CONGRESS INCONGRUOUS

Christopher DeMuth Sr.
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Autobiographical Introduction

In the late 1970s I taught at the Kennedy School of Government and directed the "Harvard Faculty Project on Regulation." Our group—professors of law, economics, political science, business, and public health—was part of the then-vibrant regulatory reform movement, which also had cells at Chicago and other universities and at the American Enterprise Institute and Brookings Institution. We were forthright deregulators when it came to price and entry controls in transportation, energy, and financial markets. For the newer programs of health, safety, and environmental regulation,[1] we thought the agencies were pursuing worthy purposes in ways that were wasteful and counterproductive. We wanted to regulate outputs (emission levels, occupational accident rates) rather than inputs (manufacturing methods, engineering standards), and to replace command-and-control rules with taxes and property rights that harnessed market incentives and avoided government micromanagement.

Congress played essentially no role in our thinking or policy prescriptions. Legislation might be needed for major reforms (one of our members, Stephen Breyer, contributed significantly to passage of the Airline Deregulation Act of 1978). But Congress was usually parochial, populist, and protectionist—something to be kept at bay as we taught the agencies to be more economically rational and public-spirited. I took that bias with me when I left Harvard in 1981 to direct President Ronald Reagan's program of White House review of agency regulations under a cost-benefit standard. It would have been nice to revise the regulatory statutes, but we already had abundant reform opportunities within our very own executive branch—the statutes gave us substantial discretion, and the president had our back. Almost all of my visits to Capitol Hill were to defend our brilliant initiatives against retrograde legislative threats from members of both parties.

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[1] The Environmental Protection Agency, Occupational Safety and Health Administration, and National Highway Traffic Safety Administration were all established in 1970, the Consumer Product Safety Commission in 1972.

Thirty years later, in 2011, I was invited to give a lecture at the Kennedy School by a program that included several compatriots from the old Faculty Project on Regulation. I had continued, following my tour in the Reagan administration, to involve myself in regulatory issues as an economic consultant, editor of the journal *Regulation*, and president of AEI. In my lecture, I assessed the regulatory reformers' successes and failures down the decades and the current state of the debates. My central argument was that Congress had delegated much too much policy discretion to the executive branch—its members voted bravely for clean air, safe products, and fair employment practices, while leaving the real choices to the regulatory agencies. Unilateral executive lawmaking was contrary to our constitutional design of checks-and-balances, and had fostered interest-group favoritism and incontinent interventionism much worse than anything we had grappled with back in the 1970s. Congress needed to get back in the action.

When I finished, the room fell silent as stone. At length, a friend from the early days stood up—an eminent authority on energy and electricity markets, famous for his careful empirical research and detailed designs for better policy. He fixed me squarely and asked with exasperation, "That's *it?*" He didn't elaborate and didn't need to. Everyone knew what he was thinking: *DeMuth has been laboring over regulatory policy for forty years, and the culmination of his thinking is that we need to bring back Jamie Whitten and John Dingell. This doesn't feel like progress.*

Apologia

The structure of American government has changed fundamentally in the forty-five years since 1970, and its domestic policies, regulatory and other, have deteriorated strikingly. The new regulatory agencies of 1970 were unlike anything that had come before, and in retrospect were the beginning of a trend. In contrast to the Progressive and New Deal agencies that regimented production in key economic sectors, the new ones were devoted to personal welfare and dignity. And their powers were much more capacious: whereas the old boards and commissions mainly adjudicated industry submissions and disputes among firms, the new agencies issued rules of their own, often with economy-wide sweep and involving costs and benefits of scores or hundreds of millions of dollars.

The transfer of power from Congress to the executive branch was more than a matter of statutory language. The Progressive and New Deal statutes were often extremely broad—agencies were to prescribe "fair and reasonable" rates and to

permit market entry according to “the public convenience and necessity.” The health, safety, and environmental statutes were sometimes similarly vague (pollution standards should be “requisite to protect the public health with an adequate margin of safety”), but they were generally much longer and more complex than the earlier statutes, and sometimes they were highly prescriptive (automobile emissions and fuel-economy standards are specified by statute).

What was new, and radically so, was the agency practice of “informal rule-making,” which hardly existed before 1970. An agency would publish a proposed rule, collect and assess comments from interested parties, then publish its final rule. Stroke of the pen, law of the land. Rules were subject to judicial review on statutory and constitutional grounds, but the standards of review were lenient and became increasingly so over the years. Once established, the rules were proprietary and dynamic—continuously monitored, enforced, adjudicated, and modified by the agencies that created them, and litigated by interest groups in the agencies’ “stakeholder communities.”

This was a genuine discovery of the practical, adventitious sort, not something lifted from Woodrow Wilson’s playbook for impartial administrative government. Rulemaking, just on paper, was capable of generating prescriptive law at much lower cost and higher speed and volume than legislative process. But its real advantage came in the hands of agencies that were specialized, hierarchal, and missionary. Special-purpose agencies are free of the internal conflicts that are the hallmark, indeed the raison d'être, of the slow-moving, consensus-seeking elected legislature. Hierarchies can make decisions much more expeditiously than the nested committees of a legislature, especially when a single chief makes the final decisions. (The earlier, bi-partisan regulatory commissions imported some of the legislature’s internal conflicts and need for compromise, but most of the post-1970 agencies were headed by a single presidential appointee.) And the missions of the new agencies were aspirational and open-ended—environmental quality, safe and healthy products and workplaces, consumer protection, nondiscrimination and affirmative participation in all walks of life for a lengthening list of identity groups. The agencies attracted individuals who were not only specialists but also committed activists, motivated by a cause; so they were missionary rather than mediating, and their work was never done—every achievement was a call-to-action for the next crusade.

The new regulatory dynamism complemented and reinforced changes underway in Congress. In the early 1970s, when Congress was commissioning many new executive agencies and programs, it was also decommissioning its own seniority system and hierarchy of strong committees and autocratic committee chairmen. Members were responding to the transformation of American politics that had begun in the 1960s and has continued ever since. Thanks to high affluence, the emergence of consumerist and lifestyle issues, and powerful new communications technologies, political causes were multiplying in number and acquiring new means of pressing their claims on the national legislature. Dismantling Congress's internal structure that controlled and limited its agenda was a step toward accommodating the profusion of new demands.

But Congress remained a legislature, riven by the conflicts of democratic representation and the Constitution's additional, deliberate encumbrances. Delegation to issue-driven agencies and informal rulemaking was the solution to Congress's inability to manage the expectations of modern democracy by its own devices. Creating a new program to "deal with an issue" was much easier than dealing with it directly through legislative process. Members increasingly turned from collective legislating to individual activism—lobbying the agencies on behalf of local or national constituency groups, and vowing to those groups their determination to support or overturn the latest executive foray.

The deterioration of federal policy followed from the new system of efficient, specialized executive lawmaking. Delegation and specialization are cardinal principles of private economic organization, and they have their virtues in government as well—it is difficult to imagine Congress making case-by-case judgments on the safety of new pharmaceutical drugs. But organizing government into hundreds of policy silos, each one combining lawmaking with enforcement and administration, produced insular cultures of power and rent-seeking with many pathologies—excess (infernally complex OSHA rules with little relation to workplace safety), abuse (EPA squashing innocent homeowners whose lots it deems to be "wetlands"), and obliviousness (SEC missing the blatant fraud of Bernard Madoff, an esteemed insider and stakeholder). The alacrity of missionary rulemaking took federal coercion into innumerable crannies of commerce and society better left to voluntary ordering. And the sheer volume of rules overwhelmed efforts at oversight and discipline—the White House review program that I managed in President Reagan's first term, and that all of his successors have

continued, has had little effect on the growth of federal regulation and has not slowed its drift into anti-economic paternalism.

The story of congressional decline goes beyond regulation to include many instances of delegated taxing, spending, and borrowing. Congress now appropriates only a third of annual spending (Social Security, Medicare, food stamps, and other programs are on entitlement autopilot), and even that third is usually approved through continuing resolutions where Congress has little practical leverage over program spending or policies. The abandonment of fiscal discipline has given us large federal deficits in all but four years since 1970 and a mounting, plainly unsustainable federal debt.

But it is the regulatory state that reveals the incapacity of Congress most starkly. It is a regime of concentrated power with a logic and momentum of its own. The executive branch has, for example, combined regulation and finance to great effect. That is how, in the 1990s and 2000s, the banking agencies, Fannie Mae, and Freddie Mac engineered hundreds of billions of dollars of highly leveraged mortgage loans to people who could not afford them, far beyond what Congress could have done through simple subsidies in the light of day—and how, in 2008, the Treasury and Federal Reserve came to the rescue with hundreds of billions of bailout dollars without any congressional appropriation. And that is how the Department of Education's Office of Civil Rights wreaked havoc on men's collegiate sports incidental to promoting women's sports, and is now forcing universities to establish campus courts with easy burdens of proof for cases of alleged sexual assault; neither of these programs could have come close to passing as legislation, and neither even risked informal rulemaking.

Congress retains ultimate authority and could undo such pestilential programs, but it does not. Its latest regulatory statutes, Dodd-Frank and ObamaCare, are executive empowerment documents—launching hundreds of rulemaking proceedings that give agencies unprecedented discretion over matters of momentous national importance. And the Supreme Court, in its *Chevron* line of cases and its decisions on ObamaCare implementation and EPA's greenhouse gas program, has made it clear that it will tolerate wild executive extemporizing with statutory law.

The "executive unbound" has many academic admirers and supporters, and it is easy to see why. The policy intellectual sees a problem in society and conceives a beautiful, carefully designed intervention to set things right. His impulse is to

action: to posit a single "decision maker" with the power and discretion to do what needs to be done. A legislative assembly—representing, in some degree, the very status quo that needs to be reformed—would take things in unpredictable directions. Yet we now have several decades of practical experience with executive-dominated government, and its record is not good. The ObamaCare statute gives the Secretary of Health and Human Services authority to prescribe prices for private health insurance entirely free of the standards, procedures, and institutions that cabined Progressive and New Deal price regulation. No one in the Harvard Faculty Project on Regulation would have thought this was progress.

Is the Representative Legislature Outmoded?

The representative legislature is the product of social thought and political contention going back to the ancient Greeks and Romans, running through the Magna Carta of 1215, and culminating in the seventeenth and eighteenth centuries in the works of, most prominently, Locke, Montesquieu, and the American founders. It became the institutional vehicle of republican aspirations against the prerogatives of kings and despots.

The problem was to devise sources of government authority and succession that were secular, peaceable, and generally accepted as legitimate. The legitimacy criterion meant not only that citizens acquiesced in the government's power and obeyed its commands, but also that the government was in some degree representative—that it embodied, defended, and furthered the characteristic values and interests of citizens and society. Representativeness was achieved, at various times and places, through assemblies of all citizens, of some citizens chosen by lot, or of self-appointed elites such as the barons and church officials who forced the Magna Carta on King John. But in the modern era it was increasingly achieved through democratic choice, in the form of election by citizens; thus, under the American Constitution, the Senate was originally chosen by state legislatures, whom the framers mistakenly thought would chose citizens of stature and accomplishment, but became popularly elected beginning in 1913. In monarchies the legislature held concurrent and countervailing power with the monarch, which over time evolved into the sole power to make law; in republics the legislature was the sole lawmaker from the start, and in parliamentary systems also chose the head of government.

The basic idea of democratically elected legislative government has been open to many interpretations and variations. Some have been questions of

political philosophy or practice that admit of no definitive answer—such as Edmund Burke's question as to whether the representative is an "agent" or "trustee" of his constituents; questions of proportional representation of small parties and of relative representation of cities versus rural areas; and many particulars of district design and election procedure. Others have reflected the growth of individualism and grown with it—the gradual extension of the voting franchise all adult citizens (soon perhaps to include resident noncitizens, i.e. illegal immigrants), and the judicial protection of certain, also expanding, minority rights against majoritarian legislation.

But two basic features have seemed to be implicit in the very idea of the democratic legislature, and have been stable and enduring with little variation or progression. First, representatives represent *geographic territories*—local political jurisdictions or specially designed districts that tile the nation. Second, the selection of representatives in districts, and the decisions of representatives in legislatures, are made by *majority vote*. These features admit of some variation such as those mentioned above. In particular, "majority vote" leaves open the critical questions of the nomination of candidates for election and of the control of the legislative agenda; and of course some issues in some legislative bodies require supermajorities. But the basic features are canonical: territorial representation is the simplest guarantee that the legislature is a "transcript" of society, and majority voting is the simplest guarantee that society's dominant powers can prevail in a manner that is peaceable and generally accepted as legitimate.

The contemporary era has not been kind to this great inheritance.[2] The idea that we should be governed by elected representatives of diverse local districts, who gather to make law by hammering out compromises and counting noses, was conceived and developed when government was naturally constrained by what economists call high transactions costs. When travel and communications were slow and costly, legislative gatherings were crucial occasions for representatives to learn of developments in other regions, to take the measure of far-flung political leaders friend and foe, and to forge alliances and make compromises (whether as "agents" or "trustees") far from the gaze of hometown electorates. When political organizing was costly, interest groups were few and broad-based, and established civic and political elites, including legislative elites, held sway.

[2] The following passage is adapted from Christopher DeMuth Sr., "The Republicans' Congress Problem," *National Review Online,* Jan. 13, 2015.

When surveillance, law enforcement, and program administration were costly, the executive could perforce do only a few things.

Modern affluence and high technology have disrupted all of those functions, initially in the early twentieth century and with increasing force in recent decades. Legislators no longer need to schlep to Washington to find out what is happening around the country, to form positions on political questions, or to plot and dicker with their peers—all of this can be done instantly and at much lower cost through the media, Internet, and direct communications. Well-organized interest groups are able to monitor, reward, and sanction individual legislators to a degree inconceivable in the past, drastically reducing the latitude for deliberation and compromise. Multiplying pressures for government interventions have (as mentioned earlier) overwhelmed legislative capacities and the disciplines of the committee system, while falling costs of administration have magnified the executive's advantages of hierarchy, specialization, and the capacity to add new functions essentially without limit.

The representative legislature has also been a victim of modern habits of mind, which tend to value identity over locality, rationalism over representation, and decision over deliberation. Each of the three branches of American government (which correspond to a division of functions found in all modern governments) has its own distinctive principles of operation and legitimacy. The judiciary's principles are reason and resolution—courts determine the facts of a dispute, resolve the dispute by deduction and inference from texts and precedents, and explain their reasoning publically. The executive's are (since the Age of Jackson) personality and action—presidents incarnate important features of national character and aspiration, dominate political attention and debate, and take personal actions that settle some matters in a stroke and redefine others by changing the "facts on the ground."

The legislature's principles, representation and compromise, are relatively unimpressive. Representing geographic localities is not what it used to be, because of the globalization of commerce and culture and increased personal mobility; locality is not without political importance, but many people today care much more about representation of their personal values, group identities, and vocational and avocational interests. Individual legislators have little capacity for decisive personal action: on their own they can campaign, give speeches and interviews, write letters, question hearing witnesses, and cast votes, none of which

hardly ever resolves anything. Their primary assignment is to negotiate and horse-trade with other representatives of similar, differing, and conflicting interests and values, leading to collective decisions that no one is entirely happy with or, quite frequently, to no decision at all.

The process seems murky and desultory when viewed from a distance, tactical and opportunistic when viewed up close: "Laws, like sausages, cease to inspire respect in proportion as we know how they are made." But that quip, made in 1869,[3] assumes that laws on their own inspire respect, which is a bit outdated at a time when many educated, influential people believe that public policies should be principled and systematic—Michael Oakeshott's "rationalism in politics." Legislative enactments, precisely because they reflect tactical compromises among competing objectives, typically cannot be rationalized from any standpoint of a priori principle.

Judicial Poaching

The legislature's comparative weaknesses are matters of degree: appellate courts decide cases by voting, and dissenters may eviscerate the majority's reasoning; presidents can be indecisive, and their decisions often involve compromises; and legislation is occasionally highly principled (preeminently the Civil Rights Act of 1964, also the aforementioned Airline Deregulation Act of 1978). But the weaknesses are pronounced and increasingly amount to an outright loss of political legitimacy. Consider that, in cases under the Fourteenth Amendment, the Supreme Court has for many decades determined the constitutionality of statutes according to their "rationality." The Court requires greater or lesser rationality from issue to issue, and is particularly demanding of statutes involving sexual practices and lifestyle preferences. The choice is telling because social mores are less suited to rational justification and more to political representation, deliberation, compromise, and learning-through-practice.[4]

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[3] Often ascribed to Bismarck, the remark was actually made by an American, John Godfrey Saxe. See Fred R. Shapiro, "Quote . . . Misquote," *New York Times Magazine*, July 21, 2008.

[4] In contrast, economic legislation is typically highly susceptible to rationalization—for example, as suppressing marginal producers for the benefit of dominant producers. But the courts are lenient in reviewing such laws, in part because they realize legislators are not muddling along but rather know exactly what they are doing.

A case in point is the Supreme Court's recent decision requiring states to recognize same-sex marriages (*Obergefell v. Hodges*, June 26, 2015). Marriage, like many customs, is something most people accept as a given—a matter of religious instruction, human instinct, social evolution, or just inexplicable tradition—rather than something requiring intrinsic justification. The appearance of gay and lesbian couples desiring to be married challenged this conventional acceptance. At first, many state legislators and their constituents found the proposition deeply unsettling, and the debates and laws went every which way, including simple declarations of the convention that marriage is for one man and one woman. But in recent years the balance of debate changed—eleven states and the District of Columbia recognized same-sex marriage by legislation or referendum, and more were poised to do so when the courts (state and federal) got into the act, effectively mandating the practice in another twenty-seven states.

Systematic logic played a role in the shift: to the argument that the purpose of marriage is to foster and protect childbearing, gay marriage proponents countered that states have always permitted elderly and infertile people to wed—demonstrating that marriage is also for the happiness and security of couples themselves. But by far the most important factors were practical experience, learning, sympathy, and changing terms of understanding and compromise.[5] It turned out that the desire of gay and lesbian couples to marry was genuine and widespread—not, as many initially assumed, a few activists pulling political stunts. Denying marriage to same-sex couples imposed immediate costs on them—and also on their adopted children, which cast the issue of children's welfare in a new light. And the countervailing benefits became increasingly ambiguous: majorities (composed mostly of heterosexuals of course) began to support same-sex marriage, and prominent advocates of traditional marriage and "family values" began to argue that the institution of marriage—personally demanding, socially beneficial, and in decline—might benefit from an infusion of enthusiastic new recruits.

There were many arguments and adherents on the other side, but the change in opinion was dramatic.[6] And as the Court took up the "rationality" of state

[5] A particularly impressive instance of legislative compromise is recounted in Niraj Chokshi, "Gay Rights, Religious Rights and a Compromise in an Unlikely Place: Utah," *Washington Post*, April 12, 2015.

[6] See Karlyn Bowman, Eleanor O'Neil, and Heather Sims, "Public Opinion on Same-Sex Marriage: Anatomy of a Change," American Enterprise Institute, June 2015.

denials of same-sex marriage, opinion had also shifted on the propriety of the Court's resolving the matter once and for all—an April 2015 NBC News/*Wall Street Journal* poll found that 58% favored "the Supreme Court legalizing gay marriage throughout the US," with 37% opposed.[7] A prominent legal pundit wrote that states now have "no good reason to deny recognition to gay and lesbian couples who seek to marry. ... At this point, the Court has only two choices: to vindicate the demands of equality and liberty, or to validate discrimination. There is no third way."[8] And the decision, when it came, was popular; opponents mostly confined themselves to the constitutional weakness and gauzy rhetoric of the Court's opinion, and to the subsequent issue of protecting the civil liberties of religious and other objectors to gay marriage. On other Fourteenth Amendment issues such as abortion, the Court had risked its own political legitimacy by lending it to one side of a divisive moral debate. But on single-sex marriage, the Court snatched legitimacy for itself from the representative legislature.

Executive Poaching

The executive branch has also gained political legitimacy at the expense of Congress. Its chief, the president, has a national electoral mandate, a continuous personal presence in the public square, and the capacity for decisive unilateral action. But these attributes, impressive as they are, cannot sanction an apparatus as vast and variegated as the executive branch has become, with tens of thousands of "unelected bureaucrats" making, interpreting, and enforcing law, usually well beyond the president's purview. The agencies have responded to this problem by crafting their own forms of legitimacy—based on rationalism (borrowed from the courts) and representation (borrowed from Congress and modernized).

Rationalism was initially imposed by the courts, but it was for the agencies' own good. The statute establishing informal rulemaking (the Administrative Procedure Act) requires that agencies provide a "concise general statement" of the rationale for a final rule. But as rules became increasingly complex, costly, and consequential, courts demanded more—that agencies explain and justify their rules in elaborate detail, and respond with particularity to the arguments and evidence submitted by rulemaking participants. The courts needed the information to sustain their own review of newly ambitious rules, but more was involved.

[7] Ibid at page 16.

[8] David Cole, "Gay Marriage: Unthinkable or Inevitable?", *New York Review of Books Blog*, April 29, 2015.

Their demands for fuller explanation came just when they were growing *less* demanding in their standards for deciding rulemaking challenges, giving Congress and the agencies greater leeway to fashion a highly discretionary regulatory state. The courts had a stake in the success of the enterprise, and they well understood the importance to the unelected lawmaker of rational (or at least rationalized) explication.

The agencies took the lesson on board, and devoted increased attention to "transparency" and persuasion. The White House cost-benefit requirement added another dimension to rationalized rulemaking. Its primary purpose was to improve the substance of regulatory policies, but a secondary purpose was to improve agency transparency: the program's overseers (including me and most of my successors) preached that clear exposition of benefits and costs would further public understanding of what the agencies were up to. Over time, however, the secondary purpose took over, and the cost-benefit requirement became corrupted into a public relations tool. If you visit agency websites today, you will find proclamations of fabulous net benefits from their new rules, especially those concerned with health, safety, and energy efficiency, that are in fact egregiously wasteful and uneconomic.[9]

Agencies developed a new, customized form of representation by using rulemaking notice-and-comment procedures to assemble political coalitions in support their policies and programs. Not every rulemaking participant is happy with any final rule, of course—often many are furious, and take the agency to court. But all who are continuously affected by an agency's mission are obliged to

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[9] An example is the background of the power-plant air pollution rule at issue in *Michigan v. EPA* (Supreme Court, June 29, 2015). The agency's "Regulatory Impact Analysis" estimated that the quantifiable health benefits of the rule would be $37 to $90 billion per year, at a cost of $9.6 billion per year, and EPA officials and press releases touted these figures insistently. An order-of-magnitude ratio of benefits to costs! A win-win for more jobs and better health for all! But essentially all of the advertised benefits were ancillary—they came not from reducing mercury and other "toxic" emissions (the purpose of the rule) but rather from reducing other, conventional emissions already controlled through other regulatory programs. EPA did not take account of these benefits at all in fashioning its rule, and, if it had, it would have opened itself to well-grounded criticisms that the estimates were wildly exaggerated and could have been more easily achieved through other measures. EPA's actual estimate of the rule's quantifiable annual health benefits of reduced mercury and other toxic emissions was $4 to $6 *million*. See Slip Opinion at page 4.

learn to live with its rules and people and norms of conduct: they thereby become insiders and "stakeholders" invested in the agency's essential legitimacy. In this manner, regulatory participation has become a substitute for the legislature's electoral sanction.

There is now a substantial academic literature on "discursive" representation, which contrasts the virtues of specialized, knowledgeable, engaged political participants with the well-known deficiencies of legislative electorates—passive, ignorant, intermittent rather than continuous, and arbitrarily (because geographically) contrived. Much of this literature is aimed at legitimizing "customary international law" and supra-national bureaucracies such as those of the EU in the face of criticisms that they suffer a "democracy deficit." But it also focuses on sub-legislative institutions, and its theorizing applies powerfully to what the regulatory state has become: a regime of ad hoc, non-electoral, administered democracy.[10]

The agencies certainly do not regard themselves as unaccountable or unrepresentative. They invite everyone to join in their proceedings, and they make themselves available and accountable to those who take the trouble to show up. And their decisions have national constituencies; in every case they represent the interests and values of large numbers of voters, often more thoroughly than the voters' own legislators.

[10] A few examples: John S. Dryzek and Simon Niemeyer, "Discursive Representation," *American Political Science Review,* 102 (2008) 481, 492 ("Discursive representation could be formalized, especially in connection with growing enthusiasm for the constitution of mini-publics to deliberate complex and controversial policy issues, and as a way for governments to meet mandated requirements for public consultation"); Archon Fung, "Democratizing the Policy Process," in *The Oxford Handbook of Public Policy* (R.E. Goodin, M. Moran, and M. Rein, eds., 2008) 667, 677, 681 ("Reforms in administrative law, in particular the Administrative Procedure Act regulating federal rule making, create opportunities for affected parties to engage directly with federal agencies in ways that bypass structures of political representation. … Rather than conceiving deliberation and participation as alternatives to representation, it is perhaps more fruitful to explore which combinations of institutions and procedures best advance democratic values such as state responsiveness for various issues and political contexts"); and Mark E. Warren, "Democracy and the State," *The Oxford Handbook of Political Theory* (J.S. Dryzek, B. Honig, and A. Phillips, eds., 2008) 382, 397 ("… it is likely that states will support, oversee, enable, and back-up many new political processes organized around issue complexes rather than territories. … [so as to] transform citizenship in such a way that 'the people' is constituted on an issue-by-issue basis …").

Forms and Predicates of Legislative Reconstruction

The eclipse of Congress is a perilous development for individual liberty, economic welfare, and political stability. All of them depend on distinctive attributes of the broadly representative legislature that modernity has not eclipsed. Efficient, specialized executive government dispenses with the need for lengthy deliberation and a strong consensus for action before the coercive power of the state may be set in train. And it greatly reduces the range of necessary deliberation among competing interests. Each interest is provided its own program whose mission is uninhibited by the need to accommodate broader interests; compromise is intramural, confined to those with direct interests, and pursued through narrow channels of rulemaking and litigation. In the delegated regulatory state, the multiplicity of factions in society does not inhibit but rather fuels the size and range of government.

Most of all, executive government is a regime of concentrated power, unifying lawmaking, surveillance, enforcement, and dispute-resolution in a single apparatus. This is a time-proven recipe for abuse, corruption, and, ultimately, political instability. In the American system, competition among the three branches, each with separate sources of authority, is the essential mechanism for keeping government tolerably honest and public-spirited between elections. Today, Congress is an adjunct to the executive—a reverse parliamentary system—when the president's party controls at least one chamber, as in 2009–2014; and when, as since January 2015, the opposition party controls both chambers, it mainly heckles from the sideline.

The purpose of congressional reconstruction should therefore be practical and specific: to enable Congress once again to pull its weight in the balance-of-power system that we have inherited and are not going to replace. Obviously, doing so will require confronting the powerful forces of modernity described in the previous section. I believe we should pursue two avenues of reform, one within Congress itself and one in the larger world of political thought and debate.

Internal reform would consist of changes Congress could, in theory, effect on its own, either through revised structure and procedures or through legislation a president would be likely to sign. The difficulty is that the needed reforms run counter to the political incentives of many members who have prospered under the current system of single-member activism and grown unused to collective

legislating. Last fall, in an essay in *The Weekly Standard*,[11] I attempted to solve this dilemma by imagining that our current period of fully divided government might be an auspicious time for Congress to begin reviving its dormant constitutional powers. A conservative Republican Congress, facing a leftist Democratic president, might want to relearn how to play checks-and-balances effectively. I proposed five steps:

1. Reclaim the enumerated taxing, borrowing, and appropriating powers Congress has delegated to the executive in recent decades, through "constitutional housekeeping" legislation that does not raise any issues of partisan contention with the Obama administration.
2. Return to the procedures of the Budget Act of 1974 and place all of the executive agencies on regular annual appropriations—and follow through by building a merit-based hierarchy with strong committees and committee chairmen.
3. Begin to undelegate regulatory authority by passing laws that supplant agency rules with legislative policies—again steering clear of partisan bills, such as ObamaCare revisions, that the president would surely veto. (I suggested high capital standards for banks and FDA-review exemptions for smartphone health apps, both of which have bi-partisan support).
4. Pass concurrent resolutions of censure or disapproval of unconstitutional executive actions, explaining clearly the nature of the violations.
5. Give the executive its due through a constitutional line-item veto and a procedure for unwinding excessive congressional micromanagement of executive prerogatives.

Not all of these ideas have skyrocketed to the top of the Republican agenda. It is not hard to see why. For Congress to retake ownership all taxing, spending, and borrowing, for example, would mean revealing the actual (higher) current levels of all three, which would be inconvenient to Republican political positioning as well as to several budgeting protocols.

Still, there has been notable progress. The Republican leadership has declared its determination to return more policy authority to the authorizing and appropriating committees and their chairmen. The budget committees have made an excellent start on passing budget resolutions and setting the stage for passing twelve regular appropriations by early fall—a predicate for reinsinuating congres-

[11] "A Constitutional Congress?", Oct. 27, 2014.

sional influence through appropriations riders and the like. A spirit of bi-partisan legislative cooperation has appeared on many fronts.[12] The leadership has been frustrated at its inability to respond effectively to administration initiatives in immigration policy, Internet regulation, greenhouse gas regulation, and other areas, which may deepen its commitment to structural reform.

The important thing for now is that measures for congressional vitalization be actively developed and debated. A rearmed, self-confident Congress is not the solution for everything that ails American government, and the trade-offs and potential adverse consequences need more examination that they have received. Powerful committee chairmen, for example—the Jamie Whittens and John Dingells of days of yore—were "men of Congress" willing and able to rein in errant agencies and stand up to presidents of either party. But they were also ferocious champions of their own parochial policies and schemes for interest group exploitation of the general public, often in league with executive agencies.

Now the executive branch is specialized and hierarchal, and a Congress that can counterbalance it will need to be specialized and hierarchal also—so we are just going to have to find ways of policing the excessive parochialism and personal fiefdoms that go with them. The glare of publicity that now attends congressional leaders could be part of the solution. Another part—I think indispensible— is the cultivation of a strong internal meritocracy that emphasizes mastery of policy fields, devotion to broad political principles (different of course for the two parties), and skill at articulation, debate, and the arts of legislative compromise. The committee chair in this conception would be powerful but accountable (and untenured). This is not a fantasy—witness the decision of the estimable Congressman Paul Ryan, 2012 Republican vice-presidential nominee and a natural to join in the 2016 presidential sweepstakes, to instead stick to his legislative knitting, now as chairman of the Ways and Means Committee.

It is in the nature of the representative legislature that it reflects the full range of ambitions, prejudices, and capabilities abroad in society. It is therefore naturally unruly and regularly succumbs to transitory enthusiasms and populist ruses. But if Congress is to find a useful place in contemporary government, it will have to channel its democratic energies through a structure that is not only specialized (as it once was) but also to a degree professional and competitive. All

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[12] Jon M. Huntsman Jr. & Joe Lieberman, "Congress Slowly Building Bipartisan Brawn," *Real Clear Politics,* May 3, 2015.

the better if this leads to improved capacities for resolution and reasoned explication—capacities the other branches have been using to Congress's disadvantage.

To press these points let me offer two further, aggressive proposals for unleashing "energy in the legislature":

First, cut back to near abolition the Senate filibuster (which effectively requires 60 rather than 51 votes to pass a bill) and Senate "hold" (whereby an individual member can prevent a scheduled motion from reaching the floor). In the past, these procedures were rare and limited to cases of unusual minority and home-state opposition, because employing them was onerous and strongly discouraged by Senate culture. Today they are frequent, costless, and employed routinely to delay or prevent legislative action for reasons of simple opposition, non-germane tactic, and personal advantage. Republicans and conservatives tend to favor the current practices, and Democrats and progressives to oppose them, because both sides see them as slowing the pace of lawmaking and therefore of government growth. But this construct is out of date. The great engine of government growth today is executive lawmaking, punctuated by spasms of legislation (ObamaCare, Dodd-Frank) that propel new executive exertions which Congress is then helpless to moderate. The filibuster and hold have become mechanisms of legislative passivity in the face of executive activism, and of the regression of Congress to a congeries of solo practitioners.

Congressional lawmaking cannot hope to keep pace with executive lawmaking unless the Senate drops its House of Lords pretensions and becomes a majority-vote legislature. Congress as a whole would remain a super-majority institution, because of bicameralism and the different electoral bases of the two chambers; and Senate super-majorities could be reserved for some exceptional cases, such as confirmation of life-tenured judges, in addition to those such as treaty ratification specified in the Constitution. But for regular legislation it would cease to be the minority-veto assembly described by Hamilton in *Federalist 22*: "Its situation must always savor of weakness—sometimes border on anarchy." Congress's capacity to thwart executive initiatives with legislation, used occasionally and always lying in wait, would moderate agency conduct and make presidents more compromise-minded. Congress would not always prevail but it would be in the game.

As for the larger worry about the growth of government, Republicans and conservatives need to overcome their fear of majoritarian legislation. After all

they currently control both houses of Congress and most of the state legislatures, and they have become steadily more populist as Democrats and progressives have become steadily more elitist. They have no chance of re-limiting government without a program of effective legislative resistance to regulatory growth. That will also increase the likelihood of both conservative and progressive legislation. If there is a legislative bias to "do something" rather than "undo something," it arises from aspects of the political culture that, one way or the other, conservatives will need to change. A strategy of legislative slow-walking is inadequate to the challenges conservatives currently face.

Second, require that campaign contributions to members of Congress be made anonymously. Most every program for congressional reform includes a proposal for restricting campaign contributions or tightening conflict-of-interest rules. I am dubious about these schemes. A government that distributes $4–5 trillion annually (counting regulation as well as direct spending) is bound to attract tenacious efforts to influence its decisions that are highly resistant to regulation. Moreover campaign donations are far less "transactional" than expenditures on congressional lobbying and on executive lobbying and rulemaking participation..

More worrisome, and more pertinent to congressional reform, are the enormous amounts of time members spend on fundraising, the enormous efforts lobbying firms now devote to monitoring the day-to-day activities of members, and the damage to Congress's reputation of the popular belief that members' votes are for sale. Donor anonymity could be a powerful antidote to these problems. Donations to individual members would be unlimited as to amount, but beyond a certain level (say $1,000) they would be required to be made anonymously, through an intermediary organization, with appropriate safeguards and robust sanctions for disclosure.[13]

Anonymity would mainly suppress the most blatant of *quid pro quo* donations, with less effect on those from friends and admirers and politically motivated large donors. Combined with the lifting of donation limits, its net effect could be positive for many legislators. But its purpose would not be "campaign finance reform" but rather legislative revival. Congress would be declaring itself an

[13] Versions of this idea are advanced in James L. Buckley, *Saving Congress from Itself* (2014), page 77, and Bruce Ackerman and Ian Ayres, *Voting with Dollars: A New Paradigm for Campaign Finance* (2004).

institution with purposes and interests of its own—countenancing a certain distance from the firms and organized groups whose interests are immediately affected by its decisions, and a certain space for internal deliberation, compromise, and choice. The reform would also free up many hours of each day that members currently devote to personal fundraising (they would not be prohibited from fundraising, but would not be nearly as maniacal about it as they are today). It would advance the integrity and reputation of Congress, and also—at least this would be the point—its self-confidence and effectiveness.

These and other reforms aimed at strengthening the institutional Congress will be resisted, regardless of their merits for achieving that aim, by many members of Congress who are content with things as they are. Disrupting an institutional status quo always requires pressure from the outside, and here—in the absence of the private market's "gale of destructive competition"—that pressure must be political, intellectual, and cultural.

There are some promising auguries in current academic thinking. Neomi Rao of George Mason University Law School argues that the disuse of the constitutional nondelegation doctrine has been a key factor in congressional decline, and that its revival would lead to a more muscular Congress of "collective choice."[14] A new school of "political realists" argues that pragmatic compromise and backroom deal making are essential to holding a fractious society together.[15] A useful extension would dust off Jürgen Habermas's powerful arguments for sustaining open-ended democratic conversation against the modern prestige of administrative rationalization,[16] and extend them to the circumstances of today's representative legislature.

I will close this essay with the suggestion that conservatives and libertarians have a special responsibility in the debates over legislative reconstruction. Most

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[14] In "Administrative Collusion: How Delegation Diminishes the Collective Congress," forthcoming, *New York University Law Review.*

[15] Jonathan Rauch, *Political Realism: How Hacks, Machines, Big Money, and Back-Room Deals Can Strengthen American Democracy* (2015), and "Rescuing Compromise," *National Affairs*, Spring 2013; Mark Schmitt, "Democratic Romanticism and Its Critics," *Democracy,* Issue 36, Spring 2015; and Richard H. Pildes, "Romanticizing Democracy, Political Fragmentation, and the Decline of American Government," 124 *Yale Law Journal* 804 (2014).

[16] *The Theory of Communicative Action* (1981); cf. *The Structural Transformation of the Public Sphere* (1962).

arguments for particular congressional reforms—restoring regular order and annual budgeting, empowering the committee chairs, eliminating roadblocks to legislative resolution—are determinedly bi-partisan. We are not prejudging whether a well-organized Congress would tilt right or left, the advocates say, but just want to restore its ability to make needed public decisions one way or the other. This spirit is understandable but highly incomplete.

The powerful, unconstrained, dysfunctional executive state is the apotheosis of Woodrow Wilson progressivism and of Theodore Lowi's "interest group liberalism"; when push comes to shove, contemporary progressives and Democratic Party activists will fight to preserve it (although a few old-fashioned liberals of the Arthur Schlesinger Jr. variety may join the reformers). And a government where more decisions are made by Congress and fewer by executive agencies is going to be a smaller government, simply because of the incorrigible cumbersomeness of legislative decision-making. To say that the purpose of congressional reform is to restore constitutional balance is something of a slight: its purpose is also to restore limited government to some degree, because Congress's inefficient structure and procedures are themselves vehicles of limited government. An Article I–dominated government would miss many momentary opportunities for intervention that executive agencies would seize with alacrity; and when the agitations subsided or the problems solved themselves without a new federal program, conservative and libertarian precepts would be vindicated.

This suggests in turn that conservatives and libertarians add a new line of argument to their rhetorical arsenals. Their political arguments, like those of progressives and liberals, tend to be abstract and focused on ultimate values—individual liberty, economic growth, protection of tradition. But the arguments for reining in the executive state and moving more decisions to Congress are practical and intermediate—concentrated power leads to abuse, the government is simply doing many more things than can possibly be done well, crumby programs have become immune to reform. Arguments such as these have the additional advantage of appealing to the pragmatic spirit of everyday Americans who focus on political questions only casually or intermittently.

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CONGRESS INCONGRUOUS — RESPONSE TO COMMENTARIES

Christopher DeMuth Sr.

Liberty Law Forum; August 2015

I am grateful for the smart and informed commentaries on my Liberty Law Forum essay by John Samples, Gordon Lloyd, Michael M. Uhlmann, and those who posted shorter comments. They do not, I think, call for point-by-point author responses, but reading them altogether suggests that I should say a few words about the motivations and purposes of my piece.

My essay is concerned with the decline (as I see it) of *Congress*, not the decline of the Constitution's separation-of-powers arrangements. Although the two are obviously related, congressional decline is a distinct and more recent development and admits of distinctive corrective measures.

I am aware that the federal government's operations departed from the framers' conceptions and provisions early on, especially with the emergence of political parties beginning in the late 1790s and the popular democratic presidency beginning in the late 1820s. I know, too, that many further and deeper departures were wrought during the 1900–1960 period by the Progressive movement, the New Deal and the Supreme Court's acquiescence in it, and the consolidation of a federal government of plenary national powers.

I focused on the changes in government structure that began approximately in 1970 because, in contrast to what had come before, they were occasioned by changes in the nature and functioning of Congress. During previous periods when the executive was on the march, when the courts were abandoning enforcement of constitutional requirements and restrictions, and when the states were surrendering political autonomy to federal expansions or their own collectivist schemes, Congress remained a relatively robust institution.

The early innovations of parties and the democratic presidency did mean that, at times when one party controlled both political branches, Congress was less independent, and did less checking and balancing, than the framers envisioned. But even then Congress remained jealous of its constitutional powers, engaged in actual legislating, and defeated or compromised many executive ambitions. In the 1930s, when the nation was in economic crisis and a hugely popular president enjoyed whopping party majorities in both Houses, regulatory delegation had to

be *extracted* from Congress by aggressive presidential lobbying and dispensing of favors and imperious appeals to public opinion.

The period since 1970 has been fundamentally different. Presidents and agencies have still extracted (or seized) legislative powers when they thought this was feasible and advantageous, but the overarching trend has been for Congress to transfer lawmaking to the executive branch *voluntarily and proactively*. The initial, early-1970s instances of regulatory delegation were the work of a Democratic Congress facing a Republican president (and many later ones occurred at times of at least partially divided government). They handed the executive lawmaking powers much more comprehensive than those in the New Deal and Progressive statutes. Later, and with increasing regularity over time, Congress proceeded to relinquish its crown jewels—its appropriating, taxing, and borrowing powers—which would have been inconceivable in earlier eras.

These trends began when Congress dismantled its internal hierarchy of member seniority and powerful committees, whose leaders had previously (albeit with more and less force during different historical periods) guarded Congress's Article I prerogatives vis-à-vis the executive and disciplined their exercise. The trends gathered steam with the subsequent "atomization" of Congress into single-member political entrepreneurs.

My essay describes these developments and links to other writings on the subject. It begins with a personal anecdote; let me add another one here. I was present at the creation of the EPA and modern environmental policy, working as a young staffer in the Richard Nixon White House in 1969 and 1970. We believed that the federal government's impending thrust into pollution control and environmental restoration would and should include not only agency regulation but also substantial components of congressionally controlled taxation and financing (our initial design was for an Environmental *Financing* Agency—"EFA").

We were wrong, and surprised by the discovery. In 1970, President Nixon proposed a national tax on SO_2 emissions—but could not find a single member of the House of Representatives of either party to sponsor it. Congressional opinion, led by senators Edmund Muskie (D-Maine) and Henry M. Jackson (D-Wash.), was strongly for turning environmental policy over to agency rulemaking and litigation, with certain spec'd-in advantages for environmental groups to keep them competitive with industry groups.

That is what we got, with the exception of congressional standards for motor vehicle emissions and grants for municipal wastewater treatment. When Congress declined to legislate a cap-and-trade program for controlling greenhouse gas emissions in 2010, leaving the matter to EPA and the courts, it was following longstanding precedent.

Now I have a hypothesis for congressional decline and the emergence of executive government, also advanced in my essay and the other pieces mentioned above (and also here). It is that they are the result of the growth of wealth, education, and technological mastery (especially in communications and information), and certain cognate cultural changes that my essay called "habits of mind." These developments, I claim, first became pronounced in the late 1960s, and have, among many other things, worked increasingly and relentlessly to the disadvantage of the representative legislature and advantage of the executive. Their effects on Congress have been parallel to and derivative of their broader effects in politics and society. They have "atomized" morality, social order, and the sense of political community (Robert Nisbet, *Twilight of Authority*, 1971). They have "atomized" political institutions from parties to election campaigns (Anthony King, "The American Polity in the late 1970s: Building Coalitions in the Sand," 1978). And they have "atomized" Congress (James Q. Wilson, "American Politics, Then & Now," 1979; Allen D. Hertzke and Ronald M. Peters, Jr., eds., *The Atomistic Congress*, 1992).

The federal executive, and to a lesser degree also the federal courts, have filled the breach. They have done so because their innate characteristics—their formal structures of authority and capacities for action and decision—have been relatively resistant to the disintegrating tendencies of wealth, technology, and cultural individualism, and in many respects have benefitted from them. The executive in particular has been able to take unique advantage of new information and communications technologies. The botched initial rollout of the ObamaCare insurance exchanges was just a hiccup in the deployment of a system for consolidating information on the incomes, health status, tax histories, and private engagements of millions of citizens, and similarly detailed information on the firms that insure and employ them.

This hypothesis is primarily a heuristic at this point, but it does help to explain the secular trend of our constitutional transformation. The Progressives' anti-Madisonian theorizing on the advantages of administrative government was

mostly aspirational during the Progressive Era itself; it first took serious hold on government structure twenty years later, with the Depression and New Deal, and was fully realized in the decades following 1970.[17] The Supreme Court's 1937–1942 revolution in constitution doctrine gave Congress capacious powers of national economic regulation that it began to exercise aggressively only thirty years later, in the mid-1960s. The practice of informal rulemaking was established in the Administrative Procedure Act of 1946, but lay dormant for twenty-five years before it was suddenly seized upon, with tremendous effect, both by the new 1970s agencies and also the previously adjudicative New Deal and Progressive agencies such as the SEC, FCC, and FTC. My explanation is that federal powers and abilities conceived in earlier eras realized their potential only when economic advance and cultural change made them politically potent and administratively practicable.

It is this view that led me, in my essay, to focus on congressional rather than constitutional reform. I am an advocate of a moderate nondelegation doctrine, and of a resuscitation of many of the Constitution's provisions that enforce the separation of powers and limit the domain of the federal government. I am for stricter judicial review of regulatory decisions, and for making agency rulemaking more formal, evidentiary, and adversarial. But I cannot help noticing that the tendency of contemporary law and policy has been strongly in the opposite direction on every point, and has been furthered by judges and elected officials of both parties, including more than a few self-styled conservatives and originalists. Something deeper must be afoot than that people of my persuasion have been losing arguments in the law journals and policy magazines. I believe that something is the profound economic and cultural developments of modern times.

So I am taking a different tack, trying to conceive a role for the representative legislature that is (a) consistent with modern politics and (b) useful in addressing the most serious problems of modern government. My recommended reforms aim to make Congress more independent and decisive and to channel its members' energies toward deliberation, compromise, and "collective choice." That would make the body much more effective at checking and balancing the

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[17] Woodrow Wilson's first and greatest triumph for expert administrative government, the Federal Reserve System established in 1913, acquired vastly greater regulatory powers over banks and finance in the late twentieth century and even more, of course, in recent years. His second and last triumph, the Federal Trade Commission established in 1914, did not even acquire rulemaking power until 1974.

executive—but at significant cost to individual members, who would need to relinquish some of the personal prerogatives they have acquired under current delegate-and-lobby arrangements, and fashion new means of advancing their careers. The trick is to make the legislative calling prestigious and admirable to the modern mind, or at least understood and tolerated. That is why I hail the new intellectual school of "political realism" and call for reexamination of Habermas.

Such a legislative restoration, if it could be achieved, might do more than restore constitutional balance. Congress is not only a branch of power but also a selfie of the nation in full. It not only represents the populace but also portrays it—not with perfect resolution by any means, but well enough to show each of us how we look and where we stand in the throng of fellow citizens who are our legal and political equals. A citizenry that permitted this portrait of its collective self to play a more central role in its government would need to be more liberal in the classical sense than ours has become. It would need to be more patient with disagreement, including intractable disagreement; more alert to the improving potential of dialogue, even when no decision ensues; less insistent on comprehensive plans and final solutions and capacious application of state coercion; and more attuned to the relative advantages of imperfect private markets and voluntary ordering.

Contemporary attitudes to the contrary may prevent a congressional restoration, but not necessarily. Social norms are, to a significant degree, adaptations to prevailing circumstances, and they have often adapted expeditiously, for better or worse, to top-down ("exogenous") changes in political forces and institutions. The regulatory state exhibits many pathologies and is probably at least as unpopular as Congress. It is entirely possible that a crisis or sequence of events within government could open the way for a legislative resurgence, which would then get the ball rolling on moderating popular attitudes and expectations.

American government and politics are in a bad way, and there are three broad strategies for improvement, each one discussed in the commentaries. The first is action from within the system aimed at improving its policies—such as running for office, serving in government or training others for service, advocating certain policies in books and op-eds, and mounting litigation on constitutional and other issues of public law. The second is action from the outside aimed at reforming the system itself—such as Charles Murray's *By the People* organized resistance to regulatory edicts, and the movement for an Article V state-convened constitution-

al convention. The third is action aimed at reforming the system from within—such as the congressional reforms I have suggested. The third, institutional reform strategy is a bit tedious to the politically engagé, but I think it is best suited to the problems we face, and in any event has been underemphasized and deserves more effort. Also, I live in Washington and like to work on problems that are close at hand and matters of immediate experience. Finally, institutional reform forces one to consider, unromantically, the interplay of government and society, and this may contribute to progress on the other two fronts as well.

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