

Book Review by Christopher DeMuth

THE DIFFERENCE CONGRESS MAKES

The Imprint of Congress, by David R. Mayhew.
Yale University Press, 176 pages, \$35



BOOKS ABOUT CONGRESS TYPICALLY compare the existing institution to a procedural ideal. Is Congress making good use of its constitutional powers? Is it fairly representing democratic sentiments? Is it legislating through deliberation and compromise, so as to moderate the clash of factions and pursue some approximation of the national interest? Is it accountable?

The answer is usually “no,” and the prescriptions for improvement are often well-attuned to the author’s policy preferences. The essential problem is that Congress has capacious powers but no purpose other than to represent. Presidents are directed to execute the law and preserve the Constitution,

judges to resolve cases and controversies that come before them, but members of Congress take directions only from voters, sufficiently to get reelected. Congress is not required to check or balance or even rubber-stamp the executive, nor pass laws or even hold votes, nor anything else; insofar as the Constitution is concerned, its powers are options, not responsibilities.

IN *THE IMPRINT OF CONGRESS*, DAVID R. Mayhew—Sterling Professor of Political Science Emeritus at Yale and America’s dean of congressional studies by dint of a half-century of teaching and influential scholarship—takes a different tack. He measures

Congress’s performance not by process or procedures but by consequences, and he compares them not to an abstract ideal but to the real alternatives on offer in advanced democratic societies. What has been Congress’s effect—its imprint—on the course of American government and society? As compared to presidents, how have congresses responded and contributed to the *Zeitgeisten* of successive eras? As compared to parliamentary systems and other presidential systems, how has our separation of powers—with a representative legislature playing a uniquely independent role—panned out?

Mayhew’s methods for answering these ambitious questions are old-school and inge-



nious. He employs no poli-sci equations, regressions, or game theory, although he does invoke path dependence at one important juncture and the median voter several times. His basic approach may be described as discursive empiricism. It could not have been done so well, and maybe not at all, by a man of lesser learning and authority.

HE BEGINS BY IDENTIFYING A SEQUENCE of large political and intellectual movements—“transnational impulses” he calls them, 13 in all, from the founding of new nations and polities in the period following our own, down to environmentalism and deficit spending today. This framing device focuses the inquiry on momentous, tidal developments with lots of action here and abroad, while guarding against cherry-picking of the author’s favorite events and aspirations. For each movement, he judges America’s performance among the European and other English-speaking nations (with a few glances to Latin America), then moves in for the analytical kill—the distinctive imprint of the U.S. Congress.

The procedure involves judgment calls, nutshell summaries of large historical and economic literatures, and partial explanations and conditional conclusions. Mayhew gives rival theories a hearing, defends his choices persuasively, and ends up with answers that seem as robust as the nature of the inquiry permits. The answers are “interesting,” he claims, but many readers will consider them profound.

For some transnational impulses—continental expansion, responding to the Great Depression, deficit spending—the U.S. has been in the middle of the pack. On others, we were way out front—national founding, economic growth and industrialization, world power. On still others, our performance was idiosyncratic—taming corporations and the rich, building a welfare state. There is a pattern, which Mayhew himself leaves implicit: where America excelled, our executive was the galvanizing force but Congress played an independent role with distinctive consequences; where America was unique, Congress itself was the prime mover; where America was average, executive and Congress were joint operators.

The pattern began to emerge at the founding. President Washington and Treasury Secretary Alexander Hamilton were the indispensable movers and shakers in our spectacularly successful national launch and immediate economic surge. Congress would never have cooked up a national bank or the assumption of state debts on its own, and it went along with great misgivings. But Congress was hardly a by-

stander. The House of Representatives drafted the Bill of Rights on its own. When, following a bitter campaign, the election of 1800 ended in an Electoral College tie, Congress overcame partisan rancor to elect Thomas Jefferson president—our first government hand-over to an opposition movement, and a transnational first as well. These steps sealed the legitimacy and prestige of the new government by demonstrating in action the advantages, and the responsiveness to popular sentiments, that had previously been just talk.

WHEN IT CAME TO CONTINENTAL expansion, Congress specialized in parceling out frontier land, from the original Northwest Territory onward, to settlers, squatters, and speculators in small plots and on easy terms. Beginning with the 1803 Louisiana Purchase and continuing for the first half of the 19th century, the executive acquired vast new territories through purchase or seizure. Congress took charge of distributing it, against executive misgivings, through an exuberant privatization campaign involving hundreds of laws, culminating in the Homestead Act of 1862. “It is a wonder that any incumbent politician ever lost an election,” Mayhew writes of this pro-growth legislative populism, whose economic and social consequences defined the nation.

America’s emergence as a global powerhouse and über-manager of international conflict, beginning after our Civil War and continuing to the present day, is a similar case of executive thrust—but with Congress playing a restraining rather than complementary role. Presidents have special constitutional responsibilities for foreign diplomacy and military leadership, and they have often become absorbed by America’s place on the world stage as competitor, enforcer, protector, and benefactor. In general, and with a few 19th-century exceptions, Congress has been resistant—“insular” is Mayhew’s summary term—skeptical, foot-dragging, preferring to focus on domestic politics. From Charles Sumner to Henry Cabot Lodge to J. William Fulbright, lions of the Senate Foreign Relations Committee have been forceful, effective opponents of presidents’ ambitions for foreign action and commitment. The Senate’s treaty power has given them special purchase, but the House has exhibited similar animus and has held the purse strings.

The long history of executive assertiveness and congressional insularity suggests that something systematic is afoot. There are a host of plausible explanations, from the legislature’s characteristic parochialism to its incapacity for the “instrumental rationality” (an executive specialty) of war and strategy.

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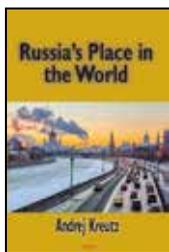
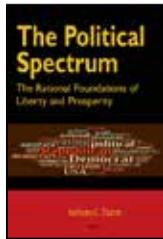
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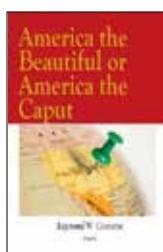
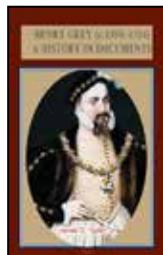
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Whatever the mix of causes, our empowered Congress has had a much greater effect on foreign affairs than have the legislatures of other great powers. Mayhew suggests—admittedly speculating, but with considerable evidence—that the upshot may be this: America alone accrued great international influence without ever establishing a colonial empire. Liberal internationalists would add that our very lack of acquisitiveness has been key to our position of global leadership.

CONGRESS'S ROLE IN ECONOMIC POLICY and national development has generally recapitulated its early days of land office politics: complementing the executive and sometimes taking the lead, always with its own populist (or at least popularity-seeking) angle. During the 1860s, President Lincoln was consumed by the Civil War, and Congress, with the Southerners gone, had become an unconflicted pro-development assembly. It took charge of financial support for the war with its Greenback currency and new income tax, and launched a monumental economic development program in which Lincoln played little role. The Morrill Tariff of 1861 was followed by three inspired investments/giveaways of federal land, all in 1862—the Morrill Land-Grant College Act, the Homestead Act, and the Pacific Railway Act.

The next period of government-led growth came after World War II. Presidents Truman, Eisenhower, and Kennedy were energetic proponents—recall, for example, Ike's interstate highway system, and promotion of dam building and the national power grid. Congress, however, was an active participant, and often the leader, in numerous initiatives, such as urban renewal, offshore oil drilling, and the National Science Foundation and Atomic Energy Acts. These bipartisan measures, geared to private capital, were sharp departures from New Deal-Fair Deal ideology, and were often enacted against strenuous opposition from left-leaning legislators.

The economic results of these two legislative gushers varied from program to program and are subjects of continuing debate. But both periods were unquestionably times of energetic building (institutional as well as physical) and widely-shared prosperity, along with a good deal of congressional pork-barreling. Mayhew is dissatisfied with the standard portrayals of post-Civil War congresses as immobilized by corruption and “a swinish scramble for government largesse.” That was certainly part of the story, but the era has been seriously understudied. No one, for example, has bothered to write a modern biography of John Sherman—brother of William

Tecumseh, early Republican and Lincoln supporter, whose 38 years in the House and Senate (punctuated by tours as secretary of the treasury and of state) included sophisticated management of federal finances and monetary policy during and after the Civil War, critical contributions to the Interstate Commerce Act of 1887, and authorship of the Sherman Antitrust Act of 1890.

RAPID INDUSTRIALIZATION IN THE late 19th century propelled America to the economic forefront among nations and laid the foundation for its political and military preeminence in the century to come. It also generated a new transnational impulse, one where America followed a highly distinctive path that was largely laid out by Congress (and also the state legislatures, but Mayhew omits them). The Gilded Age was an unsettling time, marked by the appearance of behemoth financial, industrial, and transportation corporations, spectacular personal fortunes, urbanization, and labor agitation. It gave birth to a mélange of political counter-movements and ideologies. Elsewhere, the ones with staying power were socialism and Marxism; less theorized or systematic schemes of government ownership of utilities and large industries; and aloof, Max Weber-style state bureaucracies—all executive-centered in conception and operation. The American response was sui generis: regulation by “independent” commissions, trust-busting, and highly progressive taxation.

These were congressional constructs, beginning with Sherman's Interstate Commerce Commission and Antitrust statute, and it showed. They were democratic and ameliorative rather than revolutionary, grounded not in any highfalutin theory but rather in low-down popular sentiments—opposition to monopolies (either break them up or see that they take care of farmers, laborers, and consumers), and a desire to take the rich down a peg or two. In structure and enforcement, the tax programs were soaked in politics, and the regulatory programs porous to all manner of influence. They featured precious little of the executive-centered “instrumental rationality” propounded in Progressive essays and speeches. The “independent” regulatory commissions, for example, were independent of the executive branch: they were mini-legislatures with proportional representation, reporting directly to Congress.

The late-19th century presidents, passive in the face of these developments, signed the bills with little notice. When Theodore Roosevelt and Woodrow Wilson arrived at the scene, they were on board with rhetoric and enforcement but left most of the heavy pol-

icy lifting to Congress. The Federal Reserve Act of 1913, supposedly Wilson's greatest Progressive achievement, was a thoroughly legislative creation—an "independent" institution with designed-in roles for banks and regional interests. The New Deal was executive-led but adopted Congress's regulatory-commission template, and some of it—labor regulation and bank deposit insurance—was conceived and designed on Capitol Hill (and not much to FDR's liking). Much later, the numerous 1970s programs of health, safety, and environmental regulation were almost entirely congressional initiatives. Racial preferences, however, were executive-bureaucratic enterprises—led first and tentatively by Lyndon Johnson, then energetically by Richard Nixon—incongruously displacing Congress's 1960s anti-discrimination programs.

MAYHEW'S ACCOUNT OF AMERICA'S early and continuing tax progressivism, and the eventual consequences for our welfare state, is an arresting story of path dependence. (Here and in his assessment of business regulation, he relies on the groundbreaking work, *The Land of Too Much* [2012], by Northwestern University sociologist Monica Prasad.) During the quarter-century 1894–1918, Congress introduced income, estate, and "excess profits" taxation by pertinacious fits and starts, including a constitutional amendment. The tax structure was extraordinarily progressive by international standards and remained so for most of the 20th century. Mayhew quotes economist Thomas Piketty's verdict that "very high taxes on the very rich" were "invented in the United States."

But populist social justice came at the expense of government solidarity. Taxes calibrated by income brackets focus political argument on redistribution within the tax system. By contrast, flat and regressive taxes, such as Europe's value-added taxes, focus on raising revenue efficiently. America's tax system became outstandingly progressive and complex, and outstandingly meagre in revenue production. As a result, our latter-day welfare state—a joint executive-congressional project from Social Security in 1935 to Obamacare in 2010—was financially restricted, administratively contorted, and outsourced to ungainly tax preferences and regulatory mandates on private institutions.

Above all, it is underfunded. Mayhew characterizes the most recent transnational impulse as *containing* public debt and deficit spending. It would be more accurate to describe the impulse as *raising* debt and deficits, with intermittent efforts to slightly moderate the upward trends. This certainly describes

the United States. From 1789 through about 1970, regular federal operations were generally kept in fiscal balance, and debts incurred for wars, domestic emergencies, and national investments (like those 19th-century land purchases) were systematically paid down. Since then, large annual deficits have become routine. I think Mayhew and his sources understate the size and seriousness of our resulting public debt—the official statistics are incomplete—but I agree with him that there is no clear pattern in fiscal proclivities between Congress and president, nor between parliamentary and presidential systems.

There is, however, a separate, striking U.S. pattern: the emergence and growth of routine deficit spending has coincided with the explosive growth of welfare and entitlement spending, which also began in the early 1970s. (Here I am relying on my own research.) These "transfer payment" programs have become by far the largest category of federal

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spending and have been largely exempted from the intermittent efforts to contain spending and deficits. At the same time, tax reform, with Congress in the driver's seat as ever, has come to mean tax *cutting* for growing segments of the electorate within a highly progressive structure. In these developments, and in our growing habituation to borrowing for immediate welfare spending, one may see the long shadow of the populist tax legislating of a century ago—an enduring if unanticipated imprint of Congress.

PROFESSOR MAYHEW CONCLUDES BY extracting two broad congressional imprints from his 13 case studies. The first is legitimacy and stability. Our Constitution has been extraordinarily durable, and the manifold conflicts of a large and heterogeneous nation have, with the exception of the Civil War, been fought out within rather than against the regime. This, he posits, is substan-

tially because a representative legislature has played an unusually strong, prominent role in day-to-day government and in mediating our bitterest divisions. Presidents can be "rambunctious or sectarian," but Congress, which holds most of the constitutional marbles, is more into conflict management. Dithering—"gridlock"—can be instrumental, deferring contentious problems until one side is sufficiently mobilized to act decisively and others recognize this and come to terms. Before Obamacare in 2010, all of our landmark policy departures (including all those discussed here and in the book's case studies) were enacted by large bipartisan majorities. That has simmered down long-raging ideological disputes, legitimized the new dispensation, and moved subsequent debate to a practical level.

The dynamic of representation and stability is anguishing in the case of slavery and race, to which Mayhew devotes particular attention. Before the Civil War, of course, slaves were not represented at all and the Senate was equally divided between slave states and free states. Congress temporized for decades and then, under pressures of territorial expansion, worked frantically for some sort of compromise. But its overriding aim was to preserve the union, which was undoubtedly the position of the median national (white) voter. Still, Congress provided a platform for anti- (as well as pro-) slavery firebrands, and, in time, Northern opinion gelled: Republicans forged a pro-union/anti-slavery synthesis, and another constitutional provision kicked in. "No Electoral College, no Lincoln presidency," Mayhew reminds us.

THE 20TH CENTURY BROUGHT A SIMILAR dynamic, with a twist. Blacks were now disenfranchised quasi-citizens in the Old South, which now held a decided minority of both Senate and House seats. Southerners, however, were passionately intent on maintaining Jim Crow while Northerners were, on average, lukewarm in their opposition. Even liberals had other priorities, such as unionization and recovery from the Depression. In such circumstances, representative assemblies ignore the median voter in favor of the *intense* voter. ("We expect assemblies to do that. That is one reason for having assemblies.") Armed with the Senate filibuster, Southerners delayed full implementation of the 14th and 15th Amendments for more than half of the 20th century—although "it is a plausible bet that the median national voter kept favoring at least some basic civil rights protection in the South." Then at last, public opinion in the North intensified to Southern levels (this time notably led by Southerners—Martin Luther King and

Lyndon Baines Johnson), yielding the Civil Rights Act of 1964 and Voting Rights Act of 1965.

This is a terrible history, but it is not, in its timing, an outlier. America freed its slaves on schedule with the mid-19th century's wider emancipation of slaves, serfs, and Jews—the fruits of a transnational impulse that had central governments imposing “modernizing liberalism” on lagging agrarian cultures. And in the decades following World War II, America extended civil and voting rights to non-whites at about the same time that white supremacy laws and white colonialism were being abolished across the globe. What if a strong-willed American president had forced the slavery issue earlier in the 19th century, or taken aim at Jim Crow earlier in the 20th? The South might have succeeded in breaking off—even in the second case, given how many other secessionist movements around the globe found success after 1900. Race aside, the South was culturally and economically separate through the 1960s. Reconstruction, while it lasted, had required military occupation. Desegregation, when it came, required military intervention. If the North had moved earlier, leading to a split, would that have been a better course for America, or for African Americans? Here Mayhew leaves the speculating to readers.

MAYHEW CALLS HIS SECOND BROAD imprint “messiness,” in other words “inconstancy, incoherence, and particularism.” Congress is not so much legislator as *distributor*—of land, jobs, veterans’ pensions and bonuses, and a continuous stream of custom-tailored grants, subsidies, tariffs, quotas, regulatory favors, and tax preferences. The earliest congresses followed big executive land acquisitions with retail distribution to the citizenry. Modern ones have followed big executive welfare initiatives, such as Social Security, Medicare, and Medicaid, with numerous incremental benefit extensions and constant tinkering. They have also, I would add, taken the entitlement distributions off-budget, just as the land distributions had always been.

These seem to be the natural propensities of the popularly elected, highly empowered legislature. Legislatures accommodate intense preferences rather than median preferences in small matters as well as large—this is the realm of policy commandeering by special-interest groups, where “[a]ssertion butts up against indifference, and assertion wins.”

There is a dynamic element as well: Members come and go, each generation amending existing programs with idiosyncratic tweaks and new departures, leaving behind a com-

pounding profusion of overlapping and conflicting policies. Mayhew notes that there were 92 changes to Social Security benefit calculations between 1935 and 1990, and that as of 2001 there were at least 15 separate student loan guarantee programs. In recent decades, naming retirement savings programs seems to have become as popular as naming post offices. The result is not only incoherence but incomprehensibility. My own examples: most people have no idea of the rules and conditions governing programs such as Social Security and Obamacare that affect them deeply; tax professionals frequently disagree on the calculation of tax liabilities; the provision of “guidance” through bureaucratic thickets has become a growth industry.

Is our fine mess of a government a threat to its legitimacy and stability? Mayhew is not so sure. If Congress provides for every special interest that walks through the door, it may cumulatively satisfy the median voter after all. Its fondness for distributional micromanagement may have warded off schemes for government ownership that depend on businesslike management, thereby preserving our unusually wide space for private capitalism. Certainly, a strong representative legislature is perilous to the neutral, scientific administration propounded by Woodrow Wilson and still celebrated by progressive law professors. The best approach may be to permit Congress to delegate problems requiring instrumental rationality to the executive branch—so long as it retains, and employs, its prerogatives to pillory, interpose, and undelegate when the executive becomes too remote and high-handed.

UNFORTUNATELY, THERE IS MUCH TO be said on the other side of the question. Another word for messy is “incontinent.” A government with a special program for everyone may be politically stable for a time, but the resulting negative-sum economics block opportunity and improvement while providing abundant examples of official hypocrisy. An educated, affluent society such as ours demands that government do many things and solve many problems—and also expects it to perform with a modicum of competence and honesty. That may be more than Congress is equipped to deliver. In practice, its response has been paralysis: more delegation of political hot potatoes to the executive, less oversight of executive excess, abandonment of budgeting and spending control, shorter work-weeks, more time on talk shows and social media, more pandering to ideological affinity groups.

Quite plausibly, the combination of incontinence and incompetence is an important

source of declining popular legitimacy. Americans have always been realistically skeptical about government, but lately we have become outright cynical and distrustful, and drain-the-swamp populism has taken root. Our one remaining highly popular, thoroughly bipartisan domestic enterprise is the debt-financed welfare state. But that is going to come to grief before long, absent a level of economic growth no serious economist thinks is in the cards. The comeuppance will be delegitimizing and conceivably destabilizing.

CONGRESS’S RECENT ABDICATIONS, ILLUSTRATED by the examples just given (there are more), have prompted two divergent movements for reform. The first would accept and accelerate congressional decline by embracing executive government—through more and broader lawmaking delegation, judicial doctrines to enhance executive discretion and autonomy, and procedures to give the president a formal role in introducing legislation and setting the congressional agenda. The second would aim to resuscitate Congress—through beefed-up professional staffs, new offices for regulatory and scientific analysis on the model of the Congressional Budget Office, more disciplined budgeting procedures, devolution of internal authority from party leaderships to policy committees, revision of the Senate’s filibuster and other supermajority rules, and judicial restrictions on delegation. (For more on congressional reform, see Joseph Postell’s “What’s the Matter with Congress” in the Spring 2018 CRB.)

The Imprint of Congress supplies valuable ammunition to the latter, congressional-empowerment movement, along with a critical caution. Revitalizing Congress could promote general checking and balancing, and the several particular, beneficial imprints Mayhew has identified. But it could also give new impetus to messy, servile government, enraptured by political distribution and indifferent to performance. So congressional reform needs to be coupled with measures for better results for the paying public. Congress will never be an engine of instrumental rationality, nor should it be. But its powers can be harnessed much more thoroughly to responsibility, and electoral representation to government performance and national well-being. That would be an impulse worthy of transnational emulation and, with time and luck perhaps, a new chapter in a second edition of David Mayhew’s splendid book.

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