246–260 (1988).

6. See, e.g., 2 JAMES MADISON, *THE WRITINGS OF JAMES MADISON* 157 (Gaillard Hunt ed., 1901).

these virtues to the fore, and the powers and responsibilities assigned to Congress attempt to take advantage of them.

A. *Congressional Representation*

Congress is entrusted with the legislative power because it is a representative assembly. Popular representation and policymaking power were understood by the Framers to go together,<sup>7</sup> and as a consequence the delegates at the Philadelphia Convention spent most of the summer wrestling with the twin problems of what powers were to be entrusted to the national government and who would control those powers.<sup>8</sup> As a practical matter, that meant determining what powers Congress was going to possess and how Congress was going to be constituted. Those were the thorniest issues to be resolved in drafting a new Constitution, and Article I of the U.S. Constitution is the most detailed of all of its parts to memorialize those carefully negotiated arrangements.

In the late eighteenth and early nineteenth centuries, statesmen recognized that political representation in a republic could reflect three distinct things: property, people, and political communities.<sup>9</sup> The architecture of Article I embodies and reconciles all three forms of representation.

Notably, this idea of republican government meant rejecting another possible basis of representation: social orders.<sup>10</sup> The governments of Europe were forced to compromise republican principles and take into account inherited social orders. The landed aristocracy and the hereditary nobility were understood to be a distinct social interest that required their own representation.<sup>11</sup> The “people” were only represented in a single component of the British government, the House of Commons, and that chamber alone was to represent their interests.<sup>12</sup> By contrast, the United States consisted only of the people. No other interest could be recognized as legitimate. They were not to be confined to a single

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7. See JACK N. RAKOVE, *ORIGINAL MEANINGS* 209–219 (1996).

8. See MAX FARRAND, *THE FRAMING OF THE CONSTITUTION OF THE UNITED STATES* 68–123 (1913).

9. See JOHN PHILLIP REID, *THE CONCEPT OF REPRESENTATION IN THE AGE OF THE AMERICAN REVOLUTION* 31–62 (1989).

10. See GORDON S. WOOD, *THE CREATION OF THE AMERICAN REPUBLICAN, 1776–1787*, at 197–256 (1969).

11. *Id.* at 197–202.

12. *Id.* at 596.

portion of the government; their spirit was to move all of its parts. There would be no American House of Lords.

It was a long-standing principle of the evolving British constitutional system that property-holders should have a voice in the decision to collect taxes. The need to represent property was essential to the emergence of parliamentary government.<sup>13</sup> This was a critically democratizing reform. British property-holders insisted that the king should not be able to unilaterally extract resources from society and dispose of those resources at his own discretion. The people who were being asked to bear the costs of government activities should have a role in authorizing and directing those activities. The king must go to the legislature to open the purse strings.<sup>14</sup> That fundamental principle was carried to the American colonies and embodied in colonial legislative assemblies. The revolutionary cry of “no taxation without representation” appealed to that same ancient principle, while denying that the Parliament in London could adequately represent the interests of the taxpayers in Boston.<sup>15</sup> There is no more basic principle in the American constitutional system than the requirement that elected representatives must choose whether to extract revenue from the people.

The Framers of the Constitution reconciled the representation of property and people in a single republican principle. It was understood that the governmental treasury would not be filled by a small set of plutocrats. The financial health of the republic stood on much broader foundations. The people as a whole are the source of financial support for the government.<sup>16</sup> Taxes would not be raised from the few but rather from the many, and as a result the many should be involved in making the decisions on how taxes should be imposed and how much revenue should be raised. If the fiscal burden of government was not to be widely shared and taxpayers were to be a small subset of the population, then requiring that the government

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13. See J.R. POLE, *POLITICAL REPRESENTATION IN ENGLAND THE ORIGINS OF THE AMERICAN REPUBLIC* 388–95 (1966).

14. See MARGARET LEVI, *OF RULE AND REVENUE* 95–122 (1988); DOUGLASS C. NORTH, *STRUCTURE AND CHANGE IN ECONOMIC HISTORY* 143–70 (1982).

15. See CHARLES HOWARD MCILWAIN, *THE AMERICAN REVOLUTION* 164–180 (1923); 1 JOHN PHILLIP REID, *CONSTITUTIONAL HISTORY OF THE AMERICAN REVOLUTION* 238–241 (1987).

16. RAKOVE, *supra* note 7, at 70–75.

consult with those wealthy enough to contribute to the public fisc would not move a country very far toward becoming a democracy. But if there is no meaningful gap between taxpayers and citizens, then the principle of “no taxation without representation” becomes a fully republican principle.

The Origination Clause in Article I, Section 7 expresses that commitment: “All Bills for raising Revenue shall originate in the House of Representatives; but the Senate may propose or concur with Amendments as on other Bills.”<sup>17</sup> Although the Origination Clause might seem like a bit of technical detail, it appears at the head of the list of congressional powers for a reason. Before the Constitution even explains the process by which legislation can be made, it specifies that only the House of Representatives can launch a proposal to raise revenue. It does so because within Congress itself the House of Representatives is the people’s chamber.<sup>18</sup> If the people, through their representatives, must authorize a tax, then it is the House alone that can give that authorization. Both symbolically and functionally, the most popular body in the government controls the purse strings.

The Origination Clause might not have been needed but for the different forms of representation embodied in the House and the Senate. As James Madison later explained, “the House of Representatives will derive its power from the people of America.”<sup>19</sup> The people are represented directly in the House and in proportion to their numbers.<sup>20</sup> The Senate, by contrast, was constructed on the basis of the third form of representation, political communities. As Madison observed, the states “as political and coequal societies” are “represented on the principle of equality in the Senate.”<sup>21</sup> Although the Seventeenth Amendment shifted the mode of selection of senators so that they are chosen directly by the people, it did not alter the principle of representation.<sup>22</sup> Madison was skeptical of the indirect election of legislatures, fearing that the “people would be lost

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17. U.S. CONST. art. I, § 7.

18. Priscilla H.M. Zotti & Nicholas M. Schmitz, *The Origination Clause: Meaning, Precedent, and Theory from the 12th to 21st Century*, 3 BRIT. J. AM. LEGAL STUD. 71, 90–93 (2014).

19. THE FEDERALIST NO. 39, at 244 (James Madison) (Clinton Rossiter ed., 1961).

20. U.S. CONST. art. I, § 2, cl. 3.

21. THE FEDERALIST NO. 39, at 244 (James Madison) (Clinton Rossiter ed., 1961).

22. U.S. CONST. amend. XVII.

sight of altogether, and the necessary sympathy between them and their rulers and officers, too little felt," and as a result he thought it was imperative that at least one chamber of Congress not be "removed from the people by an intervening body of electors."<sup>23</sup> Eliminating that intervening body of electors certainly changed the nature of the Senate, but it did not render the Senate wholly popular and "national" in the Madisonian sense. It is still the House that represents the people in their national ratio, and as a consequence the House that must originate revenue bills.

Together, these two forms of representation, the people directly and the states as equal political communities, form the twin pillars of congressional authority. It was on that foundation of national representation that Congress could be entrusted with its legislative powers. Only a national council representing the diverse interests of the country could be properly situated to make policy on the problems that spilled across state boundaries and implicated the collective interest of the nation as a whole. The regulation of interstate commerce, the establishment of uniform rules of bankruptcy and naturalization, and the coining of money all needed resolution by the representatives of the people as a whole to prevent conflict among the separate state communities. The raising of armies, the making of war and peace, and the managing of territories all affected a distinctly national interest that could not be left to the partial decision-making of individual states. The authority to make policy decisions followed the adequate representation of those who would be affected by those decisions. The Confederation period had taught the Federalists that states should not be able to impose barriers on trade across their borders or burden out-of-state creditors or admit new citizens into the United States without consulting the other states.<sup>24</sup>

The people of the individual states should be able to manage their own affairs, but they should not be able to manage the affairs of their neighboring states. The people had the right to have their voices heard in a legislature that was, in effect, setting poli-

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23. JAMES MADISON, NOTES OF THE DEBATE IN THE FEDERAL CONVENTION OF 1787, at 40 (1987).

24. On the problems of the Confederation period, see Brandon P. Denning, *Confederation-Era Discrimination Against Interstate Commerce and the Legitimacy of the Dormant Commerce Clause Doctrine*, 94 KY. L.J. 37 (2005).

cy for them. In some cases, that meant leaving policymaking authority in hands of localities, but in other cases that meant lifting policymaking authority up and placing it in the hands of national representatives who could give voice to all the relevant interests. It was this basic logic of representation that Chief Justice John Marshall leveraged to explain why state legislatures could not constitutionally tax the Bank of the United States. The people of the state of Maryland could not be allowed to exercise a veto power over the policy decisions of the people of the country at large as represented in the U.S. Congress. It was “in general, a sufficient security against erroneous and oppressive taxation” for legislatures to be allowed only to tax their own constituents.<sup>25</sup> If the voters were unhappy with their taxes, they could correct the situation at the polls. But that logic only worked when the people, through their representatives, were “taxing themselves and their property.”<sup>26</sup> Legislators could be trusted with the power to tax only so long as they were taxing their own voters, but the people of the other states would have no reason to trust a legislature in which they were not represented: “In the legislature of the Union alone, are all represented. The legislature of the Union alone, therefore, can be trusted by the people with the power of controlling measures which concern all, in the confidence that it will not be abused.”<sup>27</sup>

For the Founders, the federal nature of the Union made the relationship between representation and policymaking authority most relevant. The major constitutional question to be decided in the years after the Revolution was who ought to have the authority to act on different policy issues, national officials, or state officials. A properly designed constitutional system would match representation and policymaking authority. As Virginia’s George Mason emphasized in the Philadelphia Convention, what was needed was an assembly that “ought to know & sympathise with every part of the community” and that could adequately represent its “different interests and views arising from difference of produce, of habits, &c &c.”<sup>28</sup>

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25. *McCulloch v. Maryland*, 17 U.S. 316, 428 (1819).

26. *Id.*

27. *Id.* at 431.

28. MADISON, *supra* note 23, at 39.

There was no similar debate in the context of the separation of powers because it went without saying that only a legislature could be sufficiently representative to be entrusted with policymaking authority. In Britain, the constitutional struggle was over how to wrest policymaking from the monarch and deposit it in a representative assembly. That was not the struggle in the United States. The primary question here was *which* legislature should make policy decisions, not *whether* a legislature should make policy. That decisions about the basic policies to be pursued by the government had to be decided by a representative legislative assembly was taken as a given.

### B. Congressional Accountability

Accountability is a necessary correlate of representation. Elections not only elevate a representative to a position of authority, but they also preserve the link between the people and their rulers. Structuring a legislature to be representative is futile if legislators are not responsive to the constituents that they represent. When Parliament imposed taxes on the American colonists, the British government justified its actions by claiming that the Americans were “virtually” represented in London.<sup>29</sup> Parliament represented all British subjects and had a moral obligation to take their well-being into account, and thus could make policy for them and impose taxes on them. The revolutionaries responded by deepening the theory of legislative representation. There must be an “intimate and inseparable relation” between the electors and the elected, if representation is to be meaningful.<sup>30</sup> The colonists “might be oppressed in a thousand shapes, without any Sympathy, or exciting any alarm” among those who actually elected the Parliament.<sup>31</sup> The members of Parliament could impose ruinous taxes on the American colonies without any repercussions precisely because they were not accountable to an American electorate. An American legislature could only be entrusted to make

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29. 1 REID, *supra* note 15, at 239–41.

30. DANIEL DULANY, CONSIDERATIONS OF THE PROPRIETY OF IMPOSING TAXES IN THE BRITISH COLONIES 10 (Annapolis, Jonas Green 2d ed. 1765).

31. *Id.*



policy “for the people” if it was a “government of the people [and] by the people.”<sup>32</sup>

There have long been two models of representative government.<sup>33</sup> One model emphasizes the ability of the representative to mirror the public will and to make policy as the people themselves would make it, if only it were convenient for them to do so. An alternative model emphasizes the authority of the representative to make policy decisions on behalf of the public and to then be held accountable for their actions. As the twentieth-century political economist Joseph Schumpeter argued, the “will of the people” has a tendency to “vanish[] into thin air.”<sup>34</sup> The crucial function of the people in a democracy is not to make policy but to determine to whom “the reins of government should be handed.” The voters install a government, but they also “evict[]” it.<sup>35</sup> The capacity of the people to remove the legislators, to hold them accountable for their actions, underwrites the authority of Congress to make policy for the nation. A government in which legislators could make policy without repercussion would be little different than a monarchical government.

Congress is designed to sustain this type of accountability. The Framers did not neglect the need for an “intimate” relationship between the representative and the represented. Senators and representatives are required to be inhabitants of their states, to reside among their constituents, and to be affected by the same policies and issues that are of concern to them.<sup>36</sup> The constitutional text does not specify that federal officials would be subject to the same rules as the average citizen, but the norm is deeply rooted that the legislative power must be used to make general laws and not set up special privileges.<sup>37</sup> To emphasize that norm, the Constitution explicitly prohibits grants

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32. Abraham Lincoln, Address Delivered at the Dedication of the Cemetery at Gettysburg (Nov. 19, 1863), reprinted in ABRAHAM LINCOLN: HIS SPEECHES AND WRITINGS 734, 734 (Roy P. Basler ed., 1946).

33. See, e.g., HANNA PITKIN, THE CONCEPT OF REPRESENTATION 130–135 (1967); Heinz Eulau et al., *The Role of the Representative: Some Empirical Observations on the Theory of Edmund Burke*, 53 AM. POL. SCI. REV. 742 (1959).

34. JOSEPH A. SCHUMPETER, CAPITALISM, SOCIALISM AND DEMOCRACY 252 (Routledge 2003) (1943).

35. *Id.* at 272.

36. U.S. CONST. art. I, § 2, cl. 3.

37. See HOWARD GILLMAN, THE CONSTITUTION BESIEGED 22–33 (1993).

of nobility that might be understood to elevate a class of individuals above the law.<sup>38</sup>

More importantly, the members of Congress must stand for frequent election. The design of an electoral mechanism is always a delicate balance. Officials must be independent enough to make policy judgments but responsive enough to react to the felt interests of the people. The bicameral structure of Congress allows for a mix of perspectives. The longer-termed senators benefit from greater independence and stability. The shorter-termed representatives benefit from their closer attachment to the people. Both must be held responsible for their actions to the electorate and, as a consequence, can claim to represent the people's interest and claim the authority to act on their behalf.

### C. *Congressional Deliberation*

The representative quality of Congress walks hand-in-hand with its deliberative quality. Legislatures represent the people by bringing them "indoors." Rather than encouraging the people to take direct action through mobs and riots, the institutionalization of popular politics in the form of legislatures encouraged the people to choose agents who could represent their interests and sit down together to negotiate and deliberate.<sup>39</sup> But they come indoors in their multitude. A legislative assembly is a distinct governmental body in its collective nature. Congress represents the people in their diversity. Congress is a "they, not an it."<sup>40</sup> Congressional decision-making necessitates discussion, compromise, and agreement. At its best, Congress deliberates.<sup>41</sup>

Congress is a deliberative institution in at least two senses. First, as a collective body, Congress must deliberate to make decisions and take action. It is possible to imagine members of Congress simply casting their votes based on preconceived ideas and interests and laws emerging from tallying those votes. But Congress does not operate that way. Members in-

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38. U.S. CONST. art. I, § 9, cl. 8.

39. On the people "out-of-doors" and "outside of the legal representative institutions," see WOOD, *supra* note 10, at 320–21.

40. Kenneth A. Shepsle, *Congress Is a "They," Not an "It": Legislative Intent as Oxymoron*, 12 INT'L REV. L. & ECON. 239 (1992).

41. See JOSEPH M. BESSETTE, *THE MILD VOICE OF REASON* 150–82 (1994).

stead come together to argue, learn, persuade, and justify.<sup>42</sup> From its inception, Congress brought together a diverse collection of individuals hailing from the far-flung reaches of the country. They brought with them the particular and idiosyncratic concerns, interests, and perspectives of their local constituency. Congress was the place where those representatives could find common ground, identify a common legislative agenda, and develop agreed-upon policy.

Congress is also deliberative in a second sense, in that it investigates social problems and deliberates on possible solutions. If floor debates exemplify Congress being deliberative in the first sense as members spar with each other over the issues of the day, congressional committees exemplify Congress being deliberative in the second sense as members and their staffs develop expertise in specialized policy domains.<sup>43</sup> It is in committees, and various comparable institutions ranging from caucuses and working groups like the Republican Study Committee to institutionalized support agencies like the Congressional Budget Office, that Congress gets down to the business of policymaking. James Madison thought that the natural virtue of legislators would allow them to “refine and enlarge the public views, by passing them through the medium of a chosen body of citizens, whose wisdom may best discern the interest of their country, and whose patriotism and love of justice, will be least likely to sacrifice it to temporary or partial considerations.”<sup>44</sup> Whatever we think of that notion, we might more credibly think that “the public voice, pronounced by the representatives of the people, will be consonant to the public good, than if pronounced by the people themselves,”<sup>45</sup> because legislators have more incentive and opportunity to gain an adequate understanding of matters of state.

While there are some formal constitutional features of Congress that reinforce this deliberative capacity, informal features are at least as important. The Constitution explicitly recognizes

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42. See Keith E. Whittington, *Extrajudicial Constitutional Interpretation: Three Objections and Responses*, 80 N.C. L. REV. 773, 818–27 (2002).

43. See ROGER H. DAVIDSON ET AL., *CONGRESS AND ITS MEMBERS* 163–205 (14th ed. 2014); KEITH KREHBIEL, *INFORMATION AND LEGISLATIVE ORGANIZATION* 71–74 (1992);

44. THE FEDERALIST NO. 10, at 82 (James Madison) (Clinton Rossiter ed., 1961).

45. *Id.*

and encourages robust debate by guaranteeing in the Speech and Debate Clause that members will have legal immunity for their legislative actions.<sup>46</sup> Implicitly, the Constitution creates the conditions for a deliberative institution by constructing a legislature from districts spread across the country. The history of political debate in the national legislature would have been very different if, for example, the Founders had not chosen to allocate House seats by states. Constituting a Congress that would eventually include members from Montana and Maine, Nebraska and New York, set the conditions for legislators to arrive in the nation's capital with different backgrounds, perspectives, and concerns. One need only compare the educational, regional, and professional background of the members of the Supreme Court, the Cabinet, and the Senate to see that Congress still performs a distinctive function of drawing together the talents and sentiments of the nation as a whole.<sup>47</sup> It is no accident that it was the Speaker of the House of Representatives, Tip O'Neill, who was fond of saying that "all politics is local."<sup>48</sup> But the supports for deliberation in Congress include many informal institutions, practices, and norms. The system of standing committees on which Congress has relied since early in its history was not anticipated in the constitutional text. Political parties, interest groups, consultants, and staff are unknown to the Constitution but play critical roles in informing congressional decision-making.

#### *D. Congressional Transparency*

Congressional deliberation is on display in a way that makes the legislature a particularly important institution for insuring transparency in government. The constitutional drafters encouraged transparency by requiring that Congress keep a journal of its proceedings and record the votes of its members.<sup>49</sup> More important, however, is that the members of Congress quickly discovered that it was in their political interest to be visible. The Senate thought at first to do most of its work in ex-

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46. U.S. CONST. art. I, § 6.

47. *See, e.g.*, JOEL ABERBACH ET AL., *BUREAUCRATS AND POLITICIANS IN WESTERN DEMOCRACIES* 47–67 (1981); JEFFREY E. COHEN, *THE POLITICS OF THE U.S. CABINET* 44–80 (1988).

48. TIP O'NEILL, *MAN OF THE HOUSE* 6 (1988).

49. U.S. CONST. art. I, § 5, cl. 3.

ecutive session, and soon found itself eclipsed by the more open lower chamber. The senators realized that they were better off doing their business in public.<sup>50</sup> As often as not, members of Congress want to be visible. In a base sense, of course, members of Congress as politicians understand the value of publicity, and the institution has found it necessary to try to develop countervailing norms that reward “workhorses” as well as “show horses.”<sup>51</sup> But in a more elevated sense, part of what members of Congress do is construct and engage in the public sphere.<sup>52</sup> Part of the job of an ambitious member of Congress is to perform in public, to be noticed by the public, and to engage with the public. Congress shapes national politics not only by legislating but also by taking “action,” even when such action might simply be giving a speech or holding a hearing.

Congress represents the people in government and represents the government *to* the people. Congress gains little by acting in secret. The instinct of the legislator is to seek the spotlight, not to hide in the shadows. Congress wishes to be seen engaging in the public’s business. As Madison emphasized, the constitutional drafter hoped to harness political ambition to serve the public good.<sup>53</sup> In this case, self-interest incentivizes members of Congress to shine a spotlight on the workings of the federal government. In a republic, governmental transparency is essential. If the people are going to be able to hold their rulers accountable and contribute to the formation of public policy by selecting effective representatives, then they must be exposed to what those rulers do. Interest groups and the press have cultivated a good image by portraying themselves as watchdogs over the government, but members of Congress themselves race to perform that role as well. No branch of government makes its home in the public sphere to the extent that Congress does, and that contribution to government transparency is one of the distinctive virtues of Congress within the constitutional order. While investigative hearings may become tiresome and degenerate into partisan sparring, they serve an essential function of exposing

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50. See ELAINE K. SWIFT, *THE MAKING OF AN AMERICAN SENATE* 117–26, 149–70 (1996).

51. Donald R. Matthews, *The Folkways of the United States Senate: Conformity to Group Norms and Legislative Effectiveness*, 53 *AM. POL. SCI. REV.* 1064, 1067 (1959).

52. See DAVID R. MAYHEW, *AMERICA’S CONGRESS* 1–28 (2000).

53. See *THE FEDERALIST NO. 51* (James Madison).

the workings of the federal government to public scrutiny. If legislators might sometimes grandstand at the expense of administrative efficiency, their incentive to shine a light on the executive branch serves both to encourage government officials to anticipate that their actions might eventually have to be defended in public and to punish and reform actors and institutions that are shown to be functioning badly.

## II. CONGRESSIONAL VICES

If Congress embodies certain political virtues that the constitutional drafters hoped to encourage and exploit, it also threatens some vices that they hoped to discourage and contain. Congress might have been the first branch of the new federal government, but the experience with the Articles of Confederation, which did not establish a distinct federal executive or judiciary, persuaded the Federalists that the legislature could not be the only branch of the government.

There are five congressional vices worth noting. In many ways, they are enmeshed in the very features of the legislature that give rise to its virtues. First, Congress can *overreach*. Second, Congress can be *too responsive* to public sentiment. Third, the members of Congress can be *too parochial* in their interests. Fourth, Congressional policymaking can be *cumbersome*. Fifth and finally, Congress can be *cacophonous*.

### A. Congressional Overreach

The Founders anticipated that in a republican form of government, the legislature would always be the most powerful political institution. The legislature could speak with the authority of the people, and its members could be expected to be pressured to respond the people's immediate wants and desires. The few short years of American independence had already suggested that elected legislators could claim extravagant mandates. James Madison thought that the "legislative department is everywhere extending the sphere of its activity, and drawing all power into its impetuous vortex."<sup>54</sup> As elected representatives, legislators were prone to take on the mantle of the people themselves. When acting on behalf of the people, legislators tended to view constitu-

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54. THE FEDERALIST NO. 48, at 309 (James Madison) (Clinton Rossiter ed., 1961).

tional constraints as mere “parchment barriers,” hardly worthy of respect or deference.<sup>55</sup> Legislators would be tempted to consolidate excessive power into their own hands, which would be dangerous in its own right.

Legislators have incentives to overreach as well. A hereditary aristocracy might extend its power for its own benefit at the expense of the people. Legislators might well do the same. Unsurprisingly, the intellectual and political traditions that informed the Founders at the end of the eighteenth century were more attuned to the dangers posed by unaccountable government agents than by elected representatives.<sup>56</sup> Republicanism was the solution to the problem of monarchy and aristocracy. The electoral mechanism was expected to ensure that government officials in a republic would look out for the interests of the people. Elections work because legislators are self-interested; they pay attention to their constituents because they hope to be returned to office.<sup>57</sup> But self-interest can also lead legislators to seek ways to avoid accountability when they can. If legislators can create a cushion between themselves and the voters, then they can begin to look out for their own interests, independent of the interests of the people.<sup>58</sup> Given the opportunity, legislators can be expected to try to create that cushion by means both fair and foul. As political scientists have detailed, low-profile constituent service can build up political goodwill for an incumbent legislator, potentially freeing them from having to be as diligent in catering to constituent interests in the more consequential realm of policymaking.<sup>59</sup> More troubling, legislators might seek to manipulate electoral rules, ballot access, and campaign finance to suppress their opponents and insulate themselves from electoral accountability.<sup>60</sup> The

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55. *Id.* at 308.

56. See FORREST McDONALD, *NOVUS ORDO SECLORUM* 66–70 (1985).

57. For a classic account, see DAVID MAYHEW, *CONGRESS: THE ELECTORAL CONNECTION* (1974).

58. See, e.g., R. DOUGLAS ARNOLD, *THE LOGIC OF CONGRESSIONAL ACTION* (1990); Keith T. Poole and Thomas Romer, *Ideology, “Shirking,” and Representation*, 77 *PUB. CHOICE* 185 (1993).

59. See, e.g., MORRIS P. FIORINA, *CONGRESS: KEYSTONE OF THE WASHINGTON ESTABLISHMENT* (2d ed. 1989).

60. See Yasmin Dawood, *Electoral Fairness and the Law of Democracy: A Structural Rights Approach to Judicial Review*, 62 *U. TOR. L.J.* 499, 500 (2012); Samuel Issacharoff & Richard H. Pildes, *Politics as Markets: Partisan Lockups of the Democratic*

Founders understood that politicians might try to manipulate the public to enhance their own power and to the ultimate detriment of the public interest, but they surely did not appreciate the creativity with which modern politicians work to cartelize political power. Nonetheless, the Constitution they designed has proven remarkably useful, if hardly perfect, for reinforcing the bulwarks of representative democracy and pushing back against the self-aggrandizement of incumbent politicians.

But even when acting on behalf of the perceived interests of their constituents, legislators can overreach. Legislators have an incentive to act, and the pressure for action inevitably poses a risk that the government will overrun constitutional barriers. Constitutional fetters are designed to impede action. Legislators, however, are not likely to win reelection and fulfill their political ambitions by sitting on their hands. When their constituents bring problems to their attention, legislators are expected to do something to ameliorate those problems. It is rarely a winning political strategy to plead impotence and turn constituents away. Constituents expect their representatives to exercise power on their behalf, not explain that what the voters want is beyond the power of the representatives to provide. Legislators generally win friends by finding ways to say “yes,” rather than having to say “no.” While legislators may not be specifically motivated to engage in unconstitutional conduct, they are regularly motivated to find ways around constitutional obstacles as they pursue their policy objectives. The constant pressure to push constitutional boundaries will tend to stretch those boundaries outward.

#### *B. Congressional Hyper-responsiveness*

The tendency of an elected legislature to overreach its constitutional limits is closely related to the tendency to be too responsive to public opinion. Some degree of responsiveness is a necessary precondition for the kind of representative accountability that the Founders thought essential to a thriving republic. Meaningful elections were the mechanism that was to ensure that the political elite listened to and looked out for the people at large. Legislators without the necessary sympathy for the needs of the people could

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*Process*, 50 STAN. L. REV. 643, 644 (1998); Michael J. Klarman, *Majoritarian Judicial Review: The Entrenchment Problem*, 86 GEO. L.J. 491, 503–04 (1997).



not be effective representatives, and requirements that members of Congress stand for regular election, live among their constituents, and be citizens of a mature age were to help ensure that representatives would have that necessary sympathy.<sup>61</sup>

Effectively conjoining the interests of the legislator and the people was the first challenge of a well-designed republican constitution, but it was not the only challenge. In the immediate aftermath of declaring independence from Britain, the American revolutionaries' first priority in drafting their constitutions was to place the new American governments on a popular foundation. Government officials would answer to their own people, not to distant kings. Frequent elections and "rotation" in office (that is, term limits) were generally viewed as the primary constitutional tools for attaching the government to the people.<sup>62</sup> Across the Confederation period, however, many Federalists came to worry about a different problem. They feared that the revolutionary governments had tilted too far toward popular responsiveness.<sup>63</sup> With no breakwater between the people and the government, turbulent and transitory passions could be transmitted directly through the people's representatives into government action. The more immediate the connection between legislators and their constituents, the more representative government was likely to partake of the vices of direct democracy.

The classically-trained founding generation had drawn one fundamental lesson from the democratic experiments of the ancient Greek city-states: that democracy could easily give way to mob rule and from there to anarchy and tyranny. The people in mass were subject to emotional and irrational furors, and governments should be able to resist those outbursts rather than exaggerate them. If the people ruled personally and directly by gathering together to be swayed by demagogues, then liberty and the common weal would never be secure.<sup>64</sup> If the people could not

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61. U.S. CONST. art. I, § 2. On James Madison's nuanced views on the relationship between public opinion and republican representation, see Alan Gibson, *Veneration and Vigilance: James Madison and Public Opinion, 1785–1800*, 67 REV. POL. 5 (2005); Colleen A. Sheehan, *Madison v. Hamilton: The Battle over Republicanism and the Role of Public Opinion*, 98 AM. POL. SCI. REV. 405 (2004).

62. WOOD, *supra* note 10, at 140–41, 166–67.

63. *Id.* at 474–75.

64. See JAMES W. CEASER, *PRESIDENTIAL SELECTION 47–71* (1979); THOMAS L. PANGLE, *THE SPIRIT OF MODERN REPUBLICANISM 46–48* (1990).

make isolated government officials attend to their concerns, then liberty and the common good were likewise insecure. Government officials needed to be able to simultaneously stand apart from the people and yet share public concerns.

Democratic governments could be impetuous. They must be made to be reflective. The Federalists hoped that representative government would suffer from fewer of the problems that had historically bedeviled direct democracies. James Madison spoke for many in concluding that "pure" democracies "have ever been spectacles of turbulence and contention" and "incompatible with personal security or the rights of property."<sup>65</sup> For some, that experience suggested that popular government would be impossible to sustain. For the Americans of the revolutionary generation, abandoning popular government was not an option. They would need a "republican remedy for the diseases most incident to republican government."<sup>66</sup> More idiosyncratically, Madison argued that republics differed from democracies in that they delegated government power "to a small number of citizens elected by the rest."<sup>67</sup> Others might have simply called this representative democracy.<sup>68</sup> But crucially, Madison hoped that creating a bit of separation between the people and government power would render popular government more stable and more just. A properly designed "scheme of representation," he thought, "promises the cure for which we are seeking."<sup>69</sup> Congress could "refine and enlarge the public views" so as to better "discern the true interest of [the] country."<sup>70</sup> In the best case, legislators will be able to resist the "temporary or partial considerations" that might otherwise rile popular politics.<sup>71</sup> So long as the representatives "derived from the great body of the society, not from an inconsiderable proportion, or a favored class of it," and hold power "for a limited period," a republican government could be expected to care for

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65. THE FEDERALIST NO. 10, at 81 (James Madison) (Clinton Rossiter ed., 1961).

66. *Id.* at 84.

67. *Id.* at 82.

68. See KEITH E. WHITTINGTON, THE IDEA OF DEMOCRACY IN AMERICA (forthcoming).

69. THE FEDERALIST NO. 10, at 81 (James Madison) (Clinton Rossiter ed., 1961).

70. *Id.* at 82.

71. *Id.*

the public interest.<sup>72</sup> For many in the revolutionary generation, “a limited period” usually required annual elections. The Federalists generally thought that term of office was too short,<sup>73</sup> and over time the length of the legislative term of office in state constitutions converged toward the federal model.<sup>74</sup> All agreed that accountability and responsiveness needed to be balanced against independence and responsibility.

Legislatures could pose a danger to liberty if their members were either too far removed from the people or too tightly bound to them. “Frequent elections” were necessary to ensure that government officials would “have a common interest with the people.”<sup>75</sup> But competent legislators not only needed to know the interests and will of their own constituents, but also needed to develop “a certain degree of knowledge of the subjects on which [they are] to legislate.”<sup>76</sup> A government needed not only a commitment to the happiness of the people, but also a capacity to adopt and implement good policies that would advance that objective. A government that was too focused on creating responsiveness risked making “blunders” and succumbing to inconstancy.<sup>77</sup> A legislature needed “firmness” as well as sympathy.<sup>78</sup> Madison and his fellow Federalists tried to convince the American public that a bit of insulation between the people and their representatives did not pose a threat to their liberties. In part, Americans should feel confident that the term of office of federal representatives would not be so long as to call into question their fidelity to the interests of the voters. But equally importantly, the Federalists emphasized that constitutional checks and balances would keep the new federal legislature in line in ways that would be even more beneficial to American liberty than the frequent elections that had been embraced by constitutional drafters during the American Revolution.<sup>79</sup> Bicameralism, the presidential veto, an independent judiciary, and limited congressional powers

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72. THE FEDERALIST NO. 39, at 241 (James Madison) (Clinton Rossiter ed., 1961).

73. *Id.* at 241–42.

74. JAMES QUAYLE DEALEY, *GROWTH OF AMERICAN STATE CONSTITUTIONS* 186 (1915).

75. THE FEDERALIST NO. 52, at 326 (James Madison) (Clinton Rossiter ed., 1961).

76. THE FEDERALIST NO. 53, at 332 (James Madison) (Clinton Rossiter ed., 1961).

77. THE FEDERALIST NO. 62, at 379 (James Madison) (Clinton Rossiter ed., 1961).

78. *Id.*

79. WOOD, *supra* note 10, at 438–63.

would all work alongside elections to prevent the abuse of government power by legislators.

If Anti-Federalists in the 1780s worried that the Constitution created representatives who would be too distant from the people, subsequent developments have proven such fears to be misplaced. Far from being isolated and insulated, members of Congress have proven to be finely attuned to the opinions and preferences of their constituents. Developments in communication, transportation, political professionalization, and social and political organization all have tended to tighten rather than loosen the connections between the voters and their elected representatives. Eager-to-please modern representatives are more likely to be hyper-responsive than unresponsive to the voters who control their future political careers. Such extreme responsiveness can lead to its own dysfunctions, which the Founders might have anticipated in substance if not in form. As the British political scientist Anthony King has concluded, "America's politicians campaign too much and govern too little."<sup>80</sup> Posturing for public support might help stave off electoral vulnerability, but it does not necessarily "refine and enlarge the public views" as Madison hoped.<sup>81</sup> When the potential electoral implications of policy decisions are ever-present, deliberation on the substantive merit of a given policy is likely to be shorted.

### C. *Congressional Parochialism*

A somewhat different pitfall of how Congress represents the people is that legislative representation is likely to be too parochial. The Founders emphasized that all parts of the American system of government would rest on popular foundations. There would be no effort to try to replicate the British monarchy or House of Lords and create a political body separate from and superior to the people. The different parts of a republican government would not reflect different interests, but they can be made to represent the people in diverse ways. The personnel of the different branches of government would serve different terms, and at least originally they varied in how directly or indirectly they were chosen by the people.

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80. See generally ANTHONY KING, *RUNNING SCARED* (1997).

81. THE FEDERALIST NO. 10, at 82 (James Madison) (Clinton Rossiter ed., 1961).

Legislatures had always been the most natural representative institution. Only a multi-member body can adequately represent the people in all their diversity. Indeed, for many of the Anti-Federalists, Congress was too small to adequately represent the people.<sup>82</sup> A relatively small number of legislators seemed unlikely to be able to fully appreciate the concerns and interests of their many constituents or be able to respond to their individual complaints. The Federalists were more optimistic that a large constituency could be effectively represented, while also hoping that the diversity within a large legislative district would allow the representative to exercise some independent judgment on what might be in the public interest.<sup>83</sup>

The smaller and more homogeneous the constituency the more it might be possible for an elected representative to simply mirror the preferences of the voters, but such representation might not be ideal if the goal is good government. In particular, legislative representation can risk being too parochial. Presidents have long highlighted the difference between their own representative credentials and those of the members of Congress.<sup>84</sup> While Congress as a whole represents the people of the nation, each individual member of Congress is only accountable to a small subset of the people. As a consequence, Congress is systematically pressured to respond to the concerns of geographically concentrated interests to the detriment of more diffuse interests. The local bias of congressional representation reinforces a general tendency of democratic politics to underrepresent diffuse interests. Concentrated interests find it naturally easier to organize and mobilize political support for their concerns.<sup>85</sup> For example, automakers can more easily identify their shared interests and organize to advance those interests than can drivers; credit card issuers can more readily coordinate their political activities than credit card users. That problem is magnified by the existence of geographical legislative districts. Dairy farmers

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82. Cecelia M. Kenyon, *Men of Little Faith: The Anti-Federalists on the Nature of Representation*, 12 WILLIAM & MARY Q. 9, 11–13 (1955).

83. Martin Diamond, *The Federalist*, in HISTORY OF POLITICAL PHILOSOPHY 659, 675–76 (Leo Strauss & Joseph Cropsey eds., 3d ed. 1987).

84. See GARY L. GREGG II, THE PRESIDENTIAL REPUBLIC 50–73 (1997); Jide Nzelibe, *The Fable of the Nationalist President and the Parochial Congress*, 53 UCLA L. REV. 1217, 1224–30 (2006).

85. See, e.g., MANCUR OLSON, THE LOGIC OF COLLECTIVE ACTION 165–66 (1965).

in Vermont and coal miners in Kentucky can count on getting a sympathetic hearing from their local members of Congress, but mothers who buy milk or environmentalists who worry about air pollution have a more difficult time mobilizing political allies. As a consequence, across its history Congress has notoriously sacrificed the national interest to local interests on issues ranging from trade protection to deficit spending to military basing.<sup>86</sup> Presidents have regularly complained that Congress has failed to adopt the same kind of national perspective on political problems that comes more naturally to the White House.<sup>87</sup> At its best, Congress has found ways to counteract its own instincts in this regard with procedural devices such as fast-track authority on trade deals, hard caps on deficits and mechanisms for automatic spending cuts, and blue-ribbon commissions on base closures.<sup>88</sup>

#### D. Cumbersome Congress

Congressional decision-making can be cumbersome—more cumbersome than many alternative policymaking options. Congress is at a relative disadvantage in a rapidly changing policy environment or when perceived crises seem to require immediate action. Indeed, Presidents can and have strategically framed social problems as crises to circumvent normal congressional deliberation and enhance the position of the executive branch in making policy.<sup>89</sup> Alexander Hamilton emphasized that the singular virtue of the executive is “[e]nergy.”<sup>90</sup> Compared to other political institutions, the executive could act quickly and with decisiveness. Hamilton thought the potential for such energetic action somewhere within the political system was essential to “good government,” and there would frequently be circumstances that would necessitate the executive exerting leadership.<sup>91</sup>

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86. See, e.g., E.E. SCHATTSCHEIDER, *POLITICS, PRESSURES AND THE TARIFF* 283–94 (1935); Lawrence H. Chamberlain, *The President, Congress, and Legislation*, 61 *POL. SCI. Q.* 42, 60 (1946).

87. MAYHEW, *supra* note 57, at 127–30.

88. See, e.g., R. DOUGLAS ARNOLD, *THE LOGIC OF CONGRESSIONAL ACTION* 99–110 (1990).

89. See, e.g., JEFFREY K. TULIS, *THE RHETORICAL PRESIDENCY* 181 (1987).

90. *THE FEDERALIST NO. 70*, at 423 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

91. *Id.*

The very qualities that distinguish Congress within the constitutional order can also hamper its ability to take efficient action. The legislature is too numerous to be representative and deliberative. The Founders worried that a legislature could be too small and thus be “an unsafe depository of the public interests.”<sup>92</sup> Congress must be large enough to adequately represent the people in their diversity and “to secure the benefits of free consultation and discussion.”<sup>93</sup> But a legislature that was too large would be subject to the “confusion and intemperance of a multitude,” sacrificing the benefits that a representative democracy has over a direct democracy.<sup>94</sup> Finding the proper balance between an assembly too large or too small was at best a matter of pragmatic judgment, but there was no avoiding the reality that Congress would be a collective institution and subject to the challenges necessarily associated with reaching decisions in such a body.

Congress is always subject to collective action problems. Hamilton noted that the chief executive established by the Constitution would benefit from “unity . . . . Decision, activity, secrecy, and dispatch will generally characterize the proceedings of one man in a much more eminent degree than the proceeding of any great number; and in proportion as the number is increased, these qualities will be diminished.”<sup>95</sup> The President need merely make up his own mind to act; Congress would have to marshal a majority of its members behind any policy proposal. The process of coordinating the will of numerous legislators would unavoidably involve delays. Relatively cumbersome efforts would be needed even to take relatively uncontroversial actions. Merely organizing a legislative majority behind a single policy proposal takes time and effort. The legislature becomes more efficient only to the degree to which it cedes control to its leadership, effectively exchanging its representative qualities for something more closely resembling the unity of the executive.<sup>96</sup> Across its history, the development of the congressional capacity to act has generally required the in-

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92. THE FEDERALIST NO. 55, at 341 (James Madison) (Clinton Rossiter ed., 1961).

93. *Id.* at 342.

94. *Id.*

95. THE FEDERALIST NO. 70, at 424 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

96. See GARY W. COX, THE EFFICIENT SECRET 65 (2005).

vention of institutions and procedures that disempower individual members and minority factions within the chamber and empower majorities and a handful of leaders who can act on behalf of those majorities.<sup>97</sup>

The problem of collective action becomes more severe if measures are controversial. To the extent that legislative leaders must overcome disagreement as well as disorganization, their task becomes all the more difficult. The greater the disagreement over what the government should do, the greater the gridlock. The deeper the political differences among representatives, the less likely they are to reach a consensus on how to proceed. Again, the solution has been to reduce the amount of agreement necessary to take action. The Articles of Confederation required that the congressional delegations reach unanimity or near unanimity to take many important actions, and such a level of agreement was difficult to reach.<sup>98</sup> The Constitution allows more decisions to be made by simple majorities, but, even so, the structure of Congress conspires against hasty action.

#### E. *Cacophonous Congress*

Finally, Congress can be cacophonous. This is the reverse-side of the congressional virtue of transparency. The legislature is the branch of government that does the most work in public. Presidents are highly visible, of course, and at least since Theodore Roosevelt presidents have fully appreciated the political advantages of occupying the bully pulpit.<sup>99</sup> But presidential visibility is primarily strategic and rarely involves the actual business of governing. Presidents can demand attention by giving a televised speech from the Oval Office or attending a summit with foreign leaders, but those are carefully managed presentations to the public. Congress, by contrast, conducts important business in front of a public audience. The House and Senate chambers, not the West Wing, have galleries for spectators to observe their representatives in action. While public hearings and floor de-

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97. See SARAH A. BINDER, *MINORITY RIGHTS, MAJORITY RULE* 125 (1997); ERIC SCHICKLER, *DISJOINTED PLURALISM* 31 (2001).

98. ARTICLES OF CONFEDERATION of 1781, art. IX.

99. Gerald Gamm & Renee M. Smith, *Presidents, Parties, and the Public: Evolving Patterns of Interaction, 1877–1929*, in *SPEAKING TO THE PEOPLE* 109–10 (Richard J. Ellis ed., 1998).



bates hardly exhaust the business of the legislature, they are visible markers of congressional activity.

That relative transparency comes at a price. At its best, transparency can foster accountability and responsibility in government officials, and can be educative for citizens who can learn about the complexity of public policy. But transparency also puts the messy business of politics on display. It has long been observed that it is unappetizing to watch either laws or sausages get made. The workings of democracy do not become more attractive when observed up close. Legislative business routinely reveals the compromises, limits, and disappointments of politics. Moreover, the collective quality of legislatures exposes political disagreements and contingency. As king and parliament fought in seventeenth century England, the philosopher Thomas Hobbes advocated on behalf of monarchical authority. In part, he thought, a unitary king held an advantage over any multitudinous assembly that by its very nature would display “inconstancy” and disagreement.<sup>100</sup> While few modern Americans would share Hobbes’s enthusiasm for royalty, they are surprisingly unenthusiastic about how democratic politics operate. Witnessing political arguments leaves the average citizen frustrated. The public generally dislikes Congress precisely because Congress makes visible the kind of political disagreement endemic to democratic politics.<sup>101</sup> By comparison, executive officials can more easily cloak disagreements and compromises and simply act, presumptively in the public interest.

### III. DEVELOPMENTS OF TIME

The founding generation expected the legislature to be the principal branch of government. They understood legislative assemblies and identified them with a republican form of government. They had less of a grasp of what the executive and judicial branch would be within a democratic political system. They understood that those institutions were necessary, and could provide important checks on the democratic excesses

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100. THOMAS HOBBS, *LEVIATHAN* 91 (London, Routledge 1894) (1651).

101. See FRED R. HARRIS, *IN DEFENSE OF CONGRESS* 81–82 (1995); JOHN R. HIBBING & ELIZABETH THEISS-MORSE, *CONGRESS AS PUBLIC ENEMY* 147 (1995); JOHN R. HIBBING & ELIZABETH THEISS-MORSE, *STEALTH DEMOCRACY* 121–22 (2002).

and institutional foibles of a legislature, but the possibilities implanted in Article II and Article III were obscure.

Subsequent political developments have nurtured the relative growth of executive power. For much of the nineteenth century, Congress largely held its status as the preeminent branch. Policy was primarily made by statute, and the popular will was understood to largely filter through the legislature. Judges and executive officials were, in turn, extensions of the legislative will.<sup>102</sup> By the start of the twentieth century, the situation had changed rather dramatically. Increasing military adventurism abroad lifted the President of the United States onto the world stage and elevated the importance of the presidential role as commander-in-chief and chief diplomat.<sup>103</sup> The rise of the administrative state necessarily enhanced the power and importance of the executive branch.<sup>104</sup> Social and economic behavior had long been regulated by legislatures with durable statutes and by judges with general common-law rules. As the Gilded Age bled into the Progressive Era, however, the locus of governance shifted away from legislatures and courts and into administrative agencies and regulatory commissions.<sup>105</sup> Congress was content to pass important but broadly-worded statutes that invested substantial discretionary policymaking authority in appointed experts who were charged with developing and implementing the detailed rules that would shape the new economy and with constantly adjusting government policy to a rapidly changing environment.

Despite the rise of the executive within the American constitutional system, Congress still has an important role to play. The administrative state is not going away, and the vices of Congress will continue to make themselves felt. But the traditional virtues of Congress remain foundational to American constitutionalism.

One lesson from the rise of executive power over the course of the twentieth century is that authority and power follows action and energy. To the extent that the executive can claim to get things done, the authority to act has flowed to executive officials. The Founders anticipated that effective power in a re-

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102. See STEPHEN SKOWRONEK, BUILDING A NEW AMERICAN STATE 23 (1982).

103. See RICHARD J. ELLIS, THE DEVELOPMENT OF THE AMERICAN PRESIDENCY 217–28 (2012).

104. *Id.* at 272–80.

105. SKOWRONEK, *supra* note 102, at 248–90.

public would ultimately derive from public confidence, regardless of how formal powers are allocated in a constitutional text. They expected, and sometimes feared, that this basic political dynamic would work to the benefit of the legislature, which could credibly claim to speak for the people and that would be constantly motivated to respond to the immediate concerns of the voters. But over time other political institutions have earned the trust of the American people, and Congress has often appeared powerless to address the problems of the day. Playing a more important role in modern politics necessitates demonstrating the capacity to act for the public's benefit.

Most obviously, Congress should act as a policy leader. Electoral representation in the legislature provides both the authority to make policy and the information to identify public needs. While Congress may not be nimble in responding to rapidly changing events, it should be able to identify the common good and determine the level of public commitment to a policy goal. The kind of detailed rulemaking that administrative agencies can do well will necessarily have a place in the political landscape, but congressional decision-making is crucial for setting policy goals and direction. As a formal matter, the Supreme Court has long insisted that executive agencies must take their direction from legislation and cannot simply act autonomously, but in practice the congressional input into the policymaking process has often been rather thin.<sup>106</sup> Congress has often been unwilling or unable to take the necessary action to deliver public policy addressing recognized social problems, and even when legislation is crafted it often simply delegates sweeping authority to executive officials to determine actual policy. In particular, Congress must make the hard choices of setting priorities among competing policy goals. Statutory language that obscures the choices that must be made to implement a given policy abdicates responsibility. The representative structure of Congress is designed to facilitate deliberation, negotiation and compromise among the diverse interests of the country. While that diversity can also make it difficult to make decisions, the constitutional system as a whole functions best and most democratically if the time and effort is taken to work through those difficulties and make the hard decisions. The need for congres-

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106. See DAVID SCHOENBROD, *POWER WITHOUT RESPONSIBILITY* 101 (2008).

sional deliberation and action is no less necessary in the realm of foreign policy than in domestic policy. Since the United States assumed the status of a global power, Congress has often struggled to lay claim to a meaningful role in deciding questions of war and peace.<sup>107</sup> Congress is as ill-suited to responding to international crises as it is in responding to rapidly developing domestic events, but not all international relations revolves around crises. Nonetheless, taking advantage of opportunities for assessing the American national interest and determining national commitments would give Congress a more meaningful role in an important aspect of American policymaking and would better realize the benefits of legislative representation of the people.

Congress also has a continuing role to play as a watchdog. While legislating was at the core of the Founders' understanding of the role of a legislature, they also appreciated the ways in which a representative assembly can serve as a check on other institutions of government. Congress provides openings for affected interests to complain about mistakes and abuses by government officials. Legislators have incentives to investigate and publicize what might otherwise linger in the shadows. Aggressive monitoring of the executive branch not only effectuates the checks and balances that are necessary to preserve liberties and ensure good government, but also complements the congressional role in making policy. The ability of Congress to establish a policy agenda and priorities requires both the drafting of statutes with sufficient specificity and clarity to guide policymaking and the active monitoring of how those policies are refined and implemented within the executive branch.

The Constitution was designed to empower Congress to accomplish things on behalf of the public, but the Founders were under no illusions as to the dangers that a legislature could pose to the public good. Congress was to have limited powers enumerated in the text of the Constitution, but those were the powers best entrusted to the national legislature. That those powers would not be abused, and that Congress would not go beyond them, Congress was restrained not only by its accountability to the people through frequent elections but also by the

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107. See WILLIAM G. HOWELL & JON C. PEVEHOUSE, *WHILE DANGERS GATHER* 73 (2007).

fragmentation and dispersion of power across two legislative chambers and an independent executive and judiciary. Congress has an important role to play within the constitutional system, but it is not the only body empowered by the people to identify and advance the public good.