Congress and the Constitution

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Introduction

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Congress is the first branch of government established by the Constitution. Its priority within the constitutional text reflects the substantive importance that the Founders expected the legislature to have in the political system and its significance within their political theory. It was Congress, armed with the authority provided by popular election, that was expected to enjoy the greatest public support and to dominate national politics. It was Congress that would shoulder the task of making national policy and setting the national political agenda. It was Congress that carried the Founders' hopes for the success of the constitutional experiment, but it was also Congress and its frenetic ambitions that required the most careful attention at the constitutional convention in Philadelphia and the most detailed limitations in the constitutional text. Congress was at the center of the constitutional enterprise.

At the opening of the twenty-first century, Congress remains important and vibrant as a governmental body. While legislatures elsewhere have been reduced to mere sanctioning bodies for executives who do the real work of governance, Congress remains vital. Even so, Congress has not enjoyed great public esteem and is more likely to be seen as a threat to constitutional values than an embodiment of them. It is now, as one study of public opinion found, often regarded as a "public enemy." It routinely ranks a poor third in surveys of public confidence in the three branches.[1] Scholars and citizens alike perceive Congress as an arena of partisan conflict and electoral pandering, hardly as a bulwark of constitutional principles.

There has been little sustained attention to congressional treatment of the Constitution and constitutional issues. It has simply not been part of the research agenda of congressional scholars, who unsurprisingly have been preoccupied with other concerns that are perceived to be closer to the

heart of legislative politics and more amenable to systematic study. Constitutional scholars have generally turned a blind eye to Congress as well. The study of the Constitution has largely been defined within the academy as the study of constitutional law as produced by the courts. From this perspective, Congress is a target of constitutional law, not a producer of it.

After long neglect, the time is ripe for more sustained study of Congress as a constitutional interpreter and responsible constitutional agent. Recent Supreme Court decisions have focused attention on the constitutional powers and responsibilities of Congress, and the sustained judicial inquiry into the relationship between Congress and the Constitution has encouraged a heightened awareness of Congress in constitutional scholars as well. At the same time, a somewhat independent scholarly turn to the "Constitution outside the courts" has opened up space for considering extrajudicial constitutional interpretation and the relationship between nonjudicial political actors and the Constitution. Now that constitutional scholars have begun to look beyond the courts, we believe a more careful examination of the Congress as an institution and a political entity will be needed in order to fully understand, appreciate, and evaluate congressional engagement with the Constitution.

CONGRESS AND THE SUPREME COURT

Judicial review was a political practice largely unknown before ratification of the U.S. Constitution. Indeed, the practice was so exotic that it did not even acquire a name until the beginning of the twentieth century. In its most paradigmatic form, judicial review involves the articulation and enforcement of constitutional constraints against Congress. This was, of course, the power discussed by Chief Justice John Marshall in *Marbury v. Madison*:

> The powers of the legislature are defined, and limited; and that those limits may not be mistaken, or forgotten, the constitution is written. To what purpose are powers limited, and to what purpose is that limitation committed to writing, if these limits may, at any time, be passed by those intended to be restrained?. . . . It is a proposition too plain to be contested, that the constitution controls any legislative act repugnant to it; or, that the legislature may alter the constitution by an ordinary act. . . . It is emphatically the province and duty of the judicial department to say what the law is. . . . [and if] the courts are to regard the constitution; and the constitution is superior to any ordinary act of the legislature; the constitution, and not such ordinary act, must govern the case to which they both apply.[2]

By this logic Marshall sought the constitutional and political authority for the judiciary to set aside the work of a coordinate, and more electorally responsive, branch of government. Both Congress and the Court were agents of the Constitution established by the people, and the justices could not "close their eyes on the constitution, and see only the law."[3] Just over a decade after the Constitution was ratified, Marshall already sought to represent Congress as a troublesome constitutional agent, too much prone to forgetting the limits to its own powers. To rely upon Congress as a constitutional interpreter would give "to the legislature a practical and real omnipotence" and "subvert the very foundations of all written constitutions."[4] The seeds had been planted for regarding the legislature as a threat to, rather than a guardian of, the Constitution, and in turn for regarding the judiciary as the "ultimate interpreter" of the Constitution.[5]

If *Marbury* marks the paradigmatic case of judicial review, it also marks the relatively exceptional case. It is famously, if inaccurately, observed that after declaring a minor section of the Judiciary Act of 1789 unconstitutional in *Marbury*, the Court did not strike down another act of Congress for half a century, in the ill-fated *Dred Scott* case.[6] Though the Court has occasionally turned its constitutional fire on Congress, most notably during the standoff over the New Deal, it has far more often used the power of constitutional review against state and local governments. Over its history, the Court has struck down state and local statutory provisions in eight times as many cases as they have in cases involving federal statutory provisions, and many of the Court's most celebrated, and controversial, decisions have come in reviewing state laws. Although such decisions have often generated populist rhetoric about the antidemocratic nature of judicial review and sparked national political controversies, they do not stem from the constitutional principal-agent reasoning laid out by Marshall in *Marbury* but from the less contested logic of national supremacy.

Thus it was all the more striking when the Rehnquist Court embarked on its sustained assault on congressional power. Although the Rehnquist Court has not matched the Hughes Court that attacked the New Deal in intensity and significance, it has made up for that in endurance.[7] The Court struck down more acts of Congress in the 1990s than in any previous decade, including the 1930s. It has established doctrines that promise to continue to pinch Congress into the future. The justices have accompanied all

this with strongly worded opinions denigrating the authority and capacity of Congress to interpret the Constitution.

The Rehnquist Court's offensive against Congress truly began in 1995. In that year the Court struck down federal statutes in four cases, the most since 1983. Of greater note was that in *United States v. Lopez*, the Court for the first time since the New Deal struck down an act of Congress as exceeding federal authority under the interstate commerce clause. Whereas the New Deal Court had established a pattern of deference to congressional judgments as to the extent of federal power relative to the states, *Lopez* suggested that the Court might now look more skeptically at such legislative judgments. That suggestion was given substance over the next several terms as the Court struck down numerous statutory provisions on a range of federalism grounds.

Consider, for example, the Court's decisions involving Section Five of the Fourteenth Amendment. Section Five gives Congress the "power to enforce, by appropriate legislation, the provisions" of the Fourteenth Amendment. In *City of Boerne v. Flores* (1997), the Court struck down the Religious Freedom Restoration Act (RFRA) as an inappropriate use of the Section Five power. With RFRA, Congress had sought to overturn the effects of the Court's decision in *Employment Division v. Smith* (1990), which changed the standard that the Court used to determine violations of religious free exercise. In *Boerne*, Justice Anthony Kennedy instructed, "[Congress] has been given the power 'to enforce,' not the power to determine what constitutes a constitutional violation. Were it not so, what Congress would be enforcing would no longer be, in any meaningful sense, the 'provisions of [the Fourteenth Amendment].' "[8] Indeed, returning to *Marbury*, Kennedy noted, "If Congress could define its own powers by altering the Fourteenth Amendment's meaning, no longer would the Constitution be 'superior paramount law, unchangeable by ordinary means.' It would be 'on a level with ordinary legislative acts.' "[9] Three years later, in a case involving both the commerce clause and Section Five, Chief Justice William Rehnquist emphasized, "No doubt the political branches have a role in interpreting and applying the Constitution, but ever since *Marbury* this Court has remained the ultimate expositor of the constitutional text."[10]

Unsurprisingly, this new judicial stringency has had the effect of concentrating the scholarly mind on the problem of congressional compliance with constitutional requirements. The new judicial doctrines have themselves met with substantial hostile fire from the law reviews,[11] but more importantly for present purposes, they have also encouraged constitutional

scholars to look more closely at how Congress operates. For some, the main task is to determine why Congress has run afoul of constitutional limitations and how pervasive the legislative deficiency is. It may be possible to identify reforms by means of which Congress can adapt to the new judicial climate and make the consequences of the deficiency less severe. For others, the main task is to rehabilitate Congress, specifically in the eyes of the judges, and demonstrate how the legislature goes about the work of appropriately fulfilling its constitutional responsibilities. From either perspective, the Court's vigilance has prompted renewed examination of the relationship between Congress and the Constitution.

THE CONSTITUTION AND THE COURTS

The scholarly reaction to the federalism cases has reinforced a developing strand of research into the constitutional understandings and actions of political actors outside the judiciary. That literature takes up Rehnquist's off-handed recognition that "[n]o doubt the political branches have a role in interpreting and applying the Constitution." To the extent that this is true, then the *Marbury* logic as recently elaborated by the Court becomes problematic. If the political branches also interpret the Constitution, then it is not so obvious why the Court is necessarily the "ultimate expositor of the constitutional text." Certainly under those circumstances it is not so easy to identify congressional action with the "alteration" of the Constitution. More basically, the engagement of political actors with the constitutional text is largely terra incognita. Scholars have only begun to explore the nature, extent, and consequence of constitutional discourse beyond the courtroom.

The recent literature has important antecedents, produced by political scientists, which often did focus on Congress as a constitutional interpreter. Donald Morgan's *Congress and the Constitution: A Study of Responsibility* in 1966 was nearly unique in examining a wide range of cases that traced congressional responsibility for constitutional interpretation over the course of American history. Morgan was particularly distressed to find a decline in the acceptance of such congressional responsibility and the rise of "judicial monopolism" by which the "legislative function could receive definition solely in relation to policy" while the Constitution was understood to be "technical, and too abstruse for any but lawyers in the courtroom and judges on the bench to discuss with sense."[12] The consequence,

Morgan feared, would in the short term be an increasing judicial "activism, not only in its one remaining significant constitutional area—individual rights—but in all areas of interpretation," and in the long term that "the Constitution becomes not a way of political life in a democracy, but a rote-learned traffic code, to be evaded wherever expert opinion discovers loopholes."[13] Morgan's analysis included the results of a survey conducted in 1959 of congressmen about their attitudes toward the congressional role in interpreting the Constitution and proposals for institutional reform to improve congressional responsibility. Rather different has been the prolific output of Louis Fisher, a constitutional scholar at the Congressional Research Service. Fisher's work has often focused on the development of constitutional law in particular areas, but he has emphasized the participation of nonjudicial actors in shaping that law. Fisher has called attention to the interbranch "constitutional dialogues" and "constitutional conflicts" that have shaped law and practice over time.[14] In doing so, Fisher has been a particular advocate for the effectiveness, and even necessity, of "constitutional interpretation by members of Congress."[15] Also of note is Walter Murphy's article "Who Shall Interpret? The Quest for the Ultimate Constitutional Interpreter," which asserted the "fact of American political life that all public officials . . . often have to interpret the Constitution."[16] Reviewing the multiple possible answers that have been offered to the question of "WHO shall interpret the Constitution," Murphy argued for a "modified version of departmentalism," which denied that there was an "ultimate constitutional interpreter" and urged instead a shifting set of constitutional interpreters.[17] The article was important in its own right in again raising and defending the old Jeffersonian doctrine that held each branch of government to be independently responsible for constitutional interpretation and that had periodically risen to prominence ever since the early days of the republic.[18] It also reflected the preoccupations of a number of political scientists and lawyers loosely connected to Murphy and Princeton University, who would produce a number of works exploring "constitutional politics."[19]

More recent work on the Constitution outside the courts has given less particular attention to Congress as a constitutional interpreter, but it has effectively opened a vast new territory of research that should include more detailed examinations of the legislature. Early on, and most prominently, Bruce Ackerman's theory of unconventional constitutional amendments emphasized historical moments of constitutional politics that altered the inherited Constitution.[20] Ackerman has constructed an impressive normative and empirical argument for the claim that "we the people" have periodically empowered elected officials to transform the Constitution. Such moments of extraordinary constitutional deliberation on the part of elected officials eventually give way to a more normal politics of routine judicial interpretation and enforcement of the revised constitutional commitments. Congress plays an important role in that historical narrative, but the legislature is not Ackerman's particular focus. Stephen Griffin has likewise emphasized the Constitution as a "text-based institutional practice" that extends beyond the "legalized Constitution" interpreted and enforced by judges and recognizes the significance of the actions of other government officials in altering the effective constitution of the nation.[21] Keith Whittington has distinguished between the legalistic "interpretation" of constitutional meaning, primarily in the courts, and the political "construction" of constitutional meaning, primarily outside the courts, and has argued for the importance and distinctiveness of such constitutional constructions in shaping constitutional understandings and practices.[22] Larry Kramer has argued for a recovery of what he calls the early American practice of "popular constitutionalism," by which constitutional meaning is largely settled within the political arena, and Robert Post and Reva Siegel have called for "policentric interpretation of the Constitution by myriad political actors."[23] Mark Tushnet's "populist constitutional law" would dispense with judicial review entirely and emphasize the "thin constitution" of principles and values that are well recognized in the political arena.[24] Case studies have emerged examining how legislatures, including Congress, construe and extend constitutional meaning.[25]

The turn to examining the Constitution outside the courts has provided both normative theories suggesting its attractiveness and empirical investigations indicating its reality. Such scholarship has demonstrated the importance of nonjudicial actors in altering, preserving, interpreting, applying, and enforcing the Constitution. Existing studies have touched on the importance of ideas and institutions, constitutional entrepreneurs and average citizens, presidents and legislators, social movements, political parties, and interest groups, as well as courts and lawyers, in the American constitutional enterprise.

Among the tasks for the future is a detailed analysis of specific institutions and actors that engage the Constitution. Congress is a particularly important site for extrajudicial constitutional interpretation, and it is often crucial for both raising new constitutional controversies and settling old ones. The Rehnquist Court's challenge to the contemporary Congress gives

immediate relevance to the question of whether Congress is best understood as a subordinate or a coordinate interpreter of the Constitution, and to the resources and constraints affecting constitutional deliberation in Congress. Making sense of Congress will clearly be central to our understanding of constitutional politics.

CONGRESS AND THE CONSTITUTION

This book assesses Congress's role in interpreting the Constitution and points the way forward to substantial research that still needs to be done in this area. By bringing together some of the leading law professors and political scientists who study Congress and the Constitution outside the Court, the thirteen chapters in this book highlight the ways in which Congress thinks about the Constitution, the relationship between Congress and the Supreme Court, the judiciary's role in checking Congress, and possible reforms to the current system.

The methodologies employed and conclusions reached vary significantly from one chapter to the next. Some chapters are historical accounts of how Congress has considered constitutional issues; others employ statistical models to assess Congress's interest in constitutional questions; still others look toward personal observation, the political science literature, or economic analysis to sort out the incentives that animate Congress. Moreover, there is an extraordinary range of opinion as to whether Congress takes the Constitution seriously and whether the system can be reformed to create greater incentives for lawmakers to pay closer attention to constitutional issues. Whatever the methodology or conclusion, all chapters underscore the pervasive role that Congress plays in shaping the Constitution's meaning. For example, a chapter on pre-Civil War interpretations of the Constitution reveals that nearly every constitutional question was debated in Congress. Likewise, a study of recent House and Senate committee consideration of constitutional questions reveals that nearly every congressional committee has held hearings which prominently featured constitutional issues.

The pervasiveness of constitutional issues in Congress helps explain the design of this book. Rather than organize the book around discrete policy issues (civil rights, federalism, budgetary policy) or subunits within Congress (individual committees, party leaders), the chapters almost always take a broader view of Congress as an institution. Several chapters are

wide-ranging, largely positive accounts of the workings of Congress—lawmakers' attitudes toward Congress's role as a constitutional interpreter, offices within Congress that help lawmakers learn about constitutional issues, Congress's willingness to use its confirmation power to shape constitutional decisions by both the executive and the courts, mechanisms by which lawmakers respond to Court rulings, the frequency with which committees consider constitutional questions, and the responsibilities of lawyers in Congress. Other chapters assess the deliberative quality of Congress, especially the quality of Congress's interpretation of the Constitution (and whether courts are likely to do a better job than Congress). Finally, some chapters examine relations between the Court and Congress, including the nexus between judicial and legislative action and how the courts should take the inner workings of Congress into account.

The book is loosely divided into three units, with many chapters touching on issues raised in more than one. The initial chapters take a broad view of Congress's interest in constitutional interpretation and the resources available to Congress. Chapters in this unit also consider how Congress makes use of hearings, its confirmation power, and committee lawyers to learn about constitutional questions and to shape constitutional values. The second part of the book considers relations between the Court and Congress. The initial chapters in this part are largely positive accounts of how lawmakers respond to Court decisions. Subsequent chapters are more normative, proposing ways for the courts to evaluate Congress's work product. The last part of the book, although grounded in concrete evidence, is more speculative. The quality of Congress's handling of constitutional questions and how the current system can be reformed are the subject of these chapters.

What follows is a thumbnail sketch of the book's chapters:

David Currie's "Prolegomena for a Sampler: Extrajudicial Interpretation of the Constitution, 1789–1861" underscores how, during the early republic, " 'the whole business of legislation [was] a practical construction of the Constitution.' "[26] Currie argues that judicial deference to congressional interpretations of the Constitution is inseparable from Congress's willingness to seriously consider the constitutionality of its handiwork. During the nation's early years, Congress's performance, while variable, was often first-rate. For example, a case study on Congress's consideration of the constitutionality of state secession in 1861 reveals that Congress sometimes does a better job of considering constitutional issues than the Supreme Court.

as Oxymoron," 12 *International Review of Law and Economics* 239 (1992). Shepsle's article deals with a different topic, but his title accurately describes the difficulty I discuss here.

27 This does not ensure that these members will advance constitutionally reasonable positions. My argument is only that under some conditions some members of Congress are in a position to think about constitutional matters independently of the "special interest" pressures asserted by their constituencies.

Can Congress Be Trusted with the Constitution?

The Effects of Incentives and Procedures

BARBARA SINCLAIR

"The worst argument to use with a member when you're trying to persuade him to vote against a proposal is that 'It's unconstitutional,'" explained a senior Democratic leader to a group of staffers as they were sitting around late one evening waiting for the House to finish its business. "Oh, thank God," the leader quoted the member's response as he pantomimed, vigorously fanning himself. "I can vote for this monstrosity and the Supreme Court will take care of it."

This story—a true one—reflects critics' worst suspicions about Congress and the Constitution; legal scholars especially fear that members of Congress pay little attention to questions of constitutionality and, worse, when faced with a popular but unconstitutional proposal, they pusillanimously pass the buck—to the other chamber, the president, or the Court. Others argue that Congress "often lacks the institutional incentives to take fact finding seriously;"[1] purported congressional fact finding, contaminated by the impact of special interests, may really be just a "recitation of special-interest preferences."[2] Public choice scholars go as far as to depict "Congress as a greater auction house, in which legislation is sold to those narrowly focused, rent-seeking interest groups that channel the most money into legislators' campaign coffers."[3]

In this chapter I examine members' incentives and the congressional process to determine their likely effect on congressional consideration of the

Constitution and adherence to it. My objective is to provide a congressional scholar's perspective on whether Congress can indeed be trusted with the Constitution.

Briefly summarized, my argument is that so long as members pursue good public policy and not solely reelection, they must, for purely instrumental reasons, take into account the constitutionality of the legislation they pass. Furthermore, to the extent that the congressional legislative process promotes fact finding and deliberation and thereby the making of good public policy, Congress has as good a claim as the Court to determine constitutionality in domains where its policy and political expertise are key. This is the more so since the legislative process and the broader governmental structure force compromise and encourage consensus building; the notion that the Court needs to keep an eagle eye on Congress to prevent it from regularly trampling minority interests is premised on a lack of understanding of how the legislative process actually works.

MEMBERS' GOALS AND THEIR IMPACT

If members of Congress are in fact "single-minded seekers of reelection," as some scholars argue, then they can be trusted with the Constitution only if constituents use conformity with the Constitution as a key criterion of electoral choice, certainly a heroic assumption.[4] Some voters probably do—law professors, for example—but that there are enough such voters to make the difference seems unlikely. If we buy the assumption that members care about nothing except reelection, then it follows that members will "trash" the Constitution without compunction if doing so is popular with their voting constituents; they will choose to do what's popular, even if it is clearly not constitutional.

Although there probably are members who care only about reelection, I contend that according to both theory and data most members are motivated by multiple goals. All scholars are familiar with David Mayhew's elegant little book *Congress: The Electoral Connection*, which makes the case that much of how Congress operates can be explained by the reelection motive; yet it is often overlooked that Mayhew himself could not make his model consistent with that assumption only. When Mayhew sought to explain how tasks essential for the maintenance of the institution got performed, he was forced to smuggle in another goal—prestige or power in the chamber.

Mayhew argues that as single-minded seekers of reelection, members do not care whether legislation is enacted; that they see legislative battles as only an opportunity for electorally productive position taking. Again this conclusion is not completely consistent with other elements of his model. If, in order to assure reelection, members "service the organized," then surely actually producing laws is important. Ordinary voters may not know if the member talks a good game but does nothing else, but interest groups do, and they want not just a good try but results. The end-of-the-session rush during which members often make increasingly significant compromises to get legislation enacted also suggests that members are not indifferent to the fate of legislation. And if members, for whatever reason, actually want to see legislation enacted, they should care about the constitutional status of the bills they pass. Furthermore, many policy battles—over foreign aid or over obscenity-related restrictions on grants from the National Endowment for the Arts, for example—are either totally inexplicable or require bizarre contortions to explain within the reelection-only model. After a public outcry over federal funding of photographs depicting sado-masochistic homosexual acts and artworks consisting of crucifixes submerged in urine, it is implausible to suggest that members who nevertheless voted for artistic freedom were motivated solely by reelection concerns.

Explaining the time-and-effort allocation of many members of Congress is even more difficult. Why would a white Democrat representing a predominantly white, GOP-leaning district in south central Michigan concentrate his legislative efforts on Africa policy, working strenuously over a number of years on passing sanctions against white-ruled South Africa and providing food relief for Ethiopia? How to explain a Republican from Nebraska focusing on foreign policy and advocating a moderate internationalist line? Why would one member make the promotion of gay rights a central part of his legislative agenda, or another make anti-abortion legislation his crusade? For some of these members, their choices about where to focus their legislative efforts have created no constituency problems. Others have had to explain and to compensate with effective constituency service. "Opponents have tried to convince voters that the congressman is so obsessed with abortion that he does not adequately represent other interests. But [he] has secured his position with diligent constituency work and careful attention to the interests of blue-collar workers and organized labor," Congressional Quarterly's *Politics in America* reports.[5] The same publication said of the Africa specialist, "The key to [his] survival

is constituency service."[6] None of these members ignored locally important issues. And none chose issues that were, given his district, tantamount to committing political suicide. Yet is it plausible to argue that the time-and-effort allocation decisions of Howard Wolpe, Doug Bereuter, Barney Frank, and Christopher H. Smith can best be explained by the reelection motive?

To argue that many members of Congress do care about making good public policy (where, for each member, "good" is defined by his or her own ideology and other relevant views) is not to argue that members do not care about reelection. "You have to be reelected to be a statesman" is a well-known maxim on Capitol Hill. The key question, then, is how members balance their multiple and potentially conflicting goals. Individual political circumstances and perhaps individual proclivities influence that balance for any particular member, making a general answer impossible. What is possible—and a good deal more interesting and important—is examining the impact of the legislative process on the character of the trade-offs and on the likely result. Does the process make it easy or hard for members to pursue the making of good public policy? Does the process encourage or discourage the sorts of activities and decisions that are likely to result in good public policy? And to what extent does the process promote the Madisonian constitutional values of compromise and consensus building?[7]

I emphasize here the making of good public policy, not concerns about constitutionality directly, because that is, I believe, the key issue. As I argued above, if members sincerely want to make policy and not just create an election issue, they must take constitutionality into account. To be sure, constitutionality is only one criterion for members of Congress; members must concern themselves with whether the legislation can pass their own and the other chamber; whether the president will accept it; whether, if enacted, it is likely to accomplish its aim. Given the multitude of criteria that members must attempt to satisfy, they may well sometimes, as Justice Scalia complained, "push the constitutional envelope."[8] Often when that is so, Congress is attempting to come up with a politically and substantively sensible policy solution to a complex problem, as, for example, with the legislative veto. And Congress, as an elected and representative body, is in a much better position to judge what makes political and substantive sense than the Court is.

Thus if members attempt to make good public policy and if the congressional process encourages the sorts of activities and decisions that are likely to result in good public policy, Congress deserves deference from the Court. If there are constitutional traps around every corner, it is the current Court and not the Constitution that has laid them.

THE LEGISLATIVE PROCESS AND ITS IMPACT

To promote the making of good public policy, the legislative process should encourage fact finding and deliberation. Presumably it should also encourage members to "do what's right, not just what's popular."

There is broad consensus on fact finding and deliberation as desirable criteria for the lawmaking process; most of us would agree that public policy is more likely to be effective at achieving its aim, whatever that may be, if it is based on careful fact finding and serious deliberation than if it is slapped together hastily and without much thought.[9] Encouraging members "to do what's right, not what's popular" when thus phrased would also seem to be an unexceptionable criterion. Yet do we really want Congress to regularly thwart popular majorities? Furthermore and critically, uncertainty about the link between a specific policy choice and the societal outcome means that in most major policy areas, legitimate differences of opinion as to what constitutes good public policy can and do exist. Too often those who tell members to "do what's right, not what's popular" are essentially saying "do what I want, not what your constituents want." Nevertheless, members are sometimes faced with choosing between doing what they themselves strongly believe is right and what their constituents want them to do. Given members' powerful incentives to do what their constituents want and that members will usually have a great deal more information about the issue than their constituents do, a process that allows them to do what they think is right without paying too great a political cost might be justified.

According to these criteria, how does the legislative process in Congress measure up?

Most educated people are familiar with the hoary "bill becomes a law" story of American government textbooks. Once introduced in one chamber of Congress, a bill is sent to a committee (or subcommittee) where most of the serious legislative work takes place. Assuming it is major legislation, hearings are held at which a wide range of interested parties and disinterested experts testify. The members of the committee or subcommittee then meet to mark up the bill—that is, to amend and rewrite it—

and to report it out. Assuming that the first chamber is the House, the bill comes to the House floor as drafted and approved by the committee. It is considered there under an open rule allowing all germane amendments. If passed the bill goes to the Senate, where the process is similar: the bill is considered by a committee and, once reported out, is debated and amended on the floor. After each chamber has passed a bill, a small group of senior members of the two committees get together as a conference committee and work out a compromise between the House and Senate versions. The compromise must be approved by the membership of both chambers.

Scholars who pay attention to Congress know that in recent decades the legislative process has changed significantly.[10] Rather than being sent to one committee in each chamber, many measures are considered by several committees, especially in the House, while some measures bypass committee altogether. Not infrequently, after a bill has been reported but before it reaches the floor, major substantive changes are worked out informally. Omnibus measures of great scope are a regular part of the legislative scene, and formal summits between the executive and legislative branches to work out deals on legislation are no longer considered extraordinary. On the House floor most major measures are considered under complex and usually restrictive rules, often tailored to deal with problems specific to that bill. In the Senate bills are regularly subject to large numbers of not-necessarily-germane floor amendments; filibuster threats are an everyday fact of life, affecting all aspects of the legislative process and making cloture votes a routine part of the process.

Congress's claim to competence at fact finding and deliberation is generally thought to rest on its standing committee system. The issues and problems with which the federal government deals are too numerous, diverse, and complex for any one person to master. For a relatively small body such as Congress to hold its own vis-à-vis the executive branch and outside interests, it must divide labor and rely on its members' expertise in their areas of specialization. Some scholars, Devins for example, question the adequacy and consistency of members' incentives to engage in real fact finding, and argue that agenda setters such as committee chairs may well have both the incentive and the means to bias the process so that it "frustrate[s] the search for the truth."[11] Of course hearings are not a search for knowledge for its own sake, nor do members come to policy questions without preconceptions; yet that hardly makes the committee process as useless as Devins seems to think. First, thoroughly biasing committee

processes by, for example, slating only witnesses expressing one point of view is not so easy when the membership of the committee holds diverse views, as most though not all do. A complex mix of criteria operates in the committee assignment process, including members' preferences and, especially for the more important and desirable committees, party loyalty and geographical representativeness. Committee chairs cannot pick their own members—even those on the majority side. And of course, every committee includes members of the minority party, in numbers usually roughly in proportion to its presence in the chamber. Furthermore, grossly stacked hearings do not command respect later in the legislative process and seldom result in legislation that gets very far. Finally, congressional fact finding and deliberation neither are nor should be only about "objective" facts or "scientific" truths; political facts are highly relevant. Whether a proposed policy approach will "work" often depends as much on the political support of various groups and interests as on its technical feasibility.

Have the changes in the legislative process in the post-reform period reduced Congress's competence at fact finding and deliberation? Have procedures and practices such as multiple referral, post-committee adjustments, and the bypassing of committees eroded Congress's ability or incentive to engage in these crucial prerequisites to sound lawmaking? Multiple referral, whatever its other effects, especially delay, should enhance rather than impair fact finding and deliberation. By bringing several committees and a diversity of members into the bill-drafting process, multiple referral can increase the breadth of perspectives brought to the process and dilute the influence of special interests. As for post-committee adjustments, when committee-drafted legislation is altered after being reported by the committee but before it goes to the floor, the aim is usually to enhance its chances of floor passage. Most frequently, the majority leadership determines that the bill produced by the committee is in danger of failing on the floor. The committee may be unrepresentative in its membership and not sufficiently sensitive to sentiment in the chamber as a whole, or the political context may have changed, or, if several committees are involved, they may not have been able to work out their differences. The process of making such post-committee adjustments usually involves committee leaders from the majority party, who have a big stake in seeing the legislation pass and who bring substantive expertise to the task. When interested members who do not serve on the drafting committee are involved they diversify the perspectives brought to bear. Party leaders bring a broader, less parochial, and longer-range perspective to the endeavor; they have to

concern themselves with the impact on their membership as a whole and on the party's reputation.

Some argue that the involvement of party leadership hardens party lines and enforces an ideological purity that hinders productive compromise. True, party leaders have been known to replace a bipartisan committee bill with legislation that the party majority and the president consider more acceptable, as Speaker Hastert did with the Judiciary Committee's PATRIOT bill in 2001. Yet the involvement of leadership can have the opposite effect. Because leaders do need to concern themselves with the party's reputation and because that reputation rests in part on legislative results, leaders may be forces for moderation and compromise. For example, when the chairman of the House Ways and Means Committee, Bill Archer, drafted an ideologically pure tax bill with huge benefits for big business, the equally conservative members of the House Republican leadership pressured him into moderating the bill so that they could defend it publicly. When they were in the majority, Democratic leaders regularly leaned on especially liberal committees such as Education and Labor to tone down their legislation to make it passable in the chamber and defendable in the public arena.

It is when committees are bypassed altogether that it is most likely for fact finding to be lacking and deliberation truncated. Yet in many cases when a committee seems to have been bypassed, the legislation was in fact reported by the committee in a previous Congress. For example, the Civil Rights Restoration Act, which became law after bypassing committee in the House, had gone through the full committee process in the previous congress. The same is true of the Congressional Compliance Act that the House passed on the first day of the 104th Congress (1995–96). In those instances when Democratic House leaders used task forces rather than committees to draft legislation, they chose as the leaders of the task forces members who had great substantive as well as political expertise, and since the 104th Congress Republicans have generally followed suit.[12] Thus even when committees are bypassed, committee experts are not necessarily cut out of the process and others involved do not necessarily lack substantive expertise. Furthermore, the involvement of party leaders may again broaden the perspective and lessen the parochialism of the process. For example, when in 2002 the Senate majority leader, Tom Daschle, took the energy bill away from the Energy and Natural Resources Committee, he removed it from a body made up almost completely of western and southern senators (twenty of twenty-three members), many with a strong bias toward the interests of users.

I am not arguing that post-committee adjustments and the bypassing of committees are unproblematic; the process that results is not always one that meets minimally acceptable standards of fact finding and deliberation. The 104th Congress presents the most egregious example. Especially during 1995, House Republican leaders put extraordinary pressure on committees to report legislation quickly. Hearings, if they were held at all, were perfunctory; markups, often held before most members had had an opportunity to study the legislative language at issue, were so hurried that they were in effect pro forma. Party leaders, and task forces on which inexperienced freshmen predominated, exercised considerable influence on the substance of legislation in committee and through post-committee adjustments, and committees were frequently bypassed both to move legislation more quickly and for substantive reasons. Deliberation and the quality of legislation did suffer. Many Republicans, members and staff alike, concede privately that the legislation brought to the floor was sloppy at best; the careful substantive work had not been done.

Furthermore, substantive sloppiness was not the only problem. When committees do not hold meaningful hearings, as was common during the "Contract with America" period in early 1995, an important forum for expressing a diversity of views is unavailable. To an unprecedented extent in the mid-1990s, the minority party was excluded from decision making at the pre-floor stage; committee procedures made meaningful participation impossible, and often the real decisions were made elsewhere, within Republican-only task forces or by the Republican leadership itself. Interest groups that the Republican Party considered hostile—environmental groups, for example—were not given access to make their case, while the party's business allies participated in drafting legislation in which they had a direct interest.

With the benefit of hindsight, we can now conclude that those modes of decision making arose out of highly unusual circumstances—a new House majority and the attendant sense of mandate—and were a temporary response to them.[13] Understandably, the first Republican House majority in forty years had a lot that it wanted to accomplish; these extraordinary circumstances led to a truncated process. Furthermore, Republicans paid a price for their exclusionary procedures. Because neither the committees nor the leadership did the hard and often ideologically painful work of building a coalition broad enough to survive the entire process, much of the legislation passed by the House did not become law; excluded interests blocked it elsewhere.

So long as the parties remain as ideologically polarized—and as closely balanced in seats—as they have been since the mid-1990s, House decision making is likely to be characterized by somewhat greater involvement of the leadership than in the pre-1995 period and much greater involvement than in the pre-reform period. The difficulties of legislating under these circumstances force the majority party leadership to involve itself in all phases of the legislative process. Even a leader such as the current speaker, Dennis Hastert, who on his election committed himself to a return to regular order, has found himself drawn into what would otherwise be committee business over and over again. Nevertheless committees have regained influence, and in the foreseeable future they are unlikely to be again relegated to the subordinate role that they played in the House in 1995.

Because the parties are polarized, committee decision making is often along party lines, especially in the House, and in the House the compromises on much of the major legislation are made within the majority party. Yet even when partisan polarization is unusually high by American standards, as it is at present, Senate committees seldom operate in a similar fashion. Senate committee leaders know that to pass their legislation on the floor, they require the support of a supermajority and, given the narrow margins, that means a bipartisan majority.[14]

If changes in the process decreased the incentives for members to specialize and gain expertise, they would be detrimental to Congress's power in the system and to its capacity to make good public policy. Expertise is essential for the making of good public policy; representatives of special interests with expertise can too easily bamboozle a legislature that has none. Too much of a diminution in the influence of committees would decrease members' incentives to develop expertise. In fact, while committees are not autonomous as they were before the reforms of the 1970s, they are still the primary locus of substantive decision making, and even when decisions are made elsewhere committee experts are usually involved. Thus the incentives for members of the House to develop committee expertise, although weaker than in the committee government days before the mid-1970s, are still strong. Becoming a committee specialist is not the only route to influence, but it remains a major one. Senators do specialize less than they used to, but notable specialists still exist. The effective senator must develop some expertise; a senator must know what he or she is talking about to be taken seriously. To some extent, senators can substitute staff expertise for personal expertise, and in both chambers the increase

in staff has made it possible for members to involve themselves effectively in more issues than was once possible.

The upgrading of the Congressional Research Service and the Government Accounting Office and the establishment of the Congressional Budget Office greatly enhanced the Congress's in-house expertise; because these entities provide information generated independently of the executive and interest groups, they aid Congress in playing an independent role in policy making to the extent that members want to do so. Furthermore, they are accessible to the members of the minority as well as the majority party and so, like the substantial minority committee staffs, provide the minority party in both chambers with the information they need to make their case to the public. In a period of high partisan polarization, this is especially important to the minority party in the House, where majoritarian rules make it possible for the majority party to limit the role of the minority.

Both Republican and Democratic minorities have claimed that the especially tailored and usually restrictive special rules under which the House now considers most major legislation degrade floor deliberation, and a good many commentators have bought that argument. This contention is, I argue, based on a false premise; it is unrealistic to expect deliberation, as a great many people use the term, to take place on the floor of either chamber, and certainly not in the House. If deliberation is defined as the process by which a group of people get together and talk through a complex problem, mapping the problem's contours, defining the alternatives, and figuring out where they stand, it is unrealistic to expect all of that to occur on the chamber floors. Deliberation in this sense is a nonlinear, free-form process that depends on strictly limiting the size of the group; subcommittees, other small groups, and possibly committees are the forums where this sort of deliberation might be fostered. Deliberation so defined certainly did not occur on the House floor before restrictive rules became prevalent.

What we can and should expect on the chamber floors is informed and informative debate and sound decision making. Restrictive rules can in fact contribute toward those goals. Rules can provide order and predictability to the consideration on the floor of complex and controversial legislation; they can be used to ensure that floor time is apportioned in a reasonable and sensible way for each bill, and that debate focuses on the major alternatives, not on minor or side issues. In addition, through the use of restrictive

rules, committee compromises can be protected from being picked apart on the floor.[15]

One's conclusions about the appropriate form of special rules depend on what sorts of decisions one believes can and cannot be made effectively on the House floor. The membership as a whole can and should make the big decisions; it can and should choose among the major alternatives that have been proposed. A body of 435 should not, I believe, get involved in a detailed rewriting of legislation on the floor through a multitude of individual amendments; the institution is too large and unwieldy, the necessary expertise is often lacking, and the time is almost always too short for a full consideration of the impact of proposed changes. One could very well argue that the Senate's permissive amendment rules are a greater problem than restrictive rules in the House. Senators can offer a large number of amendments on the floor, amendments that have not necessarily undergone any sort of serious scrutiny, and those amendments need not even be germane to the bill at issue.

Restrictive rules, in and of themselves, have not damaged the quality of consideration on the House floor. Admittedly, both Democrats and Republicans, when in the majority, have sometimes used rules that were unnecessarily restrictive. Nevertheless, despite the rhetoric implying otherwise, the House seldom considers legislation under closed rules barring all amendments. Most rules, by ensuring that one or more major substitutes are in order, do allow the membership as a whole to make at least the biggest decisions.

While House floor consideration has become more predictable and more firmly under the control of the majority party leadership, the Senate has moved in the opposite direction. The greatly increased frequency of "holds" and other filibuster threats has reduced predictability and the control of party leadership, neither of which was high even before these changes in practice.[16] "Holds," which are notifications by senators to their party leaders that they will object to the consideration of a particular bill, are an everyday fact of life in the Senate, so much so that the notification process has been routinized. Since Senate rules require sixty votes to cut off debate over any senator's objections, the party leaders who do the floor scheduling and do not want to expend floor time unproductively will usually not schedule low-priority legislation until "holds" have been removed. Must-pass and other high-priority legislation will be brought to the floor, but assuming that the opposition is reasonably intense, passing that legislation will first require winning a cloture vote.

In the contemporary Senate, passing legislation is therefore harder and blocking action easier than it used to be; minorities command enormous bargaining leverage, especially when time is tight, and intensity counts for more in the legislative process. If one puts a high premium on the responsiveness of the national legislature to public sentiments, the Senate's nonmajoritarian character can certainly be deplored. It can also, however, serve as a barrier to and a safeguard against "bad" legislation; certainly much of the "Contract with America" legislation so hastily passed in the House died in the Senate, often because it could not amass the necessary sixty votes.

Informed decision making on the floor requires that members not directly involved in the crafting of legislation nevertheless have available sufficient information to make a considered choice. When Congress legislates through large omnibus measures, the likelihood that members will not know about or understand all the measures' provisions increases. Such measures offer their drafters the opportunity to insert provisions that may well slip unnoticed by most members and all of the press. Omnibus measures are thus the perfect vehicle for special-interest provisions that no member would be willing to defend publicly. When high-level summits between party leaders and the president make legislative decisions, members are also likely to face information problems. This is not a problem unique to such unorthodox processes of lawmaking; it also occurs with much other complex legislation. In all these cases the problem can be ameliorated—but not solved—by strictly adhering to layover rules requiring that language be available for a minimum time before a vote can be taken.

The problems that such legislative processes create and the possibilities for abuse that they present must be weighted against the advantages they offer. They may allow peak-level deals, including hard tradeoffs which are not attainable in other ways. The big budget deals of the 1990s that eventually balanced the budget were mostly reached at executive-legislative summits, and all were passed as omnibus measures. Omnibus bills can be used for nefarious purposes, but they can also provide the cover and the "grease" necessary for the Congress to make hard decisions. The involvement of party leaders is probably the best protection—though certainly no guarantee—that the side payments necessary to get the bill through are not excessive. Leaders have to worry about the impact of possible disclosure on the party's reputation.

Legislative leaders have always used the tools at their command to make it easier for their members to "do what's right, not just what's popu-

lar." With the increase in leadership resources in the post-reform period, leaders' capacity to do so has increased considerably. The packaging of unpopular measures with popular ones in omnibus bills can make it politically possible for members to vote for legislation that they believe necessary but hard to explain to their constituents. In the House, leaders can craft rules so as to make tough votes easier to cast—by, for example, packaging, excluding certain alternatives, crafting and offering amendments that provide political cover, and reducing the visibility of decisions by transforming substantive votes into procedural ones.[17] Of course, long-established components of the legislative process can serve the same purposes. Thus rules that require an up-or-down vote on conference reports also provide members with cover; they can argue that they had to take the bitter with the sweet or get no bill at all.

In the last few years, the majority Republicans have increasingly responded to the problems that the Senate's supermajority requirement creates for them by using conferences to recoup losses that they have suffered in the Senate. During the latter years of Democratic control of Congress, when the party had become more ideologically homogeneous, the actual compromises between House and Senate, just as those within the chambers, were most often made within the Democratic Party. Recently, Republicans with much narrower margins of control have taken to excluding most Democrats from conference negotiations altogether. In 2003 no Democrats were allowed to participate in the energy bill conference, and only two, who were considered accommodating, were admitted to the negotiations on the Medicare prescription drugs bill; Republican leaders took a highly active role in working out a final deal on the prescription drugs bill, with Speaker Hastert and the Senate majority leader, Bill Frist, conducting the final negotiations personally; and the conference reports on both the energy bill and the prescription drugs bill tilted strongly toward the more conservative House versions. Republicans gambled that Senate moderates in both parties would be loath to vote against bills on such important issues even if the specifics of the bills were considerably further to the right than they preferred. On the prescription drugs legislation the wager paid off, and the bill passed the Senate easily. The energy bill, by contrast, was blocked by a filibuster. A priority-legislation success rate of 50 percent when one party controls both chambers and the presidency suggests that exclusion of the minority party does not pay off. The lukewarm public reception that the prescription drugs legislation has received since being enacted suggests that the strategy also brings with it major political risks in the long run, even if successful in the short run.

CAN CONGRESS BE TRUSTED WITH THE CONSTITUTION?

In sum, the legislative process in Congress does encourage fact finding and deliberation. And it does so not just in the narrow sense of fact finding (gathering technical information) and deliberation (seriously thinking about that information), but even more in the broad sense of including a wide range of views and interests. The process can even encourage "doing the right thing." And the changes in the process in the post-reform era have on balance increased the inclusiveness of the process without much diminishing the extent to which it encourages the development of expertise.

The basic character of the process—two-chambered and within each chamber sequential—makes it likely that a variety of perspectives and interests will be brought to bear and a variety of arguments heard. It is true that this character can also encourage buck passing; faced with a choice between what the member considers right and what he or she knows is popular, the member may choose the latter, relying on others at some later stage in the process to rectify the outcome. Yet given the diversity of the membership of Congress, some members are almost always willing to swim against the tide. The constituencies that they represent usually allow some members to speak out against decisions that the member thinks are popular but wrong. Certainly the legislative process internal to Congress as well as the broader governmental structure make the enactment of bold policy departures extremely difficult; compromise and consensus building are usually required for positive action even of a more modest sort. With a multitude of stages and diversity of actors, the American legislative process is not one in which narrow majoritarianism is often a problem.

The standing committee system encourages members to specialize and gain expertise, and to put that expertise to use in the legislative process. Public committee hearings may not be a dispassionate search for truth, but they are often an important part of making the case and building the coalition for a particular policy approach. Making a convincing case requires allowing opposition views to be heard. And making the case and building the coalition often require high levels of both substantive and political ex-

pertise. The powerful committee chairmen of the last several decades—the John Dingells, Bud Shusters, and Bobby Byrds—were powerful because they commanded both. It is important to remember, however, that not all fact finding goes on in committee or through a formal process at all. In the course of doing their jobs—meeting with lobbyists, traveling around their districts, communicating with their constituents face-to-face and by mail and phone, and yes, going on junkets—members are engaged in fact finding. In addition, the experiences that members bring to the Congress—whether those of a corporate lawyer, farmer, or welfare mother—inform their decision making. This is, of course, why a more inclusive process as well as a more diverse membership makes for better policy making.

On balance, the changes in the legislative process in the post-reform period have increased the inclusiveness of the process. More members have the opportunity to participate on a wider range of issues and the process is more open to a diversity of outside groups. In addition to innovations such as multiple referral and the use of task forces, sometimes to draft legislation and more often to engineer its passage, sunshine rules and the increased availability of staff have enhanced effective participation. In comparison to the contemporary legislative process, the pre-reform legislative process could often be quite exclusionary. One committee had a monopoly on legislative action in a given area and was not necessarily responsive to the wishes of the chamber or of the majority party. Decisions were made behind closed doors. And the membership of many committees was biased in a way that favored some interests and excluded others. Diffuse interests—consumer and environmental interests in particular, which are seldom represented by wealthy and well-connected organizations—had little access. Furthermore, the contemporary legislative process, while more open and inclusive, also provides congressional leaders with tools that they can use to make it easier for their members to do "what's right, not what's popular," at least some of the time. Thus special rules in the House and various forms of packaging, sometimes under the auspices of the Budget Act, can provide "cover" to members faced with tough legislative choices.

Do the changes in the legislative process guarantee thorough fact finding, serious deliberation, and members' putting their sense of the national interest above their own political survival in every instance? Of course not. Like the old standard process, the contemporary process can work very well or very badly; sometimes we can agree on which is which and sometimes that judgment is inextricably intertwined with our substantive, ideological views. When Congress oversteps constitutional boundaries in the area of individual rights, where the temptation may be greatest and the justification least, there is clearly a role for the Court. My point is that members do care about making policy—they are not simply engaged in posturing—and the process does allow for fact finding, deliberation, and even "doing what's right, not what's popular." Therefore the Court owes Congress deference, particularly on issues where the political and policy expertise that Congress possesses and the Court lacks is key. The issues raised in the division of powers and federalism cases are of exactly that sort.

Scholars concerned with how Congress considers and adheres to the Constitution have proposed a number of reforms. Approaching the issue from a congressional scholar's perspective, I contend that remedies should take into account that Congress confronts real constitutional quandaries relatively rarely; they are not an everyday problem. Reforms that foster better fact finding and deliberation even if they have no impact on how Congress treats the Constitution should produce better policy and thus are worthwhile—so long as the costs are not too high. In institutional design there are always tradeoffs, and because of the multiple and not completely compatible objectives that we expect a democratic legislature to further, the tradeoffs are especially problematic. In the American context, the constitutional structure, the institutional rules and procedures, and often the political context make successful lawmaking difficult. New rules or procedures that would make it still harder to enact legislation should be regarded cautiously. If we agree that we want to focus on relatively egregious violations of the Constitution, then we do not need an instrument so sensitive that it can identify any whiff of a possible constitutional problem. And that greatly alleviates some of the tradeoff difficulties.

Take, for example, the special processes that Elizabeth Garrett and Adrian Vermeule propose in their careful and thoughtful chapter.[18] Proposals that in effect enhance the working of a "fire alarm" sort of scrutiny are worth serious consideration. Thus giving the parliamentarian the authority to flag possible constitutional problems when he refers legislation to committee would alert both members and interested outsiders cheaply. Perhaps more important, it would impose some cost on those members who introduce such bills. That the parliamentarians are already quite overburdened and could not devote great amounts of time to the enterprise is, on balance, an advantage and not a disadvantage if what we want them to do is flag egregious cases. Perhaps these cases would be more difficult to justify if committees were required to produce constitutional impact

statements to accompany every reported bill, a requirement which might encourage the committee to give a bit more attention to constitutional questions. And the statements would of course lower information costs for committee outsiders. Still, the proposal needs to be thought through carefully, so that the required statements do not become mere boilerplate or, on the other hand, a significant burden on the committee staff.

The proposal to create a special professional staff—an Office of Constitutional Issues—to provide expert constitutional analysis of legislation is, in my view, enormously problematic. Simply by virtue of its charge, such a staff would acquire a vested interest in finding constitutional problems, and highly technical and complex ones at that. Giving to the Judiciary Committee or a new committee jurisdiction to review legislation for constitutional flaws would create the same problem and also add another step in a legislative process that has plenty of steps already. I also have doubts about adding points of order; these could too easily be used for purposes of delay, no matter what sorts of purported safeguards were attempted. And under no circumstances should supermajorities be required to waive such points of order.

I began by asking whether Congress could be trusted with the Constitution. My answer is that Congress can be trusted as much as the Supreme Court can. Members are not single-minded seekers of reelection, and the legislative process does not thwart attempts by members to make good public policy; in fact it provides some encouragement and some tools for doing so. Of course incentives to pander and pass the buck also exist. After all, we expect Congress to be responsive to public sentiments; we do not want it to be too easy for Congress to make unpopular decisions! Congress does not always make good public policy, no matter how one might define that, but then the Court does not always make good decisions either. Whatever one's assessment of the legislative process, it is hard to argue that the problem is a thin but rampaging majority regularly disregarding all interests other than its own and forcing major policy change on a large and intense minority.

NOTES

1 Neal Devins, "Congressional Fact Finding and the Scope of Judicial Review," 220, in this volume.

2 *Id.* at 221.

3 This is Yoo's characterization of the public choice scholar's depiction. Quoted from John C. Yoo, "Lawyers in Congress," 132, in this volume.

4 The phrase is of course Mayhew's. David Mayhew, *Congress: The Electoral Connection* (New Haven: Yale University Press, 1974).

5 Brian Nutting and Amy Stern, eds., *Politics in America 2002: The 107th Congress* (Washington: CQ Press, 2001), 635.

6 Alan Ehrenhalt, ed., *Politics in America: The 100th Congress* (Washington: CQ Press, 1987), 727.

7 Keith E. Whittington, "Constitutional Theory and the Faces of Power," *Alexander Bickel and Contemporary Constitutional Theory*, ed. Kenneth Ward (Albany: SUNY Press, forthcoming).

8 Quoted in *Los Angeles Times*, 19 April 2000.

9 See Devins, "Congressional Fact Finding"; see also Elizabeth Garrett and Adrian Vermeule, "Institutional Design of a Thayerian Congress," 242, in this volume.

10 For an elaboration of this argument see Barbara Sinclair, *Unorthodox Lawmaking*, 2d ed. (Washington: CQ Press, 2000).

11 Devins, "Congressional Fact Finding," 224.

12 Barbara Sinclair, *Legislators, Leaders, and Lawmaking: The U.S. House of Representatives in the Postreform Era* (Baltimore: Johns Hopkins University Press, 1995), 188–92.

13 Barbara Sinclair, "Transformational Leader or Faithful Agent? Principal Agent Theory and House Majority Party Leadership in the 104th and 105th Congresses," 24 *Legislative Studies Quarterly* 421 (August 1999).

14 The budget process is the big exception; budget resolutions and reconciliation bills are protected from filibusters in the Senate, and this does affect the Senate process on those measures.

15 Sinclair, *Legislators, Leaders, and Lawmaking*, 136–62.

16 See Barbara Sinclair, "The New World of U.S. Senators," *Congress Reconsidered*, 7th ed., ed. Lawrence C. Dodd and Bruce I. Oppenheimer (Washington: CQ Press, 2001).

17 R. Douglas Arnold, *The Logic of Congressional Action* (New Haven: Yale University Press, 1990); Barbara Sinclair, "Do Parties Matter?," *Party, Process, and Political Change in Congress*, ed. David Brady and Mathew McCubbins (Stanford: Stanford University Press, 2002).

18 Garrett and Vermeule, "Institutional Design of a Thayerian Congress."