



RECOVERING A MADISONIAN CONGRESS

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A MADISONIAN CONSTITUTION FOR ALL
ESSAY SERIES

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BY DANIEL STID

The American people are fed up with Congress. Over the past eight years, the public's approval for the institution as tracked in recurring Gallup surveys has been mired in the 10 to 20 percent range, prompting the late Senator John McCain's quip that the only supporters he and his colleagues had left were paid staffers and blood relatives. To be sure, Congress has long been the institution where the things citizens like least about politics—namely, partisan fights, unseemly haggling, and convoluted procedures—take place out in the open.¹ But Americans have grown especially frustrated with Congress in recent years, marked by historical levels of polarization, tribalism, and gridlock in the institution. In the most prominent instances when Congress has managed to act, it has done so on strict partisan lines. Neither of the two most important pieces of legislation in this period, the Patient Protection and Affordable Care Act of 2010, and the Tax Cuts and Jobs Act of 2017, garnered the vote of a single legislator from the minority party on final passage. No wonder only one in five Americans approve of what is meant to be the people's branch of their government.

To put the widespread disapproval of Congress in context, we turn to James Madison. In addition to being the father of our Constitution, Madison is also seen as the father of our Congress. He served with mounting frustration in its predecessor, the Continental Congress, trying and failing to strengthen its power to act on behalf of the nation during the Revolutionary War. Later he helped lead the push for the Constitutional Convention in Philadelphia, where he was the architect of the initial proposal for a new national government anchored in a revitalized Congress. After the convention, Madison emerged as the leading champion of the proposed Congress through his landmark essays in *The Federalist Papers* during the fight for ratification. Madison then helped get Congress up and running, serving as a leader in the House of Representatives during the first four Congresses. What was Madison's vision for the first branch of our government? How and why has this vision become imperiled today? What could we do to help Congress recover at least some of the institutional virtues and contributions that Madison envisioned for it?

I. MADISON'S VISION FOR CONGRESS

Madison worked to establish a Congress that would simultaneously prevent bad things from happening and enable good things to happen. With respect to prevention, Madison wanted a Congress that would control the effects of what he termed "the mischiefs of faction," and to keep the governmental powers that the Founders had intentionally separated across the three branches from being consolidated in any one branch. At the same time, Madison wanted to foster deliberation in Congress, and to empower the first branch of government to make laws for the nation on matters that required encompassing and authoritative policy settlements.

A. CONTROLLING THE MISCHIEFS OF FACTION

Madison famously elaborated his views on the problem of faction and solutions for it in *Federalist* 10. He defined a faction as "a number of citizens, whether amounting to a majority or minority of the whole, who are united and actuated by some common impulse of passion, or of interest, adverse to the rights of other

¹ John R. Hibbing and Elizabeth Theiss-Morse, *Congress as Public Enemy: Public Attitudes Toward American Political Institutions* (New York: Cambridge University Press, 1995).



citizens, or to the permanent and aggregate interests of the community.” Given the requirements of liberty and the vagaries of human nature, it was impossible to eliminate the causes of faction. Nor would “enlightened statesmen” be able “to adjust these clashing interests, and render them all subservient to the public good.” Such statesmen would not always be around, and even when they were, they could not easily gauge and resolve the conflicts between competing interests and parties. Minority factions were unfortunate, but they would generally be checked by the “republican principle” in which the government makes decisions through majority rule. However, this solution did not solve the thornier problem of majority factions.

Here is where the Congress making laws for the large republic that Madison and his colleagues were proposing came in to play. In contrast to a “pure democracy” in which the people take part in government and rule themselves—a form of government which Madison argued was invariably prone to majority factions—a republic is characterized by a “scheme of representation” in which the citizens choose their law-makers and hold them accountable through elections. Representation allows republics to “refine and enlarge the public views, by passing them through the medium of a chosen body of citizens, who may best discern the true interest of their country, and whose patriotism and love of justice will be least likely to sacrifice it to temporary or partial considerations.”

The large republic proposed in the Constitution was unprecedented in its size and diversity. Opponents argued that it was too big to survive: republican governments had to be homogenous and therefore small to flourish. Madison turned their argument around by noting that the larger the size of the republic, the larger the chance of having representation capable of controlling the negative effects of majority factions. In a large republic, there are more “fit characters” for voters to choose from, and there are more voters electing them. Both factors combine to increase the odds that those “who possess the most attractive merit and the most diffusive and established characters” would be elected to Congress.

More broadly, a large republic mitigates against majority factions by making it harder for them to form and coordinate activities that undermine individual rights or the public good. “Extend the sphere and you take in a greater variety of parties and interests.” But here too the proposed solution only made it “less probable” that majority factions would take hold—there was no guarantee. Practically speaking, the greater diversity of factions would have to be taken in and represented, weighed, balanced, and modulated—or not—in Congress. The extended sphere that was Madison’s boldest innovation would thus depend on the absorptive capacity of Congress if it was to make good on his claim that the proposed Constitution embodied a “a republican remedy for the diseases most incident to republican government.”

B. PRESERVING THE SEPARATION OF POWERS

Madison also assumed that Congress would play an integral role in preserving the separation of powers, an arrangement deemed essential for good government by the Constitution’s supporters and opponents alike. Madison argued in *Federalist* 51 that the formal and complete separation of the legislative, executive, and judicial branches that many were calling for would be insufficient to prevent the “gradual concentration of the several powers in the same department.” The more practical solution was “giving to those who administer each department the necessary constitutional means and personal motives to resist the encroachments of the others . . . Ambition must be made to counteract ambition. The interests of the man must be connected with the constitutional rights of the place.” A dynamic system of checks and balances was necessary to



ensure the government controlled itself. Of course, in a republican system of government “a dependence on the people,” one that would be expressed most directly and frequently through elections to the House of Representatives, would be the primary means of control, “but experience has taught mankind the necessity of auxiliary precautions.”

Madison’s assumptions about the role that Congress would play in preserving the separation of powers can easily be overlooked because he was focused on another problem — that Congress would be too powerful and threaten the other branches of government. He observed that “in republican government, the legislative authority necessary predominates” given its closer proximity to the people. Most of the American states, as they framed their constitutions during the Revolutionary War, had sought to check the executive high-handedness of the sort that George III and his colonial governors had displayed. In Madison’s view, many state constitutions had over-corrected, producing legislatures that in turn proceeded to usurp powers of the other branches.

A key goal of the proposed Constitution was to guard against Congress encroaching on the other branches. The Founders sought to do this in part by dividing Congress into two chambers, each with different sizes, constituencies, modes of election, and terms to ensure that it would be harder for them to act in concert. The Founders also sought to fortify the executive and judicial branches, so that they could check Congress. The tenure of executive and judicial officeholders did not depend on congressional approval. The executive and judicial branches were also equipped to counter Congress through the president’s veto power and the judiciary’s role of interpreting and passing judgment on the constitutionality of laws made by Congress.

These and other such fortifications notwithstanding, the Constitution also invested Congress with a formidable set of defenses. The Senate could confirm presidential nominations to the executive and judicial branches. Congress could override presidential vetoes of legislation, and it could change the size, structure, and jurisdiction of the federal judiciary. If warranted, Congress could impeach and convict presidents and judges, thereby removing them from office. In sum, if members of Congress failed to ward off encroachments from the other branches, it would not be because they lacked the “necessary constitutional means” to do so.

Given Madison’s arguments in *Federalist* Nos. 10 and 51, it is possible to view his plan for Congress as designed to prevent bad things from happening. But this interpretation only gives half of the picture. Madison and the Founders also sought to establish branches of government that would supply essential virtues: energy in the executive, impartiality in the judiciary, and — most relevant for our purposes — deliberation in the legislature.²

C. SETTING THE STAGE FOR DELIBERATION

Madison had wanted Congress to be the institution to host and to foster deliberation on what the federal government should do about important issues facing the nation. This is fitting since Congress is the branch closest to the people on account of its modes of election, it has the power to make laws that bind and tax citizens, and it includes a diversity of people and perspectives needed to represent and deliberate on behalf of a large and diverse nation

² David Epstein, *The Political Theory of the Federalist* (Chicago: University of Chicago Press, 1984), especially pp. 147-197.



Opponents of the Constitution were suspicious of what they saw as the unduly small size and long terms of the proposed Congress, in particular for the House of Representatives—the chamber directly elected by the people. They wanted a larger, more numerous House to better mirror the different elements in society, and one-year terms to keep the legislators on a short leash—consistent with the then-common maxim, “Tyranny begins where annual elections end.” But Madison and his colleagues wanted to strike a balance, both in the number of legislators and the length of their terms. Madison reasoned that the number had to be sufficient to provide the requisite diversity of voices for the purposes of representation, but not so extensive that it would lead to a mob-like cacophony. And the terms of office had to provide for the recurring accountability needed in a republic, but also the tenure lawmakers needed to learn about, debate, and resolve the issues at hand without having to constantly look over their shoulders. Madison argued that the House, as structured, promoted republicanism and deliberation.³

The Senate, in which the states would have equal representation, would provide for even more stable and thoughtful deliberations by dint of its smaller membership, larger constituencies, indirect election, and staggered six-year terms. In *Federalist 63*, Madison proposed that the Senate would defend the people against “their own temporary errors and delusions” and ultimately enable the “cool and deliberate sense of the community” to prevail. In combination with the House, the Senate would ensure that Congress represented both short and long-term perspectives and—given the need for laws to be approved in both chambers—would ensure that considerations from both time horizons were duly reflected in the legislative deliberations and majority rule of the new national government.⁴

D. LEGISLATING FOR THE NATION

The final component of Madison’s vision for Congress was that it would have the legislative power and authority it needed to govern a fledgling nation. Such wherewithal had been conspicuously lacking, much to Madison’s chagrin, under the Articles of Confederation. The first sentence after the preamble to the Constitution declared that “all legislative powers herein granted shall be vested in a Congress of the United States.” Among this awesome set was the all-important power of the purse, i.e., the power to tax and appropriate funds, as well as the power to regulate inter-state commerce and international trade, to borrow and coin money, to regulate the currency, to manage immigration and naturalization, to provide for and regulate an army and a navy, to declare war, and (through the Senate’s “advice and consent” powers) to ratify treaties. In short, Congress and the national government it anchored could now address the array of problems that had been bedeviling the nation at home and abroad.

Madison and the Founders viewed Congress not simply or primarily as a check on executive power, as had long been the tradition in Anglo-American politics. Rather, Congress was meant to be, on account of its proximity to the people and institutional design, the generative, law-making body in the new republican system of government.⁵ It was only in Congress that the full sweep of ideas, agendas, interests and passions

³ Madison makes this case in *The Federalist* Nos. 52–57. See also Joseph M. Bessette, *The Mild Voice of Reason: Deliberative Democracy and American National Government* (Chicago, University of Chicago Press, 1994), 20–28.

⁴ Greg Weiner, *Madison’s Metronome: The Constitution, Majority Rule, and the Tempo of American Politics* (Lawrence, Kansas: University of Kansas Press, 2012).

⁵ Jack Rakove, *Original Meanings: Politics and Ideas in the Making of the Constitution* (New York: Random House, 1996), Chapter 8.



could be represented and reconciled, and it was only in Congress that the legislative alloys in which they would be combined could be forged and tempered. Madison's "republican remedy" thus depended on this difficult and often clamorous work getting done in Congress.

II. THE MISMATCH BETWEEN MADISON'S VISION AND TODAY'S REALITY

How is Madison's vision for Congress playing out at present? The low esteem Americans have for Congress today is a clear signal that something is amiss. In a nutshell, the mischiefs of faction, rather than having their effects controlled by a Madisonian Congress, are spiraling out of control from within it. And Congress, rather than encroaching on the branches of government, has been ceding—in many cases quite willingly—its powers to them, especially the presidency. These fundamental problems are in turn making it difficult for Congress to engage in substantive and productive deliberation on major policy issues, and to legislate in ways that generate the negotiated settlements on these issues that the nation needs.

A. MISCHIEFS OF FACTIONS

Congress's faction problem today is multi-faceted. In surveying it, we cannot overlook the challenge of minority factions, which Madison believed could be dealt with via majority rule. But Madison had assumed that the federal government would be limited in its scope and activities. As both its scope and activities have expanded, especially in the period from the New Deal through the mid-1970s, federal legislation and regulation have generated countless nooks and crannies in which minority interests—be it a firm, an industry, or a group of people—have concentrated costs or benefits at stake. Such circumstances have prompted and enabled these interests to solve their collective action problems and engage in focused policy advocacy in ways that lead to responsive representation in Congress. Meanwhile, the countervailing and broader but more dispersed interests of taxpayers, consumers, and—not least—future generations have found it harder to have their concerns represented on Capitol Hill.⁶

Over the years, as these dynamics have played out, a multi-billion dollar lobbying industry has developed in the nation's capital. It has grown to the point that five out of the ten wealthiest counties in the United States can be found in the Washington, D.C. metro area—exactly the type of concentration of wealth in and around the capital city that has long concerned theorists of republican government.⁷ Congress is both a target and a recruiting pipeline for this lobbying-industrial complex. What once was taboo—retired members lobbying their former colleagues—has become commonplace. Over the past three election cycles, more than 60 percent of the retiring members of Congress who have kept working have done so in the lobbying industry.⁸ With the revolving door spinning like this, no wonder Americans are calling to drain the swamp that lies on the other side of it.

⁶ Jonathan Rauch, *Government's End: Why Washington Stopped Working* (New York: Perseus Books, 1999) and Greg Weiner, "After Federalist 10," *National Affairs* (Fall 2017), 132-136.

⁷ Rebecca Lerner, "The Ten Richest Counties in America 2017," *Forbes*, July 13, 2017, retrieved from <https://www.forbes.com/sites/rebeccalerner/2017/07/13/top-10-richest-counties-in-america-2017/#3a34710e2ef3> on October 30, 2018.

⁸ Retired member lobbying data from Center for Responsive Politics, "Revolving Door," retrieved from <https://www.opensecrets.org/revolving/departing.php?cong=114> on October 30, 2018.



Our two political parties present even more vexing mischiefs of faction. To be sure, we have had parties dating back to the Washington Administration, when Madison—despite his well-articulated reservations about them—joined with Thomas Jefferson to form a party to counter what they saw as the anti-republican Federalist interest.⁹ But for the vast majority of American history, our political parties have internalized the diversity of the extended sphere. They have been coalitions encompassing different regions, ideas, and interests, and served to modulate expressions of partisanship. Over the past fifty years, however, the two parties have sorted themselves out, cohering internally and diverging externally, to the point where they are as polarized as they have been since the Civil War. This entrenched conflict in Congress undermines the effectiveness and legitimacy of the institution. It also radiates out through partisan media echo chambers to the public, driving polarization in the electorate.

As University of Maryland political scientist Frances Lee has recently observed, a big part of the problem is that the parties are mired in an unusually protracted battle for control of Congress. Traditionally, one of the parties has dominated for extended periods of time, with comfortable majorities in both houses. The other party, relegated to minority status with little hope of winning power in the near future, has to “go along to get along.” The past four decades, in contrast, have been marked by intermittent periods of red or blue control, with much narrower majorities. As these majorities have been politically insecure, they have been loath to work with a minority that could plausibly unhorse them. The minority, meanwhile, is equally dead-set against cooperation, trying instead to isolate and embarrass the majority so as to increase its odds of winning power back in the next election.¹⁰

The party lines in the prolonged battle for political control are reinforced by rival coalitions of issue groups, that political scientists have termed “intense policy demanders.” Think the National Rifle Association (NRA), Americans for Tax Reform, and National Right to Life on the Right, or the Sierra Club, the AFL-CIO, and NARAL-Pro-choice America on the Left. It is not a foregone conclusion that they should naturally ally with each other. Yet on issue after issue, these groups, and the donors and activists behind them, hang together in a partisan coalition, pushing the party and candidates on their side of the political divide to hew to polarized positions.¹¹ Minority factions outside of Congress are in effect banding together to submit the parties and candidates to litmus tests that worsen polarization inside the institution.

Rather than producing a mix of legislators capable of refining and enlarging the public views—and of resisting the more intense claims of partisanship—these dynamics actively select for legislators inclined to be more responsive to such claims. The polarization is further reinforced by primary elections in which those donating and voting to nominate candidates are much more partisan and ideological than the electorate as a whole. And the primary election is effectively *the* election in the states and districts that have been rendered safe for one party or the other by the geographic sorting of the electorate and / or (in some states) egregious gerrymandering of House districts.

⁹ On the extent to which Madison anticipated the partisanship he came to practice in Congress, see William F. Connelly, Jr., *James Madison Rules America: The Constitutional Origins of Congressional Partisanship* (New York: Rowman & Littlefield, 2010).

¹⁰ Frances E. Lee, *Insecure Majorities: Congress and the Perpetual Campaign* (Chicago: University of Chicago Press, 2016).

¹¹ Kathleen Bawn, Martin Cohen, David Karol, Seth Masket, Hans Noel, and John Zaller, “A Theory of Political Parties: Groups, Policy Demands and Nominations in American Politics,” *Perspectives on Politics* (2012), 571-597.



B. FROM IMPETUOUS VORTEX TO WILLING PUSHOVER

Alongside its failure to mitigate the effects of the “mischief of faction,” Congress has also failed to hold its own within and defend against attacks on the separation of powers. The presidency—not Congress—has turned out to be the “impetuous vortex” that Madison worried would encroach on the other branches. This dynamic would not surprise Madison. Even as he was serving in the House of Representatives, President Washington and his enterprising Secretary of the Treasury, Alexander Hamilton, had demonstrated that the executive branch could seize the initiative in domestic and foreign policy alike, to Madison’s alarm and consternation.¹² The emergence of the presidency under Andrew Jackson as a democratically elected office—the only one for the nation as a whole—brought more power and authority into the White House. So did the twentieth century rise of the United States as a global and nuclear power, one for which the president served as the chief diplomat and commander-in-chief. Meanwhile, Theodore Roosevelt and Woodrow Wilson scrapped longstanding norms against presidents appealing to the public to advance their policy agendas, further augmenting the powers of their office. Finally, new media technologies—radio, television, and now social media—have more naturally focused the public’s attention on the president in the White House rather than on the hundreds of legislators in the Capitol.

But for all of these institutional developments empowering the presidency vis-à-vis Congress, the largest source of legislative disempowerment has been Congress itself. Ambition in Congress has always been challenged to check ambition in the president given the latter’s superior capacity for “decision, activity, secrecy, and dispatch” that Hamilton described in *Federalist 70*. However, over time, congressional ambition has twisted and taken the form of delegating and deferring to presidents to avoid responsibility for exercising the powers that the Constitution gave to Congress. Deep down, members know it. As two of them—Senator Mike Lee and Representative Jeb Henslerling—recently lamented:

The dysfunction in Washington today has accreted over decades, under Houses, Senates, and presidents of every partisan combination. . . .The stability and moral legitimacy of America’s governing institutions depend on a representative, transparent, and accountable Congress to make its laws. For years, however, Congress has delegated too much of its legislative authority to the executive branch, skirting the thankless work and ruthless accountability that Article 1 demands and taking up a new position as backseat drivers of the republic.¹³

Apart from the problematic delegation of law-making power to the administrative state, Congress increasingly fails to exercise two of its most critical powers. The first is the power of the purse, perhaps the bedrock of the Congress’s authority. This power is wide-ranging, but Congress has worked itself into a straightjacket when it comes to wielding it. Two-thirds of federal outlays are on automatic pilot via entitlement programs, primarily Social Security and Medicare. Like the third rails they are often likened to, these mandatory spending programs are essentially impossible for lawmakers to adjust, despite the pressure they are putting on the rest of the budget. On the other side of the ledger, the unstinting advocacy of the anti-tax faction has made it similarly difficult, if not impossible, to raise taxes, notwithstanding the

¹² John Ferejohn, “Madisonian Separation of Powers,” in Samuel Kernell, ed., *James Madison: The Theory and Practice of Republican Government* (Stanford: Stanford University Press, 2003), 126-155.

¹³ Mike Lee and Jeb Henslerling, “A Stronger Congress, A Better Republic,” *National Review Online*, Feb. 2, 2016, retrieved from <https://www.nationalreview.com/2016/02/congressional-law-makers-representatives-dont-represent/> on October 24, 2018.



need for more revenue and the underlying wealth of the country from which it could be drawn. The resulting deficits, once again running in the trillion-dollar range annually, further tighten the fiscal squeeze via larger interest payments. The deficits also give rise to rapidly accumulating national debt, which already exceeds our annual gross domestic product.

Madison would be equally concerned by Congress's abdication of its war powers. Since the congressional declaration of war at the outset of American involvement in World War II, the United States has waged subsequent wars in Korea, Vietnam, the Persian Gulf, Afghanistan, and Iraq without one. The 2001 congressional "authorization" of military force, originally meant to be used against those complicit in the 9/11 attacks, continues to be invoked by presidents seventeen years later as a blanket authorization for the global war on terror. Data compiled by scholars at Brown University indicates that between 2015 and 2017, this never-ending and amorphous war witnessed U.S. air and drone strikes in 7 countries, U.S. combat troops operating in 15 countries, and U.S. counter-terrorism training operations in 58 countries.¹⁴

Meanwhile, the pattern of Congress yielding its power and authority to the presidency, on multiple fronts has been accelerated by polarization and, in a vicious cycle, actually worsens it. A divided Congress is even more hard-pressed to take the collective action needed to rein in or rebuff unilateral executive actions. And in a deeply divided society, unilateral executive action rallies those supporting the president, while at the same time enraging their opponents.¹⁵

C. "A PARLIAMENT OF PUNDITS"

Not surprisingly, the polarization in Congress and legislators' abdication of core constitutional responsibilities have had a negative impact on legislative deliberation. A major shift here has been the subordination of congressional committees to congressional parties. This change was set in motion in the 1970s by liberal reformers in the Democratic Party, who had sought for years to reduce the power of their predominantly southern and more conservative committee chairs who had retained their gavels via the seniority system. The post-Watergate surge of liberal Democrats in the 94th Congress led to the unseating of three of the most obstinate chairmen in the House and the caucus putting the others on notice that they could not stray far from the party line. In the wake of the Contract with America in the 104th Congress, Newt Gingrich and the new Republican majorities took things to the next level, making seniority a secondary consideration, and loyalty to the party leadership the acid test, for GOP committee leaders. In addition, from that point forward, GOP committee leaders have been term-limited, further reducing their clout.

Parties, not committees, have become the primary drivers of legislation, and party leaders steer bills using methods that reduce opportunities for committee members, let alone rank and file legislators, to deliberate on the merits of major policies. Key bills are increasingly hashed out by majority party leaders and their staffs, who negotiate with their minority counterparts only when they have no choice to do otherwise. These packages are then pushed through Congress in carefully structured processes that restrict debate and amendments. The reliance on unorthodox procedures is now the new orthodoxy.¹⁶

¹⁴ Brown University Costs of War Project, "Current United States Counterterror War Locations," retrieved from https://watson.brown.edu/costsofwar/files/cow/imce/papers/Current%20US%20Counterterror%20War%20Locations_Costs%20of%20War%20Project%20Map.pdf on October 24, 2018.

¹⁵ Richard Skinner, "Barack Obama and the Partisan Presidency," *Society Magazine* (2012); Sidney Milkis and Nicholas Jacobs, "Donald Trump, the Administrative Presidency, and the Hazards of Executive-Centered Partisanship," *The Forum* (2017).

¹⁶ The title of a leading textbook tells this story: the late Barbara Sinclair's, *Unorthodox Lawmaking: New Legislative Processes in the U.S. Congress*, first published in 1997 to describe departures from the "textbook Congress," is now in its fifth edition.



Another factor facilitating party control of legislation and undermining Congress's capacity for deliberation is the substantial reductions in policy staffing and expertise available to support lawmakers. This change was also driven by the new Republican majorities in the 104th Congress, who followed through on the Contract with America's pledge to reduce House committee staff by one-third. The GOP majorities also eliminated the Office of Technology Assessment, with its specialized expertise meant to give Congress an independent perspective vis-à-vis the executive branch's technocrats, and lowered the budgets and staffing of the Government Accountability Office and the Congressional Research Service. Critics of this shift have likened it, harshly but not unfairly, to a self-administered "big lobotomy" from which Congress has yet to recover.¹⁷

Finally, the imperatives of the permanent campaigns that members of Congress feel obliged to wage have undermined deliberation and bipartisanship. Most members of Congress now live in their states and districts rather than move with their families to Washington. This means members spend much less time together in D.C. and struggle to develop the relationships with each other that were once commonplace—and essential for legislative negotiations. Moreover, newly elected members are instructed by party officials to spend at least half their time fundraising, further curtailing members investing the time, holding the hearings, and acquiring the knowledge needed for substantive deliberations. Many legislators seem to be focusing more on the performative aspects of their role, serving as media commentators about what the president is or is not doing, supporting or opposing his actions depending on whether they are from the same party or not. What they are collectively doing much less of is serving as legislators carrying out their constitutional responsibilities in a co-equal branch of government. As Jonah Goldberg recently put, we no longer have a Congress so much as "a parliament of pundits."¹⁸

The cumulative effect of these developments is the failure of Congress to address the major problems facing the nation. Sarah Binder of the Brookings Institution has found that levels of legislative gridlock have been steadily rising in recent decades, especially on the most salient issues.¹⁹ Presidents of both parties have tried to take advantage of these impasses, issuing executive orders and using other administrative tools in an effort to make national policy on matters where Congress cannot or will not act. But these legislative workarounds are superficial and unstable. To be sure, a president can decide not to bother with the hard work of assembling majorities in Congress, to wave his phone and pen and endeavor to bring about sweeping policy shifts on his own. But his successors can wield their own phones and pens to negate or reverse these policies. We have seen this whiplashing occur over the past few years on immigration, free trade, climate change, and gun control, among other major and contentious issues, roiling policies and politics alike. We must find a better way forward.

¹⁷ Paul Glastris and Haley Sweetland Edwards, "The Big Lobotomy," *Washington Monthly*, Summer 2014, retrieved from <https://washingtonmonthly.com/magazine/junejulyaug-2014/the-big-lobotomy/> on October 30, 2018.

¹⁸ Yuval Levin, "Congress is Weak Because Its Members Want It To Be Weak," *Commentary*, June 2018, retrieved from <https://www.commentarymagazine.com/articles/congress-weak-members-want-weak/> on October 30, 2018; quotation from Joe Concha, "Fox's Goldberg: Congress 'a parliament of pundits': Everyone wants 'to secure their position on Morning Joe or Fox & Friends,'" *The Hill*, August 2019. <https://thehill.com/homenews/media/400741-foxs-goldberg-congress-a-parliament-of-pundits-everyone-wants-to-secure-their?>

¹⁹ Sarah Binder, "Polarized We Govern?" Brookings Institution Center for Effective Public Management, May 2014.



HOW MIGHT WE BEGIN TO RECOVER A MADISONIAN CONGRESS?

To be practical, any proposed changes or improvements for Congress need to be developed and implemented within the constraints of our existing system. But there is power in constraint: it forces us to think clearly about what would be feasible and desirable, and to identify and work with rather than against the grain of the constitutional system. With this in mind, we turn now to explore three potential paths forward. They are distinct but not mutually exclusive. They overlap with and reinforce each other, and they all point in the same general direction: toward the recovery of a Madisonian Congress. These pathways include depolarizing our politics, strengthening Congress as an institution, and revitalizing Americans' appreciation for and commitment to the people's branch of government.

A. DEPOLARIZING OUR POLITICS

The first pathway involves mitigating the effects of factions, in particular polarization and hyper-partisanship, that too often work to inflame passions and grind things in Congress to a halt. The difficulty here is that most of the potential levers of reform are hard to pull, have to be done on a state-by-state basis, and may not have the desired consequences. Consider the reforms touted most frequently by pundits as the cure for polarization: expanding the use of nonpartisan redistricting and opening up primary elections currently controlled by parties. There may be good democratic reasons to adopt these reforms, but the available evidence suggests they will not do much to alleviate the underlying problem of polarization.²⁰

An emerging reform that may hold more promise is "ranked choice voting" (RCV). This election format gives voters more choices and provides a finer-grained register of public opinion, ensures that winning candidates are supported by a majority of voters, and — most importantly — gives candidates incentives to forgo highly negative and partisan campaigns.²¹ RCV is currently used in many other countries (including Australia, Ireland, and multiple Canadian provinces) and in cities across the United States. The citizens of Maine have now passed two ballot measures establishing RCV for their state and federal legislators in primary and general elections beginning in 2018. Momentum for adopting RCV is building in several other states.

RCV could work especially well in the context of multi-member legislative districts, a combination that would enable fuller representation of women, racial minorities, and both parties in state congressional delegations, while practically eliminating the possibility of partisan gerrymanders. Multi-member districts are less alien than they may seem at first glance. Across the U.S., 15 percent of state legislators represent multi-member districts, as in effect do U.S. Senators. Multi-member districts were common in the House of Representatives until the 1840s, and some states continued using them for the House of Representatives until 1967, when Congress passed legislation requiring single-member districts. But this law could be overturned, and legislation has been introduced that would do just that, establishing RCV in multi-member house districts.²²

²⁰ Nolan McCarty, "Reducing Polarization: Some Facts for Reformers," *University of Chicago Legal Forum*, 2015, 243-278.

²¹ Here is how RCV works: voters rank the candidates in order of preference, and the ballots are initially counted for each voter's top choice. If a candidate secures more than half of the first-place votes, that candidate wins. If not, the candidate in last place is eliminated. Votes are then reallocated to the voters' top choices across the remaining candidates. This process repeats until one candidate is the top remaining choice of a majority of the voters.

²² See FairVote, "The Fair Representation Act," retrieved from <https://www.fairvote.org/the-fair-representation-act#why-rcv-for-congress> on October 30, 2018.



We also need to find ways of mitigating the polarizing effects of our current system of campaign finance, which has been deregulated through a series of Supreme Court decisions. Given recent appointments to the Court, these problematic precedents will not be revisited anytime soon. We are going to have to cope with the problems they have produced, including effectively unlimited and undisclosed spending by highly ideological outside groups in the years ahead. But reformers can learn from and work to expand novel experiments in public financing via the matching funds and voucher systems currently being used in New York City and Seattle, respectively. These experiments have the virtue of encouraging candidates to build connections with and raise funds from their constituents. Recent scandals involving so-called Leadership PACs could also prompt reforms of those entities, which intensify the pull of partisanship in Congress.

While these reforms would be helpful, they will not address the fundamental causes of polarization and hyper-partisanship in Congress. In the end, our politics will need to be reformed through politics. This will probably entail some combination of two developments. The first is that one party will need to decisively win the battle for control of Congress that, at least since the mid-1990s, has had the two parties fighting on a knife's edge in each electoral cycle. More secure and stable majorities in Congress would signal to the minority party that they would need to go along or risk marginalizing themselves further. The second development is a reshuffling of the party coalitions so that they once again overlapped, with each party competing (albeit more or less effectively) for the votes of all Americans. President Trump's resort to identity-based appeals to white Americans is clearly taking us in a different direction at present. But demographic changes already underway will likely make it increasingly difficult for future GOP presidential candidates to follow his lead and win national office. That said, if the move toward identity politics continues unabated, it will certainly make it harder to cope with the problem of polarization. Some political divisions are impossible to bridge.

B. STRENGTHENING CONGRESS AS AN INSTITUTION

In addition to finding better ways of controlling the effects of faction, we also need to find ways of strengthening Congress as an institution in our separation of powers system. Rather than piecemeal reforms to different parts of Congress — e.g., ending term limits for GOP committee leaders, or moving to biennial budgeting — what is needed first and foremost is a multi-faceted reassertion of congressional power and authority vis-à-vis the executive branch. This was the pattern that prevailed in the immediate aftermath of World War II, when Congress passed a number of measures, including the Legislative Reorganization Act and the Administrative Procedure Act, to recapture some of the powers it had ceded to the executive branch during the years of depression and war; likewise with a series of reforms that Congress undertook in the wake of Vietnam and Watergate, including the Budget and Impoundment Control Act, the National Emergencies Act, and the Foreign Intelligence Surveillance Act. These legislative resets each had a half-life, and many of them have been depleted. After years of justifiable complaints of presidential overreach from legislators in both parties, the time is ripe for another reset.

We can expect this institutional reassertion to be led by what Roger Davidson once termed “procedural entrepreneurs” in Congress, i.e., legislators who seek to diagnose the institution's problems and develop solutions that would enable it to function more effectively.²³ Procedural entrepreneurs often serve as

²³ Roger H. Davidson, “The Legislative Reorganization Act of 1946,” *Legislative Studies Quarterly* (1990) 15:3, pp. 357-373.



catalysts for larger groups of institutionally-minded and rank-and-legislators frustrated with the roles and few degrees of freedom assigned to them in the status quo, bringing them into reform coalitions. These coalitions formed and had great effect in the 1940s and 1970s. There are signs it is happening again. Several bipartisan reform caucuses have emerged in Congress to push various reform agendas, and multiple bills are now in circulation. There is growing support in Congress to establish a joint select committee to review and reform the operations of Congress as a whole, a step that lay behind these earlier waves of systematic institutional reform. A concurrent resolution that has been introduced in the present Congress to set up such a committee has a bipartisan group of 67 co-sponsors in the House.²⁴ As with these earlier periods, we now also see external advocates for congressional reform working across the political spectrum with procedural entrepreneurs inside Congress to inform and reinforce their efforts to remake the institution.²⁵

Rather than run through a litany of potential reforms that could be advanced through a reassertion of congressional power, we should anticipate a few basic ways in which this reset might play out. We could expect the reset to be driven by, and clear the way for, individual members, especially in the Senate, taking action on their own, refusing to toe the partisan lines articulated by party leaders and presidents, and opting instead to work with like-minded colleagues on both sides of the aisle to advance shared policy and institutional concerns.²⁶ We could expect the reset to involve power and initiative flowing from party leadership back into committees and subcommittees, furthering the trend toward individual initiative and bipartisanship in congressional policy-making. We could expect the reset to begin to rebuild the staffing and expertise Congress needs to do its work—on committee policy staffs, in legislative support agencies like GAO, CBO, CRS, and perhaps in a rebooted Office of Technology Assessment or an equivalent entity. (As a side note, Congress augmenting its internal capacity to make and oversee policy would bolster the institution vis-à-vis minority factions by reducing the need for members and their staffs to rely on the “legislative subsidy” provided by lobbyists.)²⁷ Ultimately, the reset of Congress would be made manifest in an institution whose members spend more time making laws and overseeing their implementation, and in a Congress that has regained the basic control it is meant to exercise over the administrative state: the powers of the purse, and the nation’s wars—in sum, in a Congress fulfilling the essential functions that it is meant to, and has to, in our separation of powers system.

²⁴ House Concurrent Resolution 28, retrieved from <https://www.congress.gov/bill/115th-congress/house-concurrent-resolution/28/cosponsors> on October 9, 2018.

²⁵ See for example the work of congressional reform advocates, think tankers, and scholars associated with the Legislative Branch Capacity Working Group at www.legbranch.com, Future Congress at www.futurecongress.org, the Congressional Reform Project at <https://www.conginst.org/congressional-reform-project>, the National Budgeting Roundtable at <https://www.budgetingroundtable.com>, the Center for Effective Lawmaking at <https://thelawmakers.org>, and the Congressional Oversight Initiative at <https://www.pogo.org/congressional-oversight-initiative>.

²⁶ My thinking on this point has been greatly informed by conversations with James Wallner and Yuval Levin.

²⁷ Lee Drutman and Steve Teles, “A New Agenda for Political Reform,” *Washington Monthly*, Spring 2015, retrieved from <https://washingtonmonthly.com/magazine/maraprmay-2015/a-new-agenda-for-political-reform/> on October 30, 2018.



C. REVITALIZING THE PEOPLE’S BRANCH

The pathways to change described above might suggest that recovering a Madisonian Congress is a job for electoral reformers, political leaders, and members of Congress—i.e., elites in Washington, D.C. But American citizens also have a role to play—indeed it might be the most important one of all. We all need

to revitalize our understanding of the proper functioning of Congress and do our part to ensure that our representatives and senators reflect this understanding. For some, this will entail more active engagement with the legislators representing us *in between* elections to ensure they understand their constituents’ preferences and are taking them into account. As with earlier periods of reform, new grassroots organizations and networks have emerged to help citizens engage with members in ways that maximize the influence of their voices. Other citizens are taking the lead in organizing political efforts to elect members of Congress that will better represent them. Not surprisingly, these local and informal political organizers are going about their work in a pragmatic manner well-suited for the places they live and know best (as opposed to the more ideologically doctrinaire spokespeople we encounter on national and social media).²⁸ Finally, a groundswell of citizens, many from non-political backgrounds, have been putting themselves forward to run for Congress. Brookings Institution researchers have found that 2,280 candidates ran for House seats in 2018, a 37 percent increase from 2014. The upcoming midterms will see many in this wave of new voices make it to Congress. When they get there, an ample portion of them will be determined to revamp the institution.

Running across all of these examples of reawakened citizen engagement with Congress is a conviction that the first branch of government can and must do better when it comes to representing the American people. This is a conviction that we all should share and act upon. The sustained public repudiation of Congress we noted at the outset reflects the reality that the institution has been underperforming for some time. But its duration also suggests that citizens have grown complacent and / or resigned in the face of its underperformance. Thus we too are implicated in the institutional failure. American citizens elect and get the Congress they deserve. If it is broken, we need to do our part to fix it. On this point, we might conclude with argument made by Madison in a speech at the Virginia Ratifying Convention: “I go on this great republican principle, that the people will have virtue and intelligence to select men of virtue and wisdom. Is there no virtue among us? If there be not, we are in a wretched situation. No theoretical checks—no form of government can render us secure.”

²⁸ See Lara Putnam and Theda Skocpol, “Middle America Reboots Democracy,” *Democracy: A Journal of Ideas*, February 20, 2018, retrieved from <https://democracyjournal.org/arguments/middle-america-reboots-democracy/> on October 30, 2018.