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# TOWARD A MORE DEMOCRATIC CONGRESS?

JAMES E. FLEMING\*

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## INTRODUCTION

There is considerable talk of failure in the air these days – including constitutional failure, moral failure, political failure and institutional failure – and criticisms of Congress figure prominently in this discourse. First, I shall ask whether talk about Congress being “the broken branch,” the topic of the first panel in this symposium, is talk of *constitutional* failure or failure of some other sort. Second, to link the topic of that panel to the topic of the panel in which I participated, I will ask whether some call Congress the broken branch because it is not adequately or appropriately *democratic*. More generally, when people disparage Congress, are they doing so because they view it as undemocratic? Or instead, because they view it as dysfunctional, ineffective, irresponsible, and otherwise not up to the challenge of meeting the daunting problems it will face in the twenty-first century?

Finally, I consider whether proposals that would make Congress more defensibly democratic would likely mend or alleviate the supposed brokenness. And, would making Congress more democratic lead people to disparage it less? To preview my two arguments: first, I shall argue that talk about Congress being “the broken branch” is not talk of constitutional failure but instead talk of other sorts of failure; and second, I shall contend that making Congress more democratic – from the standpoint of a normative political theory of majoritarian democracy that is not embodied in the Constitution – is not likely to heal its brokenness or to mitigate its disparagement.

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## I. DISCOURSE OF FAILURE IN THE AIR

What is constitutional failure? Does it presuppose a conception of constitutional success and of the preconditions for constitutional success?<sup>1</sup> Whatever failure is, there is considerable talk of it in the air these days. Just consider these titles from respected academics:

- Bruce Ackerman, *The Failure of the Founding Fathers: Jefferson, Marshall, and the Rise of Presidential Democracy*;<sup>2</sup>
- Ronald Dworkin, *Is Democracy Possible Here?: Principles for a New Political Debate*;<sup>3</sup>
- Alan Wolfe, *Does American Democracy Still Work?*<sup>4</sup>
- Thomas Mann & Norman Ornstein, *The Broken Branch: How Congress Is Failing America and How to Get It Back on Track*;<sup>5</sup> and
- Sanford Levinson, *Our Undemocratic Constitution: Where the Constitution Goes Wrong (and How We the People Can Correct It)*.<sup>6</sup>

Consider also:

- John Dean, *Broken Government: How Republican Rule Destroyed the Legislative, Executive, and Judicial Branches*;<sup>7</sup>
- Larry Sabato, *A More Perfect Constitution: 23 Proposals to Revitalize Our Constitution and Make America a Fairer Country*;<sup>8</sup>

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<sup>1</sup> Sotirios Barber, *Constitutional Failure: Ultimately Attitudinal*, in THE LIMITS OF CONSTITUTIONAL DEMOCRACY (Stephen Macedo & Jeffrey Tulis eds., forthcoming) (on file with author).

<sup>2</sup> BRUCE ACKERMAN, *THE FAILURE OF THE FOUNDING FATHERS: JEFFERSON, MARSHALL, AND THE RISE OF PRESIDENTIAL DEMOCRACY* (2005).

<sup>3</sup> RONALD DWORKIN, *IS DEMOCRACY POSSIBLE HERE?: PRINCIPLES FOR A NEW POLITICAL DEBATE* (2006).

<sup>4</sup> ALAN WOLFE, *DOES AMERICAN DEMOCRACY STILL WORK?* (2006).

<sup>5</sup> THOMAS E. MANN & NORMAN J. ORNSTEIN, *THE BROKEN BRANCH: HOW CONGRESS IS FAILING AMERICA AND HOW TO GET IT BACK ON TRACK* (2006).

<sup>6</sup> SANFORD LEVINSON, *OUR UNDEMOCRATIC CONSTITUTION: WHERE THE CONSTITUTION GOES WRONG (AND HOW WE THE PEOPLE CAN CORRECT IT)* (2006).

<sup>7</sup> JOHN W. DEAN, *BROKEN GOVERNMENT: HOW REPUBLICAN RULE DESTROYED THE LEGISLATIVE, EXECUTIVE, AND JUDICIAL BRANCHES* (2007).

<sup>8</sup> LARRY J. SABOTO, *A MORE PERFECT CONSTITUTION: 23 PROPOSALS TO REVITALIZE OUR CONSTITUTION AND MAKE AMERICA A FAIRER COUNTRY* (2007).

- Robert Kuttner, *The Squandering of America: How the Failure of Our Politics Undermines Our Prosperity*,<sup>9</sup> and
- Sheldon Wolin, *Democracy Incorporated: Managed Democracy and the Specter of Inverted Totalitarianism*.<sup>10</sup>

Before this recent spate of books, there was Mark Brandon's *Free in the World: American Slavery and Constitutional Failure*.<sup>11</sup> I should also mention Will Harris's *The Interpretable Constitution* and Sotirios Barber's *On What the Constitution Means*, for both of these works – though they do not cry out “failure” in their titles – prefigure the discussion of failure today.<sup>12</sup> Doubtless there are other examples as well, but this list should serve to illustrate the range of discourse about failure.

We should ask, are any of these authors really arguing that we are experiencing a *constitutional* failure? To be talking about distinctly constitutional failure, surely one has to be talking about failures *of* the Constitution, failures *caused by* the Constitution, failures stemming from a feature or defect of the Constitution, or the like. The striking fact of the matter is that, for all the ominous talk of failure, it is for the most part not talk of constitutional failure in this sense. Instead, it is talk of other sorts of shortcomings or failure: a moral failure (for example, in which a people prove to lack the public reasonableness and religious moderation necessary for a morally pluralistic constitutional democracy);<sup>13</sup> a political failure (for example, the emergence of a new form of democratic politics that prompts analysts like Alan Wolfe to ask whether American democracy still works);<sup>14</sup> an institutional failure (for example, the developments leading to Thomas Mann & Norman Ornstein's diagnosis of the institution of Congress as “the broken branch”);<sup>15</sup> and a failure of policy (for example, a policy that has unintended bad consequences or indeed makes a problem worse rather than helping to solve it). Thus, it appears that the worrisome states of affairs diagnosed are not failures

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<sup>9</sup> ROBERT KUTTNER, *THE SQUANDERING OF AMERICA: HOW THE FAILURE OF OUR POLITICS UNDERMINES OUR PROSPERITY* (2007).

<sup>10</sup> SHELDON S. WOLIN, *DEMOCRACY INCORPORATED: MANAGED DEMOCRACY AND THE SPECTER OF INVERTED TOTALITARIANISM* (2008).

<sup>11</sup> MARK E. BRANDON, *FREE IN THE WORLD: AMERICAN SLAVERY AND CONSTITUTIONAL FAILURE* (1998).

<sup>12</sup> SOTIRIOS A. BARBER, *ON WHAT THE CONSTITUTION MEANS* (1984); WILLIAM F. HARRIS II, *THE INTERPRETABLE CONSTITUTION* (1993).

<sup>13</sup> See, e.g., DWORKIN, *supra* note 3, at 52-55; JAMES E. FLEMING, *SECURING CONSTITUTIONAL DEMOCRACY: THE CASE OF AUTONOMY* 226 (2006).

<sup>14</sup> See WOLFE, *supra* note 4, at 22.

<sup>15</sup> See MANN & ORNSTEIN, *supra* note 5, at 6-11.

of the Constitution or failures directly attributable to the Constitution (or to its being inadequately or inappropriately democratic).<sup>16</sup>

Let me illustrate my claim with a few observations about Sanford Levinson's book, *Our Undemocratic Constitution: Where the Constitution Goes Wrong (and How We the People Can Correct It)*.<sup>17</sup> I think Levinson's book is the closest thing we have in mainstream constitutional scholarship to an argument that the American Constitution has failed or is in serious danger of failing. Levinson, however, does not talk about actual failure, but about serious defects, problematic dysfunction, and "hard-wired" features of our structural Constitution that could contribute to a crisis, if not a failure.<sup>18</sup> Nowhere does he say our Constitution has failed. Indeed, much of his gripe with the Constitution and our constitutional culture concerns the extent to which we venerate the Constitution and view it as a success. Thus, he laments how difficult it is to arouse people about the need for a constitutional convention to make basic changes in the structural Constitution.<sup>19</sup> He is frustrated that it is such a huge struggle to get people to see, as he puts it in his subtitle, "where the Constitution goes wrong." It is even more difficult to motivate them to press for a constitutional amendment, let alone a constitutional convention, to correct it.

What exactly is Levinson's indictment of the American Constitution? He argues that it is seriously *undemocratic* as measured by a normative theory of democracy that is more majoritarian than the arrangements established in the Constitution. His criticism also includes a number of empirical propositions in support of the view that the constitutional order is dysfunctional, if not broken.<sup>20</sup> He fears that the undemocratic features of our structural Constitution he criticizes may contribute to constitutional crises, and he tells us about a number of crises that we have narrowly averted (including some about which

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<sup>16</sup> Of course, it could be the case that these types of failure, though not themselves constitutional failure, are ultimately attributable to the Constitution in the sense that they are made more likely by our constitutional design. This seems to be the suggestion of Sotirios Barber's critique of James Madison's (and our Constitution's) eschewal of the Aristotelian tradition of "supplying the defect of better motives" by inculcating moral and civic virtues in favor of a strategy of private incentives and of letting ambition counteract ambition. Barber, *supra* note 1 (manuscript at 6-9).

<sup>17</sup> LEVINSON, *supra* note 6.

<sup>18</sup> *Id.* at 22-24.

<sup>19</sup> *Id.* at 167-80.

<sup>20</sup> Levinson told me in an email that he had proposed to Oxford University Press the title of *Our Broken Constitution*, but they declined because they had already used "broken" in the title of the Mann & Ornstein book, *The Broken Branch: How Congress Is Failing America and How to Get It Back on Track*. See generally MANN & ORNSTEIN, *supra* note 5 (explaining the institutional decline of Congress and the increase in partisan polarization within the branch). For what it is worth, I think it is a good thing that Oxford did not let Levinson use that title, because it would not have fit his book as well as the title they agreed upon.

we did not even know). For example, in 1976, if only 5559 voters in Ohio and 3687 voters in Hawaii voted for Gerald Ford instead of Jimmy Carter, Ford would have had 269 electoral votes compared to Carter's 268 and Reagan's 1, and that would have sent the choice to the House of Representatives.<sup>21</sup>

Levinson's analysis, focusing as it does on the "hard-wired" features of our structural Constitution that have been in place since the beginning, could have been written at most any time during the nation's history, and certainly any time during the twentieth century.<sup>22</sup> Granted, the presidential election controversy culminating in *Bush v. Gore*,<sup>23</sup> shifts in population resulting in the disproportionate influence of small states in the Senate and the Electoral College, and the emergence of the red states-blue states phenomenon (with small red states having disproportionate influence in the Senate and presidential elections) give the book a special urgency at the present time. Nonetheless, even if George Bush had easily carried Florida in the 2000 presidential election and Al Gore had conceded defeat on election night, Levinson still would have viewed the outcome as a travesty that demonstrates one important place where the Constitution goes wrong. After all, Gore still would have won the nationwide popular vote by a considerable margin and still would have lost in the Electoral College, 271 to 266.<sup>24</sup> And so, Levinson still would have called for the abolition or reform of the Electoral College in favor of direct popular vote and a requirement that, to be elected, a presidential candidate must win a majority of the popular vote.<sup>25</sup>

Thus, Levinson's book is not simply a diagnosis of constitutional failure at the present time. Instead, it is a descendant of writing during the progressive era castigating the Constitution for being undemocratic and for not embodying a form of democracy more like a British-style system of parliamentary supremacy. Not surprisingly, he praises this progressive era literature and the progressive movement for constitutional change.<sup>26</sup> Woodrow Wilson could have written much of this book; indeed, witness the quotation from Wilson with which Levinson concludes his book.<sup>27</sup>

In sum, Levinson does not so much argue that the Constitution has failed or that Congress is broken. Instead, he asserts that the Constitution and Congress are seriously imperfect from the critical standpoint of a normative political theory of majoritarian democracy that is not embodied in the Constitution. He

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<sup>21</sup> LEVINSON, *supra* note 6, at 94.

<sup>22</sup> I say that this analysis could have been written at any time during the twentieth century because I recognize that some of the features of our practice that he criticizes, like policy-based presidential vetoes and filibusters in the Senate, developed over time.

<sup>23</sup> 531 U.S. 98, 110 (2000).

<sup>24</sup> Richard L. Berke, *Bush Prevails: By Single Vote, Justices End Recount, Blocking Gore After 5-Week Struggle*, N.Y. TIMES, Dec. 13, 2000, at A1.

<sup>25</sup> See LEVINSON, *supra* note 6, at 81-97.

<sup>26</sup> *Id.* at 162-63.

<sup>27</sup> *Id.* at 181.

criticizes the conception of democracy – with all its limitations on majority rule and one person, one vote – established by the Constitution. Thus, his book is notably different from the other books about failure and congressional brokenness in an important respect: they clearly are books for and about our present predicament – for example, Wolfe’s *Does American Democracy Still Work?*, the title of which implies that it used to work but no longer does.<sup>28</sup> From Levinson’s standpoint, the Constitution has always been indefensibly undemocratic.

## II. UNDEMOCRATIC AND BROKENNESS

What is the relationship between charges that Congress is “the broken branch” and criticisms that the Constitution in general and Congress in particular are “undemocratic”? Have undemocratic features of our Constitution and practice caused or contributed to the breakdown of Congress? If so, how? Can we address or overcome breakdown by adopting proposals to make Congress more democratic? And if so, through what measures?

I want to make as clear as possible that arguing Congress is the broken branch and arguing it is undemocratic are not necessarily the same thing. Congress could be broken for reasons that have nothing to do with being undemocratic (from the standpoint of a normative political theory of majoritarian democracy). And we could object to the undemocratic nature of Congress even if it were functioning quite well. Indeed, I have suggested that much of Levinson’s indictment of our Constitution and our Congress for being undemocratic would apply at any point in our nation’s history irrespective of how well or poorly our institutions are functioning.<sup>29</sup>

For example, Levinson views the equal representation of states in the Senate as illegitimate from the beginning. This criticism applies even in the moments when the Senate has lived up to its self-image as the world’s greatest deliberative body, and not just in the moments when senators from less populous states (like former Senator Ted Stevens of Alaska) were able to bring the bacon home to their citizens disproportionately when compared with senators from more populous states (like California).<sup>30</sup> Similarly, his critique of bicameralism would apply at any time in our nation’s history,<sup>31</sup> even at the moment when the less democratic but more responsible Senate passed the October 2008 financial bailout bill after it had been rejected by the more democratic (but, need I say, less responsible) House.<sup>32</sup>

What is more, I would suggest that adopting proposals to make Congress more democratic would not likely mend the branch’s brokenness. For example, abolishing the Senate in order to create a unicameral system would

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<sup>28</sup> See WOLFE, *supra* note 4.

<sup>29</sup> See *supra* text accompanying notes 22-27.

<sup>30</sup> LEVINSON, *supra* note 6, at 25-27, 49-62.

<sup>31</sup> *Id.* at 29-38.

<sup>32</sup> See David M. Herszenhorn, *Bush Signs Bill*, N.Y. TIMES, Oct. 4, 2008, at A1.

not do so.<sup>33</sup> Nor would reallocating Senate seats or increasing the total number of such seats, which Larry Sabato proposes and Levinson supports.<sup>34</sup> Nor for that matter would getting rid of the presidential policy-based veto, which Levinson proposes.<sup>35</sup> Granted, adopting such measures would make the Congress and the Constitution better fit a normative political theory of majoritarian democracy, but doing that and mending the brokenness of Congress are not the same thing.

Let us look briefly at one of Levinson's favorite punching bags, the equal representation of states in the Senate. His complaint is that this arrangement violates the principle of equal participation or one person, one vote.<sup>36</sup> I have heard Levinson say that in recent years he feels more and more like a political scientist as distinguished from a law professor.<sup>37</sup> But, I submit that preoccupation with the equal representation of states in the Senate as being an undemocratic pox on the face of the Constitution or indeed a "constitutional stupidity"<sup>38</sup> is a preoccupation peculiar to law professors. Law professors have read and teach *Reynolds v. Sims*,<sup>39</sup> and they want to bring its principle of one person, one vote from reapportionment of the House over to reconstitution of the Senate. Political scientists, by contrast, tend to begin with the study of how the Senate actually works.<sup>40</sup>

If the Senate is a failure or a stupidity for its failure to conform to the principle of one person, one vote, I would say it is a *successful failure* of the

<sup>33</sup> Levinson mentions a resolution to abolish the Senate. See LEVINSON, *supra* note 6, at 162. He is also deeply critical of "our illegitimate Senate" and the assumption that bicameralism is the natural division of legislatures despite the fact that "two-thirds of the countries around the world have only one-house legislatures." *Id.* at 30-31, 49-62.

<sup>34</sup> SABATO, *supra* note 8, at 23-28; see Sanford Levinson, *Still Complacent After All These Years: Some Ruminations on the Continuing Need for a "New Political Science" (Not to Mention a New Way of Teaching Law Students About What Is Truly Most Important About the Constitution)*, 89 B.U. L. REV. 409, 418-19 (2009).

<sup>35</sup> LEVINSON, *supra* note 6, at 38-49.

<sup>36</sup> *Id.* at 49-62.

<sup>37</sup> Levinson, *supra* note 34, at 409.

<sup>38</sup> LEVINSON, *supra* note 6, at 58 (referring to articles by Yale law professor William N. Eskridge, Jr., *The One Senator, One Vote Clauses*, in CONSTITUTIONAL STUPIDITIES, CONSTITUTIONAL TRAGEDIES 35, 35-39 (William N. Eskridge, Jr. & Sanford Levinson eds., 1998), and Vanderbilt law professor Suzanna Sherry, *Our Unconstitutional Senate*, in CONSTITUTIONAL STUPIDITIES, CONSTITUTIONAL TRAGEDIES, *supra*, at 95, 95-97).

<sup>39</sup> 377 U.S. 533, 561-68 (1964).

<sup>40</sup> See generally David R. Mayhew, *Is Congress "the Broken Branch"?*, 89 B.U. L. REV. 357 (2009) (arguing that there is no compelling case for revising the Constitution); Kenneth A. Shepsle, *Dysfunctional Congress?*, 89 B.U. L. REV. 371 (2009) (responding to Levinson and arguing that our unhappiness with Congress stems from an unhappiness with institutions generally); Barbara Sinclair, *Question: What's Wrong with Congress? Answer: It's a Democratic Legislature*, 89 B.U. L. REV. 387 (2009) (arguing that Congress may appear dysfunctional and ineffective because what we ask it to do is "really, really hard").



American Constitution.<sup>41</sup> How so? Accepting James Madison's arguments in *The Federalist Papers* for the virtues of an extended republic over a small republic as a structure for controlling the effects of factions over and against the common good,<sup>42</sup> the Senate represents more extended republics – i.e., states – than do the districts of the House of Representatives. Additionally, senators, representing these more extended republics, have a relatively greater capacity to deliberate about the common good, not only statewide but also nationwide.<sup>43</sup>

Furthermore, while many decry the influence of money in politics, not to mention the increasingly national flow of money in senatorial campaigns, one benefit may be that senatorial candidates have to take more national perspectives and show a commitment to the nation's common good. Speaking for myself, as a resident of Massachusetts, I contributed no money to the senatorial candidates in Massachusetts, though I enthusiastically voted for one of them. However, I did contribute money to senatorial candidates in states like New Hampshire, North Carolina, and Minnesota.

Finally, the greater national visibility of the Senate makes it a more fertile breeding ground for presidential candidates than the House.<sup>44</sup> This, too, fosters a broader view and greater likelihood of senators taking positions for the national common good, not just for the good of, say, Illinois or Arizona. Granted, sometimes this is nothing more than position-taking (this is something I learned long ago from David Mayhew's famous and influential book, *Congress: The Electoral Connection*).<sup>45</sup> Nevertheless, if we put aside the fact that the composition of the Senate violates the principle of one person, one vote, we can see that it functions as a more extended republic, with greater capacity for deliberation about the common good, and greater capacity for responsible democratic government, than the House. It may not be perfect

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<sup>41</sup> James E. Fleming, *Successful Failures of the American Constitution, in THE LIMITS OF CONSTITUTIONAL DEMOCRACY*, *supra* note 1 (manuscript at 19-22, on file with author).

<sup>42</sup> THE FEDERALIST NO. 10, at 56 (James Madison) (Jacob E. Cooke ed., 1961).

<sup>43</sup> It is not for nothing that the Senate conceives itself as the world's greatest deliberative body – and sometimes it even acts like it!

<sup>44</sup> Consider the presidential candidates from the last ten presidential elections: nine had been governors (George W. Bush (2004 & 2000), Bill Clinton (1996 & 1992), Michael Dukakis (1988), Ronald Reagan (1984 & 1980), and Jimmy Carter (1980 & 1976)); eight had been senators (Barack Obama (2008), John McCain (2008), John Kerry (2004), Al Gore (2000, more recently Vice President), Bob Dole (1996), Walter Mondale (1984, more recently Vice President), Richard Nixon (1972, more recently Vice President), and George McGovern (1972)); only one had been in the House of Representatives (Gerald Ford (1976, more recently Vice President)); and two had never been elected to national office before becoming the Vice President (George H.W. Bush (1988 & 1992)).

<sup>45</sup> DAVID R. MAYHEW, *CONGRESS: THE ELECTORAL CONNECTION* 61-73 (1974) (“The third activity congressmen engage in may be called *position taking*, defined here as the public enunciation of a judgmental statement on anything likely to be of interest to political actors.”).

from the standpoint of a normative political theory of majoritarian democracy, but it may work well enough.

### III. PROPOSALS FOR IMPROVING CONGRESS

We could distinguish at least three types of proposals for improving Congress: some might focus on making Congress more effective; others might aspire to make it more democratic; and a third group might attempt to make it more responsible. Three panel topics from the symposium allude to these three types of criticisms and proposals. Panel I, "Is Congress 'the Broken Branch'?" raises the first issue of how to mend Congress's brokenness by making it more effective and less dysfunctional. The panel in which I presented, "Toward a More Democratic Congress?" invites analysis of how to make Congress more democratic and whether doing so would mend its brokenness. Panel VI, "Toward a More Responsible Congress?," considers how irresponsibility contributes to Congress's brokenness and how increasing Congress's responsibility might make it less broken.

Let us distinguish two types of reforms that might make Congress more democratic. The first type consists of altering or abolishing present arrangements by constitutional amendment – such as the equal representation of states in the Senate, the practice of the filibuster, and the policy-based presidential veto. This would include proposals like Sabato's idea of having former Presidents serve as national senators, as well as his idea, endorsed by Levinson, of expanding the number of seats in the Senate (and the House).<sup>46</sup>

The second type of reform consists of enacting significant statutes that aim to curb present abuses. To invoke Bruce Ackerman's recent analysis in *American Prospect*, we might undergo "great repudiations" every thirty years or so.<sup>47</sup> Thus, just as we repudiated the excesses of the Nixon presidency by the War Powers Resolution, the Federal Election Campaign Act, and the Independent Counsel Act,<sup>48</sup> so we might repudiate present excesses through what Mark Tushnet has called "good-government reforms."<sup>49</sup> At the present time, though, it seems that any significant good government statutes along these lines would be adopted in response to the excesses of the Bush presidency. Any breakdowns or failures of Congress will be low priority for the foreseeable future. Just recall the failure of John McCain to get any

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<sup>46</sup> SABATO, *supra* note 8, at 23-32; see LEVINSON, *supra* note 6, at 8-9.

<sup>47</sup> Bruce Ackerman & Gerard Magliocca, *The Great Repudiator?*, AM. PROSPECT, Nov. 5, 2008, [http://www.prospect.org/cs/articles?article=the\\_great\\_repudiator](http://www.prospect.org/cs/articles?article=the_great_repudiator).

<sup>48</sup> ANDREW RUDALEVIGE, *THE NEW IMPERIAL PRESIDENCY: RENEWING PRESIDENTIAL POWER AFTER WATERGATE* 5-7 (2005).

<sup>49</sup> Mark Tushnet, *Some Notes on Congressional Capacity to Interpret the Constitution*, 89 B.U. L. REV. 499, 508 (2009).

traction on or arouse any furor over the practice of earmarks during his 2008 presidential campaign.<sup>50</sup>

One of the striking, yet not surprising, things about most of the proposals for constitutional amendments made by Levinson and Sabato is that they aim to make Congress more democratic by diluting the disproportionate power of small states and minority political parties. I will make two points about this. First, small states and minority political parties may have sufficient power to block any proposed constitutional amendments of this sort. Not only would they vote against constitutional amendments whereby they would relinquish their disproportionate power, but also, they would not suffer gladly the debate surrounding the proposed amendments with the opposition contending that they presently enjoy unjustified (and unjustifiable) disproportionate power. Minority political parties can block at the proposal stage. It requires only one third of one house of Congress to defeat a proposal for a constitutional amendment. And small states can block at the ratification stage – it requires only one quarter of the states to do so.<sup>51</sup>

Second, we should reflect upon the circumstances in which we have successfully amended the Constitution to make it more democratic. Consider, for example, the adoption of the Twenty-second Amendment limiting the president to two terms.<sup>52</sup> One might see this amendment as making our Constitution more democratic (although, of course, one might also see it as making the Constitution less democratic, by denying the people the power to elect whom they choose). We could imagine that in 1950, when the amendment was ratified, cynics might think that Democratic representatives and senators who had been strong supporters of FDR would oppose the amendment on the ground that it was an implicit criticism of him for having the audacity (and popularity) to run four times. Republican supporters of the amendment who hated FDR surely viewed the proposed Twenty-second Amendment as a rebuke to him. Yet the Congress did propose the amendment and the states did ratify it, despite the fact that Democrats controlled both houses of Congress, and FDR had won at least three quarters of the states in 1944 as in all three prior elections.<sup>53</sup>

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<sup>50</sup> Of course, we also might distinguish between institutional design writ large – like that in Levinson's and Sabato's books – and institutional design writ small – as in Adrian Vermeule's book. Compare LEVINSON, *supra* note 6, at 168-80, and SABATO, *supra* note 8, at 221-32, with ADRIAN VERMEULE, *MECHANISMS OF DEMOCRACY: INSTITUTIONAL DESIGN WRIT SMALL 2* (2007) (“In established constitutional polities, I argue, law can and should – and to some extent already does – provide *mechanisms of democracy*: a repertoire of small-scale institutional devices and innovations that promote democratic values against the background of standard large-scale institutions.”).

<sup>51</sup> U.S. CONST. art. V (requiring a vote of two thirds of both houses of Congress to propose a constitutional amendment and support from three quarters of the states to ratify it).

<sup>52</sup> *Id.* at amend. XXII, § 1.

<sup>53</sup> AKHIL REED AMAR, *AMERICA'S CONSTITUTION: A BIOGRAPHY* 433-38 (2005).

Consider, by contrast, the fate of proposals to alter or abolish the Electoral College, after the presidential election controversy culminating in *Bush v. Gore*.<sup>54</sup> These proposals went nowhere, in part because Republicans would never support them, not only because such proposals would deny them their disproportionate power in the Electoral College (through their relatively greater success in small states), but also because they were not about to do anything implying that George Bush had illegitimately, unfairly or undemocratically gained office.<sup>55</sup>

These two examples prompt us to ask, in what circumstances is Congress able to ascend to a high enough level of public-spiritedness to enable it to propose amendments that would make the Constitution more democratic? This is a subject worthy of further study that I cannot pursue fully here.<sup>56</sup> One would have to examine amendments like the Seventeenth Amendment,<sup>57</sup> Nineteenth Amendment,<sup>58</sup> Twenty-fourth Amendment,<sup>59</sup> and Twenty-sixth Amendment,<sup>60</sup> all of which in one way or another can be said to have made the Constitution more democratic.

Part of the answer surely has to do with social movements and with the political events of the day. It is hard to imagine the call for abolishing the Senate or limiting the policy-based presidential veto as generating social movement-driven constitutional amendments or even as inspiring good government statutes.

Furthermore, I suppose that Levinson's proposals are self-defeating in a certain sense.<sup>61</sup> For the very circumstances that give rise to the proposals – the undemocratic character of Congress or the Constitution – practically insure that the proposals will not be adopted. After all, would a Congress that is as

<sup>54</sup> 531 U.S. 98, 110 (2000).

<sup>55</sup> For a discussion of proposals to abolish the Electoral College in the aftermath of the 2000 presidential election, see David Stout, *The 43rd President: The Electoral College*, N.Y. TIMES, Dec. 19, 2000, at A31.

<sup>56</sup> For fuller analysis of the circumstances in which the Constitution has been amended, see, for example, AMAR, *supra* note 53, at 313-463.

<sup>57</sup> U.S. CONST. amend. XVII (creating the direct election of senators and ratified in the context of the progressive movement).

<sup>58</sup> U.S. CONST. amend. XIX (giving women the right to vote and ratified in the context of the women's suffrage movement).

<sup>59</sup> U.S. CONST. amend. XXIV, § 1 (abolishing the poll tax and ratified in the context of the civil rights movement).

<sup>60</sup> U.S. CONST. amend. XXVI, § 1 (giving eighteen-year-olds the right to vote and ratified in the context of the Vietnam War, which in effect says "if you're old enough to die for your country in the Vietnam War, you're old enough to vote").

<sup>61</sup> This is the kind of argument I would expect my co-panelist Adrian Vermeule to make. See Adrian Vermeule, *Self-Defeating Proposals: Ackerman on Emergency Powers*, 75 FORDHAM L. REV. 631, 631 (2006) ("Proposals defeat themselves when the motives, beliefs, or political opportunities ascribed to relevant actors by the theorist's diagnosis are incompatible with the solution that the theorist offers.").

undemocratic (and dysfunctional) as Levinson says it is propose the amendments that he believes would be necessary to make it more democratic? The answer is likely no. Indeed, Levinson recognizes this. That is one reason why he calls for a constitutional convention, and not merely amendments to the existing Constitution.<sup>62</sup> He also blames the "iron cage" of Article V's onerous procedures for amendment.<sup>63</sup>

Perhaps his call for a constitutional convention is itself a self-defeating proposal. For one thing, there is no guarantee that the constitutional convention he hopes for would adopt more democratic arrangements than we currently have. For another, if the dysfunction of Congress (and the electorate) is ultimately attitudinal, as Sotirios Barber has argued,<sup>64</sup> perhaps the attitudes that the delegates would bring to the convention would lead it to propose arrangements that are less democratic (and otherwise worse) than arrangements under the existing Constitution.

#### CONCLUSION

In conclusion, a Congress described as broken is not likely to propose constitutional amendments or even significant legislation to make itself more democratic. In any event, attempts to make Congress more democratic would not likely mend its supposed brokenness.

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<sup>62</sup> LEVINSON, *supra* note 6, at 167-80.

<sup>63</sup> *Id.* at 160.

<sup>64</sup> Barber, *supra* note 1 (manuscript at 2).