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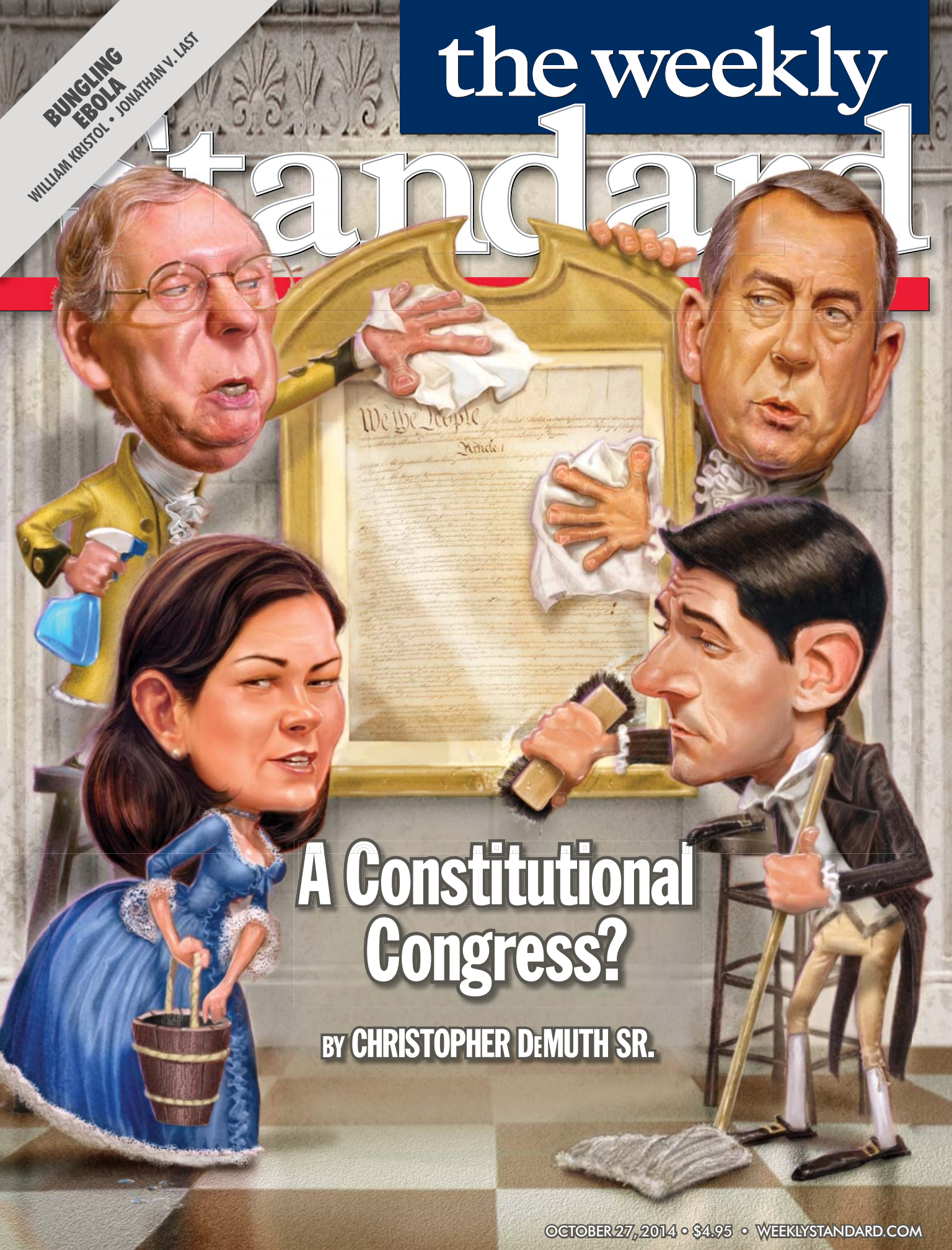

A Constitutional Congress?

BY CHRISTOPHER DEMUTH SR.

OCTOBER 27, 2014 • $4.95 • WEEKLYSTANDARD.COM

A Constitutional Congress?

How the legislative branch can resume its rightful role

By Christopher DeMuth Sr.

What difference will it make if the Republicans win the Senate and hold the House in November? The House can already block Democratic legislation Republicans do not like, and President Obama would still be able to veto Republican legislation he does not like. The Republicans are talking of a positive, problem-solving agenda. That seems to mean passing some constructive bills President Obama could sign, thereby signaling that Washington can get things done, and some others the president would veto, thereby signaling even better days ahead following a GOP presidential victory in 2016.

Such a strategy would hold serious potential. Divided government can be both partisan and productive—as in the second Clinton administration, which brought both an impeachment trial and balanced budgets (and, for the Republicans, the prelude to control of the White House and both chambers of Congress after the 2000 elections).

A Republican Congress facing a Democratic president could, in addition, do something of transcendent importance, something that would furnish a stately frame to its policy initiatives. It could reverse Congress's institutional decline and begin to restore the elected legislature to its vital position in our constitutional balance of power.

If the Republicans were to attempt this, it would be an edifying spectacle for all concerned. We are familiar with the Celebratory Constitution—Independence Day orators extolling the wisdom of Founders and Framers, Tea Party activists parading in colonial garb. And we are familiar with the Judicial Constitution—aggrieved persons demanding their rights, lawyers exchanging dialectics, judges parsing the Framers' phrases and discerning their intent. But the path suggested here would be the Members' Constitution—its sworn officers in Congress assembled, performing its duties, accepting its constraints, and exercising its powers astutely or not—a "living Constitution" indeed. Be forewarned, however, that this path would be as unfamiliar to modern congressional Republicans as to Democrats.

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The decline of Congress has been masked in recent years by the Obama administration's brazen acts of unilateral lawmaking—revising or ignoring key provisions of the Affordable Care Act (Obamacare) and several welfare, immigration, education, energy, and environmental statutes and evading the Constitution's appointment requirements. Many of these actions have been unconstitutional. A few have been blocked by the courts, and a few have been acceded to with obvious reluctance, but most are immune from legal challenge because no one has standing to sue (which requires tangible individual harm). The House is stepping in with a constitutional lawsuit of its own—casting Congress as a pitiful, helpless giant and innocent bystander to presidential usurpations.

But Congress is not innocent: It has been and continues to be an active partner in the transfer of legislative power to the executive branch. Since the 1970s, it has established dozens of agencies, such as the EPA, with authority to enact sweeping, costly, contentious national policies under vague statutory standards. During the 2008 financial crisis, when the Bush administration rewrote the Troubled Asset Relief Program almost before the ink had dried, legislators complained bitterly but soon acquiesced with supporting legislation. Since then, the Obamacare and Dodd-Frank statutes have set new standards of delegated lawmaking, providing sweeping discretion to a phalanx of agencies, councils, and committees.

Regulation is one thing, but Congress's most dramatic abdications involve its powers to tax, appropriate, and borrow. These powers, enumerated in Article 1, Sections 8 and 9, are specific, plenary, and exclusive and are the linchpins of Congress's constitutional position. Yet Congress now appropriates only 30 percent of annual spending—the rest is entitlements and other automatic spending free of annual appropriations, and interest on the federal debt. In

most years Congress doesn't really appropriate the 30 percent either, because of the collapse of its budget procedures and its reliance on continuing resolutions. It did not pass a single regular appropriation for the fiscal year beginning October 1, 2014.

Congress's propensity to spend much more than it taxes has produced, through continuous annual deficits, a separate kind of delegation—to future citizens and Congresses, who will somehow, someday pay the costs of today's mounting debt. But in the meantime that propensity has also led Congress to transfer taxing, spending, and borrowing authority to the executive.

Congress has recently handed several agencies the power to set, collect, and spend their own taxes. For example, the FCC's fraud-plagued universal service program, now spending $9 billion annually, is funded by a tax on communications firms that the commission adjusts each quarter to keep pace with program spending. The Public Company Accounting Oversight Board, created by the 2002 Sarbanes-Oxley Act, supports itself with a corporation tax calibrated to its annual expense budget, currently about $260 million.

These are genuine, broad-based taxes—unlike, say, FDA filing fees and entrance fees at national parks. They do not loom large among federal revenue raisers, but they are recent innovations and powerful precedents: agency taxes geared to an agency's own spending, free of legislative politics and the need to compete with priorities in other areas. And they are a singularly radical form of delegation. The justifications for regulatory delegation—specialization, "expertise," and the need for policy flexibility—are altogether absent. The Constitution is adamant that taxation is a legislative function—even requiring that revenue bills originate in the House, the people's chamber whose members must face the voters every two years.

The Dodd-Frank Act's Consumer Financial Protection Bureau is another departure in executive independence. The CFPB is funded not by its own tax but rather by a draw (up to a statutory cap) from the profits of the Federal Reserve Banks. Those profits, from bank fees and earnings from open market operations, are remitted to the Treasury as general revenue. Guaranteeing the CFPB a portion that would otherwise support other government programs is a new entitlement program—this one for a regulatory agency rather than Social Security or Medicare—and deficit-financed to boot. This year's Federal Reserve profits will be more than $100 billion, while its own operating costs will be about $6 billion and the CFPB's expenses will be about $500 million, so there is plenty of room for agency entitlements to grow.

Congress's latest surrender—of its borrowing power—is fraught with irony. That power has been exercised for nearly a century through a legislated ceiling on the Treasury's total borrowings. The debt ceiling is a legitimate constitutional prerogative but a feeble one at a time of continuous budget deficits—because when the ceiling needs to be increased Congress has already authorized the taxing and spending that makes the increase necessary. In recent years, the House has unwisely used the need for debt-ceiling increases to attempt to extract spending and policy concessions from the Obama administration. In the midst of the interbranch brinksmanship, President Obama wisely declined the advice of legal pundits that he ignore Congress and borrow beyond the ceiling on his own accord. Then, when the dust settled following the government shutdown in late 2013, he was presented the borrowing power on a plate. Congress—chagrined at its rediscovery of the weakness of the debt ceiling, but loath to vote for an $18 trillion debt ceiling with an election looming—simply suspended the ceiling, giving the Treasury authority to borrow as needed for a set period of time.

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If Congress is to turn back presidential encroachments, it will first need to recover the arsenal of powers it has given up voluntarily. Today's Republicans would seem to be ideally suited to the task with their fresh, Tea Party-inspired devotion to constitutionalism. But the task would put that devotion to the test, for Congress did not relinquish its powers by inadvertence but rather by calculation. Restoration will require a new political calculus and a new institutional culture.

It is important to understand that the Constitution's powers are also responsibilities. The first responsibility of the legislator is collective choice—to decide matters of public importance and dispute, in league with others of differing, often conflicting interests and viewpoints. This requires more than the politician's natural gregariousness and assertiveness. One must sublimate one's ego: suffer fools gladly, make wretched compromises, settle for half-loaves, and endure the treachery of opponents and the disappointment of allies. In compensation, one is a member of a famous and powerful elite, possessed of many

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prerogatives and perquisites, deferred to and addressed as honorable. The deference is not only to power: To be an elected legislator is to be part of a tradition of democratic self-government that extends back for centuries and is one of the greatest achievements of Western civilization.

Delegating lawmaking to the executive has been, not entirely but to a considerable extent, a means of shirking the legislative responsibility while retaining, and even increasing, the power and prerogatives of the individual member. In exchange for the burdens and risks of collective choice, the member becomes a solo practitioner with a public license—to influence the choices of a vast executive apparatus through grant-getting, letter-writing, regulatory tweaking, placing allies in agencies and at Washington lobbying firms, adding entrepreneurial riders and earmarks and line-items to blunderbuss spending bills, vowing to preserve or scuttle executive decisions before aroused constituency groups, and pell-mell personal fundraising.

Some of these things are time-hallowed congressional prerogative, of course, but they have coalesced into a new Capitol Hill culture with a logic and momentum of its own. As executive government grows, so do the opportunities for influencing its choices at the margin, and so, correspondingly, does the value to outsiders of access to individual members. Instantaneous mass communications and continuous surveillance by interest groups put a premium on public positioning and drive out the time and negotiating space necessary for collective choice. As the legislative arts decline, "Acts of Congress" become, increasingly, slapdash emergency bills controlled by the majority party leadership rather than the committees of jurisdiction, containing little in the way of considered law that many members have had a hand in or even know much about. Nancy Pelosi's admonition when she was speaker, that members should pass a bill first and read it later, was a true expression of what Congress has come to, much of the time.

So a constitutional revival will require a cultural revival. Recovering Congress's lost powers will require relearning legislative skills, redirecting legislators' energies, and risking the ire of party constituencies who are unfamiliar with the obligations of legislating and their centrality to the separation of powers. That is a tall order, but the time may be ripe. Contempt of Congress has become routine, even breezy, as in the recent hearings on the IRS political scandals. Many members have noticed that their institution has nowhere to go but up.

At the same time, President Obama might cooperate—up to a point. At least he ought to. Modern presidents have gotten too powerful for their own good, and late-term presidents know it. The range and volume of executive branch policymaking has grown far beyond the span of control, or even comprehension, of its sole elected official and his immediate staff, and brings new surprises and dilemmas every day. When the agencies act, and when the president acts on his own initiative, he is seen as exercising personal power, unmediated by legislative engagement. Unlike a prime minister in a parliamentary system, he stands before the citizenry alone and apart. Congressional reaction is often in the form of a discordant Greek chorus—partisan messaging from the leaders of both parties, hailing and condemning the president's action in unqualified terms—which reinforces the impression of crown government. America has now had three consecutive presidents subjected to continuous, highly organized personal defamation, which is plausibly the result of the extreme and undemocratic concentration of power in a single person and the increased value to the opposition of undermining his reputation and authority.

A bit of power sharing with an elected legislature would make our president stronger, not weaker, than he is today. The constitutional separation of powers is intended to provide balance as well as checks, and shared responsibility. All presidents seek congressional approval for unusually controversial or risky decisions, especially in military matters. It would be good for presidents if they did so more frequently—as a matter of obligation rather than discretion—even if they did not always get the approval they sought.

The president would have some legitimate gripes of his own to bring to the table. At the top of the list would be congressional micromanagement of executive branch organization and administration. The distinction between "policy" and "administration" can be in the eye of the beholder, and the bureaucracies of democratic governments are bound to depart from administrative efficiency for political reasons, sometimes worthy ones. But Congress frequently prescribes detailed organizational charts, management methods, and procurement requirements, infuriatingly complex procedures for even the most mundane decisions, and impossible-to-meet deadlines—all of which either interfere with the pursuit of statutory objectives or substitute for the lack of such objectives. Congress also establishes mechanisms that permit its committees, members, and even staffers to partake in executive decisions on a routine basis. Many of these practices go beyond what a legislature should bother over, and are another manifestation of Congress's evolution from collective choice to individual finagling with executive choice. A better division of labor between legislating and executing would be good for both branches and for the rest of us.

These abstract meditations would quickly spring to life in practical politics if a Republican-led 114th Congress embarked on something like the following five-step plan for constitutional reconstruction:

First, retrieve the recently relinquished borrowing, taxing, and spending authorities. This would best be done through legislation that presents the constitutional issues starkly, unencumbered by policy issues on which Congress and the president would differ. The measures would be of little immediate consequence but neither would they be symbolic; they would be surprising and a bit off-message, and therefore signals of constitutional seriousness.

The debt-ceiling suspension was politically clever and will be a tempting precedent for renewal when it expires in March 2015. Suspending the ceiling for a set period of time, rather than raising it to a set number of dollars, avoids explicitly approving scary and unpopular debt levels—while still obliging the Treasury to return to Congress for suspension renewals, just as it used to have to return for debt increases. But the borrowing power gives Congress little or no leverage over the executive in a time of growing debt that neither party is capable of moderating much in the near term, as Republicans have recently discovered and should not soon forget. And exercising that power as a time limit rather than a dollar limit jeopardizes congressional prerogatives for the future. Sooner or later, the power to specify borrowing limits will again be potent. That might be when the federal debt has returned to a constant and sustainable share of GDP and the executive is seeking an extraordinary debt issue (say, to bail out a bankrupt state). Or when long-term entitlement reform is on the table with multiple trade-offs to be negotiated. Or when an external debt crisis (caused by a precipitous rise in interest rates, or a major war, or the failure of entitlement reform) forces excruciating choices among massive new borrowing, defaulting on installed debt, and drastic spending reductions.

It would be most unfortunate for Congress if that day should arrive, which might be by surprise, when the Treasury had unlimited borrowing power with months or a year to go. Of course, Congress could take back the borrowing power by suspending the suspension, but that would require legislation with the president's approval. In any event, borrowed authorities tend to become easements over time. Both branches would adapt institutionally to the Treasury's managing the debt without a dollar constraint; Congress would grow unfamiliar with the mechanics of credit markets and the solemnity of approving increasingly gargantuan debt levels (a minimum practicable debt ceiling just to get through 2015 will be at least $2 trillion higher than when Congress last went on record at $16.4 trillion in 2011). Better to take back the borrowing power now, in the absence of exigent necessity and while the 2013–2015 suspension is still an exception, and seize the occasion to educate the public about the realities of our fiscal circumstances and the hard tasks ahead in debt consolidation. A truth-in-government ceiling of $20 trillion will be necessary to get through the next several years regardless of Republican accomplishments in spending and debt reduction, and probably enough to finance the government for the remainder of the Obama administration without further pointless theatrics.

A targeted retrieval of taxing and spending authorities would involve revoking the statutory authorizations of the FCC and PCAOB and similar agency taxes, and of the CFPB's entitlement to Federal Reserve profits, and replacing them with special appropriations for 2015 in the amounts already budgeted for the fiscal year (which will already be in its second quarter when the new Congress convenes). The new appropriations would violate established budget limits (evading the limits was one purpose of moving the authorities out of Congress in the first place); the violations should be countenanced as special exceptions, preferably with a minimum of accounting gimmickry in substitute for the unconstitutional gimmickry being repaired. Suitable appropriations for these programs—and taxes too, which could be part of a thorough overhaul of individual and corporate taxation—should be left for fiscal years 2016 and beyond. Federal agencies charge a variety of fees, such as Patent Office filing fees, that are true user fees related to the cost and value of services rendered to applicants and purchasers; some are sensible and others are not, but they do not raise constitutional issues and should not be part of this initiative.

Second, reinstitute the spending power. Congress's ability to control and direct federal discretionary spending (now $1.3 trillion out of $3.7 trillion, the rest being entitlements and interest on the debt) has been deeply compromised by the collapse of its capacity for collective choice. The first order of business is to reestablish Congress's structure, procedures, and "regular order" to undergird the coming battles over spending priorities.

The Congressional Budget and Impoundment Control Act of 1974 establishes procedures and timelines for adopting an annual budget and passing 12 appropriations bills (covering such spending categories as Defense, Interior and Environment, and Commerce, Justice, and Science) within the budget—all well in advance of the fiscal year to which they apply. The act has been a failure, and Congress has rarely followed it in full. Although its procedures are open to criticism and are the subject of a large reformist literature, they are not the main problem.

The act was passed just as the old congressional seniority system was coming unraveled—in part because most of the seniors were Southern Dixiecrats, reviled by northern liberals of both parties and in eclipse following the civil rights revolution of the 1960s. But powerful, seasoned committee chairmen had provided the structure and

hierarchy that are necessary for any legislature to operate effectively, and that are particularly important in our separated-powers system, where the legislature needs to contend with an inherently hierarchical executive branch over spending priorities and much else. The Budget Act was an effort to substitute abstract process for incarnate power. It failed because, in the absence of internal authority, spending became a "tragedy of the commons" where every legislator was free to graze and foolish not to, and no one was responsible for the results. The spending mayhem overwhelmed the act's procedures and deadlines. Among the results: improvised continuing resolutions managed by party leaders rather than committee chairs; recurring brinksmanship over government shutdowns; a profusion of parochial earmarks added by individual members; and the emergence of large, routine budget deficits.

Resuscitating spending control does not require new legislation or "budget process reform." It requires a new congressional structure of strong authorizing (policy) and appropriations (spending) committees with powerful chairmen. Chairmen would be selected by some combination of tenure and recognized leadership and political skills. Each chamber's rules would give the chairmen awesome authorities—subject to automatic, preestablished sanctions such as losing their stripes for failure to meet budget and appropriations levels and deadlines. There are already stirrings in these directions. The Dixiecrat legacy no longer casts a pall over the notions of seniority and hierarchy, while the need to return to regular order is widely recognized (even as each party violates it tit-for-tat when it holds the majority). In recent years, committee chairs such as Paul Ryan in the House and Ron Wyden in the Senate have begun to assert themselves in ways that have impressed colleagues on both sides of the aisles. A time of fully divided government—when the House and Senate had real prospects of achieving concurrence on budgets and appropriations in response to the proposals of a late-term president—would be the ideal time for a new dispensation.

The immediate goal would be for the House and Senate to proceed in crisp, businesslike fashion to adopt a budget by April 15 and pass all 12 appropriations bills and supporting legislation for the president's approval or veto by the end of July (for the fiscal year beginning October 1). That would give Congress real, constitutionally grounded leverage over spending levels. The president's "Budget of the United States Government," released with much fanfare in February, is simply a recommendation to Congress for next year's appropriations (its accounting of federal receipts and expenditures for past years is, however, constitutionally grounded and definitive). Although the construction of each year's budget proposal is an important exercise in internal executive branch spending discipline, the budget document itself has become progressively more rhetorical and less analytical in modern times, and less attended to; the *New York Times* called President Obama's 2015 budget a "populist wish list and election blueprint," and even the White House acknowledged that it was not a serious budget. The Congressional Budget Office—the one unambiguous achievement of the 1974 Budget Act—has displaced the president's Office of Management and Budget as the authoritative source of budget data, analysis, and projections. So the political and institutional as well as the constitutional framework is in place, waiting for Congress to make its move.

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The intermediate goal would be to build capacity for extending budget authority over entitlement spending when the day inevitably arrives that these programs must be fundamentally reformed. Many policy gurus of both parties would favor converting the entitlements to multiyear appropriations, but Congress is not ready for that yet. If the day of reckoning arrives as a crisis before Congress gets its act together, the result will be an executive-dominated emergency summit, held at a military base, that leaves Congress on the sidelines for years or decades to come.

The larger, more profound goal of congressional reconstitution would go beyond budgeting to all aspects of lawmaking. It would be to establish strong merit-based hierarchies in both chambers as the ways and means of organizing collective choice, discouraging go-it-alone member activism, and investing the legislative calling with political prestige. Today many ambitious men and women pursue election to Congress for reasons that have little to do with legislating. They see it as a stepping-stone to "higher office" (meaning executive office, elected or appointed) or to a quasi-private career in the government space, or as a way to assert their conservative or progressive worldviews, details to follow. But imagine if it were also possible for a member of Congress, through legislative mastery and esteem, to ascend to a position of authority for improving the electric power grid or air traffic control

system, or reforming the social safety net, or designing a better system for supporting basic scientific research, or reversing the growth of federal criminal law, or conceiving new intelligence methods or security doctrines, or one of a hundred other concrete matters of national importance that are currently the domain of administrative bureaucracies and frequently managed with great ineptitude. If persons with specific competencies such as these saw congressional careers as a route to high achievement, the pool of office seekers could be enriched and diversified, and the prospects for reestablishing Congress's constitutional position much improved.

Third, regulate the regulators. The recent fluorescence of executive lawmaking has transformed regulatory policy debate. Traditionally, these debates were about the merits of agency policies and procedures under the Clean Air Act, the Communications Act, and other statutes, and about reform proposals to substitute economic incentives for regulatory command-and-control, to subject rules to a cost-benefit test, and to tighten rulemaking procedures and standards of judicial review. Now the debates are about the problems of excessive legislative delegation and executive policy autonomy and what might be done about them.

The boldest congressional initiative has been the "REINS Act," two versions of which passed the House in recent years. Under REINS, major regulations (those with an economic impact of $100 million or more annually) would not take effect unless and until approved by a joint resolution of Congress and signed by the president; these rules would move directly to the full House and Senate for an up-or-down vote without amendment. In effect, major agency rules would become legislative proposals with fast-track privileges akin to those employed in trade-liberalization and military base-closing programs.

The House's REINS proposals, with no prospect of passing the Democratic Senate, had a symbolic, anti-Obama cast, and President Obama would certainly veto such a bill from the 114th Congress. The interesting question is whether Congress itself should embrace a REINS-like procedure for the future (a bill could carry an effective date of January 2017). The purpose of fast-track, no-amendment procedures is to dodge the authorizing committees, which might have parochial reasons for burying or amending a proposal from the executive branch. The procedure is consistent with a strong committee system—when, as in the case of the trade-liberalization and base-closing programs, it is done as a matter of pre-commitment for purposes of achieving goals Congress has legislated in advance. Under REINS, in contrast, fast-track privileges would be accorded to perhaps a dozen pieces of costly, complex legislation each session, each one appearing at a time, on a subject, and in a form of the administration's choosing. The constitutional advantages would be substantial: Agencies would be obliged to look beyond their narrow missions and immediate constituency groups to the need to gain two legislative majorities, and Congress would be induced, over time, to make its own policy choices in regulatory legislation rather than leaving them to agency initiative and REINS review. But the costs, in terms of large mandatory additions to the legislative calendar and routine sidelining of the committee structure, would be substantial.

REINS presents the problem of legislative capacity starkly, but so does any proposal for insinuating representative, collective choice into the machinery of specialized, high-volume executive choice. Given the immensity of the dilemma, it would be best to begin incrementally and concretely—not with sweeping procedural overhauls but rather targeted measures to displace specific agency rules with statutory law. It must be said that statutory regulation has been a mixed bag—including tailpipe emissions standards for cars and trucks (largely effective and beneficial), the CAFE fuel-efficiency standards (largely ineffective), the minimum wage (politically potent but socially harmful), and the recent incandescent light-bulb ban and Positive Train Control mandate for reducing railroad collisions (both gratuitous and wasteful—indeed foolish). Let us pray for better performance. An effort to undelegate regulatory policy case-by-case would provide a good test of the relative policy merits of legislative versus executive choice, and a gauge of Congress's progress in relearning legislative skills.

The targets of immediate interest to a Republican-led Congress would be those that combined executive overreach, policy disagreement, and political salience. At the top of the list would be the EPA.

The targets of immediate interest to a Republican-led Congress would be those that combined executive overreach, policy disagreement, and political salience. At the top of the list would be the EPA's severe contortions of the Clean Air Act to regulate carbon dioxide and other greenhouse gas emissions, and the many revisions of Obamacare statutory standards for insurance eligibility, mandatory provision and enrollment, terms of coverage, and exchange subsidies. But crafting statutory responses would mean either replacing the executive policies with the original statutory policies (which, in the case of Obamacare, most Republicans do not like and voted against in the first place) or going further (which

would quickly move beyond the constitutional issues). And President Obama would veto whatever was passed, even if passed with some Democratic support. Republicans may wish to enter these frays for policy and political reasons, but pressing the pure constitutional point might better be done through a concurrent resolution strategy suggested in Step Four below.

In all events, Congress should look for opportunities for ousting administrative regulation that have a chance of significant Democratic support and President Obama's signature. Republicans, led by Louisiana governor Bobby Jindal, have been saying that the FDA should permit birth-control pills to be sold over the counter rather than by prescription only. Rather than plead with the FDA, why not settle the matter themselves with a one-page bill and see what President Obama does with it? Here are two suggestions for statutory resolution of high-visibility regulatory snarls that would be easy to explain and understand, highly popular, and hugely beneficial:

Legislate strong, simple capital requirements for American banks. A central cause of the 2008 financial collapse was that banks, with the cooperation of their regulators, were maintaining grossly inadequate equity capital, so that a small decline in the value of their total assets (caused by the bursting of the housing bubble) left them bankrupt or insolvent. If they had been soundly capitalized, their shareholders would have absorbed the losses, their creditors would not have panicked, and there would have been no occasion for taxpayer bailouts. The need for higher equity capital is now widely acknowledged, but the big banks are opposed—they like thin equity because that is more profitable when times are good. The Federal Reserve and other regulatory agencies have responded timidly, with standards that are only marginally higher than current ones and that remain unnecessarily complex. Regulators like to fine-tune capital standards by "risk-weighting" different kinds of bank assets, and have a poor track record. Before 2008 they thought mortgage-backed securities were unusually safe; they were deluded (as were many but not all of the banks), which made the problem much worse.

Senators Sherrod Brown (D-Ohio) and David Vitter (R-La.) have introduced and held hearings on a bill that would require large banks to maintain equity capital of at least 15 percent of the value of their assets (three times what the regulators are considering) and smaller banks to maintain somewhat less, with no risk-weighting or other regulatory shenanigans. There is room for debate on several points, but the experience and academic research behind the bill is robust; a 15-percent standard would be abundantly reasonable, and the whole bill would be about 20 pages long. Over time, legislators would learn something more: that well-capitalized banks had made the "too big to fail" dilemma a thing of the past and most of the provisions of the Dodd-Frank Act obsolete. But that would be for another Congress.

Excuse the FDA from controlling innovation in personal health information. New technologies in the form of smartphone apps, software, and plug-ins and stand-alone kits and devices are opening up important possibilities for improved personal health and medical treatment. They make it possible for individuals to monitor their physical conditions on a frequent or continuous basis—going beyond the footsteps, calories, weight, and biomass familiar to fitness buffs to include cardiac and respiratory functions, glucose and many other blood levels, urine levels, skin conditions, sleep patterns, and even genetic profiles. The information may be stored, tracked, combined, transmitted to and from doctors and nurses, and used to adjust personal behavior, diagnose and treat illnesses, evaluate and modify therapeutic regimens, and manage chronic conditions.

The FDA believes that many and perhaps most of these things are subject to its review and approval before they may be marketed, because they may be used to diagnose or treat medical conditions. The agency promises to "exercise enforcement discretion" to let many of them off the hook, but there is room for doubt. Last year, it ordered 23andMe to cease marketing inexpensive personal DNA tests (done with a saliva sample) with information on the predisposition of various gene sequences to various conditions and diseases. The offending information is general knowledge, available for example on the Internet, but usefully organized, appropriately qualified, and accompanied by a reminder to consult one's doctor. And most of these software-embedded innovations simply monitor and organize one's own health data (including from FDA-approved diagnostic devices) in real time.

The FDA is supposed to regulate the safety and efficacy of drugs and medical devices, not the possession of information. If all of us acquire more and better health-related information about ourselves, some of us will make mistakes with that information. That is no reason to prevent the rest of us from becoming better informed—and good reason to encourage learning-by-doing by both consumers and developers. The FDA's industrial-age regulatory procedures are at odds with the continuous, incremental, experience-based updating that has become familiar in other areas of information technology innovation.

Senators Deb Fischer (R-Neb.) and Angus King (I-Maine) have introduced a five-page bill to eliminate FDA regulation of clinical and health software. It is an excellent start, with plenty of room for debate and legislative choice; another recent proposal exempts a broader range of apps and devices but only from pre-market clearance. Under any formulation, the FDA and other agencies would continue to police fraud (there have been some real frauds

among mobile medical apps) and set technical standards.

If bills such as the two described here were to move seriously toward the House and Senate floors, the bank and medical regulators and their business and media allies would mobilize against them with a fusillade of weak and self-serving arguments. So much the better. Passing the bills would be a momentous victory for bipartisan populism over the elite forces of faux expertise and crony capitalism. And their benefits would build congressional confidence for further irredentist excursions in legislative choice.

Fourth, censure unconstitutional executive acts. Congressional censure of presidents and subordinate officials has been talked of intermittently throughout American history; several Democratic legislators proposed that President Clinton be censured rather than impeached in 1998, and there are many ideas for censuring President Obama floating around these days. But executive censure motions have rarely been passed, and almost never by both chambers.

A Republican majority in both chambers would open the possibility of concurrent censure resolutions with the full prestige of a co-equal branch of the government. (Concurrent resolutions, unlike joint resolutions, are acts of Congress alone and are not presented to the president for signature.) That would be a grave step, but commensurate to the Obama administration's flagrant intrusions into Congress's lawmaking powers. Where the president or his subordinates have ignored or revised specific, important statutory requirements, not on constitutional grounds but for reasons of administrative convenience or political tactic, Congress should not be obliged to reenact the provisions already on the books or replace them with yet different provisions, which the president may or may not accept. Filing lawsuits that ask courts to referee the disputes is constitutionally supine and risks involving the judiciary in continuous supervision of the political branches. Of the available responses, the concurrent resolution is the most commensurate and reciprocal. It should be called a Constitutional Censure (or just Constitutional Resolution) to distinguish it from censure for personal misconduct, and should consist of a clear and precisely grounded statement of why the act in question violated the Constitution, without reference to motivations or political circumstances. A concurrent resolution would not correct the offending act directly but could alter the course of events: It would be an authoritative statement for the guidance of courts and edification of public opinion, and a preamble for Congress's further, fully legislative proceedings concerning the relevant statute and transgression.

There are reasons (including his own words) to fear that President Obama may become increasingly aggressive in governing by declaration in his final years in office. And he may do so, as in the case of major revisions to immigration policy, precisely on grounds that Congress has failed to enact his legislative proposals. In such cases, Constitutional Censure would be the natural and minimum response.

Fifth, acknowledge executive strengths. As Congress unlimbers its constitutional powers and responds to executive trespasses, it should make a strategic retreat from its own trespasses on executive territory. Legislation frequently contains microscopic requirements for executive branch organization and management that are not only unnecessary but are positive nuisances to the effective execution of the law. Presidents often approve such laws with "signing statements" that they will ignore specified provisions they regard as unconstitutional intrusions, especially where military and foreign affairs are concerned. Nevertheless, the executive agencies have accumulated a profusion of debilitating mandates that often make sensible decisions impossible. In such areas as permitting and procurement, executive officials need more discretion, not less.

The 114th Congress should initiate a practice of inviting the agencies, through the president, to submit wish-lists of management mandates, superfluous programs, and counterproductive procedures that they would like repealed. It should give prompt and serious attention to the submissions, and consider establishing a mechanism, akin to the base-closing programs, for compiling and considering management reforms through a structure it has legislated in advance. The purpose of such a mechanism, of course, is to give Congress political cover to do what it knows needs to be done but that it cannot do on its own—it must rely on the executive branch's comparative advantage in balancing national against local and parochial interests.

Finally, it would be particularly bold, and fitting, for a Republican Congress to "repeal and replace" the impoundment provisions of the 1974 Budget Act for the signature of a Democratic president. Those provisions, which effectively prevent the president from impounding appropriated funds, were enacted over the veto of Watergate-weakened Richard Nixon a few weeks before he resigned the presidency. Presidential impoundment has a legitimate albeit contestable constitutional basis. The Constitution says the executive may not spend money "but in Consequence of Appropriations made by law," but it does not say that appropriated funds must be spent in full; all executives need some latitude in managing budgets, pursuing economies, and avoiding waste, so the important question is: how much?

Before 1974, presidents going back to Thomas Jefferson had deferred or rescinded appropriated spending; Congress always bridled, but often came around to the president's view. Many impoundments concerned military bases, ships,

and weapons systems presidents regarded as unnecessary or overtaken by events, but with the growth of domestic spending in the 20th century presidents also impounded domestic spending on grounds of economy, budget discipline, and avoiding inflation. Nixon's domestic impoundments relied on precedents from FDR and LBJ, but his were more aggressive and politically charged (he impounded $6 billion of an $11 billion appropriation for sewage treatment plants that had passed over his veto), and he had many fewer friends in Congress, and eventually none.

The 1974 act established procedures for presidential rescissions of appropriated funds with congressional approval, which has usually been denied. Although the act's impoundment and congressional budgeting provisions are usually seen as separate initiatives, they were really a matched set: Just as Congress was dismantling its own authority to discipline spending, it dismantled the executive's as well. Congress came to see its mistake, and gave the president even greater power to control spending in the Line Item Veto Act of 1996—but, regrettably, the Supreme Court held it unconstitutional in 1998. Since then Congress has been mulling over a variety of substitutes within the contours of the Court's jurisprudence. It is time to pass an ample version—say, to recognize the president's impoundment authority as traditionally practiced and tolerated, to permit broader rescissions when approved by Congress under very-fast-track, up-or-down procedures, and even to gear impoundments to deficit and debt-reduction targets. Again, Congress would be relying on the executive's advantage in achieving certain joint, overarching goals. And *nota bene*: Acknowledging and encouraging the president's authority to control spending levels within appropriated amounts, while at the same time reprimanding and resisting the incumbent president's unauthorized rewriting of statutory law, would teach a splendid object lesson in the true living Constitution.

It remains to be said only that the program suggested here, or anything like it, would require more than a two-and-a-half-day workweek. Western members would rebel at a five-day week; perhaps the collective choice would be four days. Eventually, the best approach might be for Congress to stay in continuous session for four months at a time—five to six days a week at the office like top executive officials—and then take off to the real world for political refreshment for a month or two, even though this would mean a few genuine recess appointments. Washington would await the return of the legislators with hope and trepidation. ♦