

Chapter Two

The Constitutional Origins of Congress

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The distinguishing institution of any democracy is its legislature. Legislatures, unlike executives, are by their nature *plural* institutions. Because legislatures have many members, they can mirror social divisions more completely and naturally than any executive, even an elected one.

Consequently, it is usually the legislature to which citizens in a democracy first turn to resolve conflicts. And because legislatures are the target of competing social demands, *how* they are designed to process those demands determine much of the character of nations' politics.

It is the constitution of a nation that determines the most basic parameters of how a legislature operates. In some countries, such as Great Britain, the constitution is implicit. In most, such as the United States, the constitution is an actual written document that delineates the relative powers of the different parts of government and specifies how people are chosen to occupy official positions. In theory, there is an infinite variety of ways to organize a democratic government and its legislature. In practice, democratic governments are organized in a number of different basic ways. Some have one legislative chamber, many have two, and a few even have three. Some constitutions make no distinction between the executive and the legislature while others (notably the United States) throw up formidable institutional barriers between the legislature and executive. Some constitutions specify fixed terms of office for their legislators; others allow the legislature to determine when elections will be held. Some countries elect their legislators from single-member districts, while others hold some sort of "at large" election for their legislature.

The Constitution of the United States is the basic framework that organizes Congress — both internally and in terms of Congress's relationship with citizens. Because this book emphasizes institutional features of Congress in explaining its behavior, the natural starting point for an empirical investigation of congressional behavior is with the Constitution.

In this chapter, we examine the constitutional origins of Congress with two things in mind. The first is to understand why the national legislature that preceded the modern Congress — the institution that is known in the history books as the Continental Congress — failed. After all, if the Continental Congress had been successful in resolving the pressing conflicts that faced the new country, it is unlikely that the Constitutional Convention would have met at all. The second subject we will attend to is understanding why and how the Constitutional Convention agreed to change fundamentally the status of Congress, changing it from an assembly of ambassadors that could not act without the concurrence of the state legislatures, to an independent and sovereign legislature that was no longer tied strongly to the wishes of state officials.

I. The Failure of the First Congresses of the United States

The United States Congress is not like the mythical figure Aphrodite, who sprang full-grown from the head of Zeus. The Framers drew on a great deal of prior experience as they designed Congress. When the American Revolution began in 1775, the colonies already had 150 years of experience with local legislatures. Virginia, for instance, could claim a tradition of legislative self-governance through its House of Burgesses, which first met in 1619. In the Revolutionary period and beyond, the newly-independent states developed these legislatures as the centers of political authority in the states. In addition, the Revolutionary period spawned a series of "national"

congresses that met, first, to address the crown with a set of grievances, then to coordinate the fighting of the Revolutionary War, and finally to act as the first national legislature of the new nation.

As the Revolutionary War wound down, the thirteen former colonies joined together in a confederation. The document that delineated the first government of the United States was called the *Articles of Confederation*. The Articles vested legislative authority in a Congress, which we will call the *Confederation Congress*.¹ The Confederation Congress was virtually the entire national government. The Articles provided for no national courts; lacking a president, heads of executive departments were either members of Congress doing double duty or chosen by Congress.

Because Congress was the only formal institution of government under the Articles, the dissatisfaction that led to the Constitutional Convention that met in Philadelphia in 1787 focused on the failings of the Congress to provide a national government that was credible to the outside world, could defend itself against internal insurrection, and could ensure smooth commercial relations among various parts of the country. In addition, the political leaders who instigated the Convention were alarmed at what they regarded as the tendency of the state legislatures to ride roughshod over local minority and property rights.

¹Historians and political scientists don't know quite what to call the Congress that served the United States between the start of the Revolution, in 1775, and the ratification of the Constitution, in 1789. The Congress of the pre-Articles of Confederation period is usually called the Continental Congress; after the adoption of the Articles, Congress is sometimes still called the Continental Congress, while others call it the Confederation Congress. The reader should not be confused by this, either in the historical record or in this chapter, since even with several different names, Congress acted as a continuing, ongoing body from 1775 until 1789.

In short, the political revolution that began at Lexington and Concord rested on a theory of government that exalted legislative institutions and distrusted single-headed executives. A decade of experience with such a government — in states and at the national legislature — acquainted political leaders with the dangers of entrusting governing purely to legislatures that, although they were supreme within the political system, were nonetheless prone to chaos.

The Constitutional Convention was called because of the perceived failures of existing legislatures. The solution to these failings constituted a new type of national legislature on the North American continent: one that was truly sovereign over citizens. At the same time, the compromises necessary to establish this new Congress embedded in the Constitution a set of complicated political relationships that balanced power at the national level and also established tensions between state and national political leaders.

The Congress of the Confederation²

The ending of the Revolutionary War removed from the colonies one looming problem, only to replace it with a collection of difficulties, which, considered together, were at least as perilous. The severing of colonial ties with England, and the ensuing disruptions in export markets, created monumental economic difficulties for the new nation. The areas of the country that *did* develop new export markets found themselves at odds with each other and with regions that remained isolated from world trade. There was no permanent national capital. The Treaty of Paris, which ended the war between the colonies and England, specified a western frontier for the new nation

²Much of this section is drawn from the analysis offered by Jillson and Wilson (1994), which is the best account of the operation of the national government under the Articles of Confederation that uses the modern tools of political science.

that was permeable to foreign infiltration by the English, Spanish, and French to the north, west, and south. Native American tribes were willing surrogates for the European powers that wanted to challenge the hard-won independence on the frontiers. The English were recalcitrant in decamping from forts they held in upper New York state. The western territories (beyond the Appalachian Mountains) contained a hodge podge of conflicting land claims that pitted states against each other. Towering debts had been built up fighting the war for independence, but no firm mechanism had been created for meeting those debts. Beyond these massive problems of defending the borders and meeting a nation's obligations to the rest of the world, the new country was faced with more mundane tasks of delivering the mails, protecting mariners, and ensuring that a small, but far-flung, bureaucracy functioned effectively.

To meet these problems, the Articles of Confederation were ratified in 1781, establishing the United States. The Articles specified that delegates elected by each of the state legislatures would meet annually as "the United States in Congress assembled." According to the second section of the Articles, each state retained "its sovereignty, freedom, and independence." Taken as a whole, the Confederation Congress was not designed to translate popular sentiments into bold action on a national stage. Rather, "the United States in Congress assembled" was a meetingplace of co-equal ambassadors from independent states who were expected to protect the interests of state governments, and not much else.

The Articles did not rely on the general proclamation of sovereignty, freedom, and independence to its member states to keep its Congress in check. Instead, it further delineated a set of parameters for Congress's membership that kept its members closely tied to the state legislatures that elected them and cut off opportunities for congressional delegates to develop

independent political followings back home. Congressional delegates were kept on a short leash: Each state could send up to seven (and no fewer than two) delegates to Congress each year. Terms were of one year; delegates were allowed to serve only three years out of any given six; state legislatures were allowed to recall their delegates mid-term for any reason; and the state legislatures were each responsible for paying their delegates. Congress, at best, was bound to be a waystation for ambitious local politicians who wished to gain some experience with the wider world of North American politics. It was not designed to be the focal point of national power.

Historians have long attributed the demise of the Articles of Confederation to the weak links that were forged between the general government and citizens of the individual states. First, and most obviously, delegates to Congress were not popularly elected. Thus, there was no direct formal tie between delegates to Congress and residents of the united states. Second, laws passed by Congress were not binding on the states. Congressionally-passed laws were mostly exhortations to the states, which could choose to accept them, or not. Most vexing for the new nation in this regard was the inability of Congress to get states to adopt the taxes necessary to pay off the debts that had been incurred fighting the Revolutionary War and to meet obligations to other countries.

While the weak link between the Confederation Congress and the nation as a whole helped lead to its ultimate demise, Congress had a further problem: It had only a limited set of rules to guide its deliberations. The Confederation Congress never developed an effective committee system or effective rules of procedure. In later chapters we will discover that the effective functioning of any legislature rests, in part, on rules of this sort. Therefore, although the Articles

of Confederation cut off the Congress from the well of popular support, Congress itself compounded its weakness by developing only the barest internal organizational structure.

Like virtually all large bodies, the Congress that existed under the Articles of Confederation found it useful to refer its business to a subset of its members, to committees. Unlike virtually all modern legislative bodies, however, the Confederation Congress granted virtually no independence to its committees. The foundation of the committee system, beginning even before the Articles of Confederation, during the War of Independence, was a series of *ad hoc* committees, usually consisting of three members, which were authorized to study matters that had come before Congress and to report back their findings. Because they were *ad hoc*, these committees did not develop the level of expertise we typically associate with functioning standing committee systems. Members appointed to consider a measure regulating the conduct of the army one week might not be appointed to the committee to consider a similar matter the next week. Including the revolutionary period, between 1774 and 1788, over 3200 committees were appointed.

Over time, the business of Congress grew, so that members found themselves appointed to more and more committees. As certain matters began to recur, Congress experimented with a few standing committees, such as committees on naval affairs, military affairs, and foreign affairs. Yet, the work of these committees was closely scrutinized and second-guessed on the floor of Congress, leaving members of these committees to wonder whether their work on the committees was worth it. In addition, as the ineffectiveness of Congress grew more apparent to more people, absenteeism ran high, leaving even the "standing" committees short of members. Failing to develop a viable standing committee system, Congress then experimented with a series of

executive boards and individual executives to run the government, but these executive devices also served to spawn even more *ad hoc* committees to oversee (and second-guess) the work of the executives.

In short, working in an environment in which the floor was unwilling to grant its committees latitude to make deals and to exercise independent judgments, committee members grew inattentive to their work. Faced with inattentive and ineffective committees, the floor had no reason to especially value the work of the committees it sanctioned, even though its members continued to express the desire to use the committee system to develop a system of expert policy advice within its halls. Organizationally, Congress was in an equilibrium in which virtually everyone agreed to the need to divide labor and to allow committees to exercise independent judgment over policy, and yet no one was willing to relinquish their own individual right to second-guess and hinder the work of committees.

Compounding the problems that arose due to the lack of an effective committee structure were those that arose due to the lack of effective rules to control floor deliberations. During the Revolution, a simple set of rules was adopted by Congress that limited the number of times a member could speak on any question and specified that any motion made on the floor had to be dealt with immediately (even if immediate consideration meant postponing the action to later). Later rules, adopted as the war was winding down, fleshed out floor proceedings a little, but the principle of maximal flexibility remained. Thus, any item forwarded on to Congress, whether it be by petition from state legislatures, citizens, or soldiers, could demand immediate consideration of the Congress. There was no way, for instance, to ensure that a bill to provide for the retirement of the war debt would be considered before a petition from a citizen group desiring to procure a

captured cannon for the village green. Furthermore, the rules provided no way to limit debate or amendments, so that it was easy for opponents of measures to tie the floor up in knots with a series of motions. Compounding this feature of the rules was the puzzling lack of any mention of a "reversion point" (see Chapter 1) to motions.

As we learned in Chapter 1, because there is generally no "equilibrium of tastes" in legislative chambers, legislatures usually rely on institutions to provide stability to their proceedings. The signal characteristic of the Confederation Congress's rules is that they fostered instability, rather than reduced it.

One interesting example of how the Confederation Congress's rules undermined stability is how Congress reacted in the summer of 1783 to being attacked by mutinous troops from Philadelphia. Adjourning to the safety of Princeton, Congress eventually proceeded to consider where next to convene — that is, where to move the nation's capital. In the midst of great confusion about how to pick a permanent capital for the country, the decision was made to begin with New Hampshire and to vote on locating the capital in every state down the seaboard. The last state to receive seven votes would get the capital.

In the ensuing voting down the coast, only New York and Maryland received as many as four votes. Lacking a location that could even collect the support of one-third of the delegations, a motion was made to narrow the choice down to two possibilities — one on the Delaware River, near Trenton, and the other on the Potomac, near Georgetown. This motion led to an amendment, from a supporter of a site closer to Wilmington than to Trenton, to delete the language about Trenton or Georgetown, leaving instead general language about the rivers.

The rules specified that in such cases, the motion would be on whether the *original* words (specifying Trenton or Georgetown) should stand, and it would take seven votes to keep the original wording. This motion to let the original proposal stand received five positive votes, with three states voting no and three being divided. Thus, the original language was removed from the bill. But, because no other sites were even remotely as favored as these two, the location of the new capital was left blank.

Later votes provided little relief to the problem. A motion to adjourn to Philadelphia and then to move to Trenton only elicited an amendment to strike Philadelphia from the motion. The motion to strike Philadelphia failed, but then the motion for Trenton-then-Philadelphia failed on a 5-4 vote. (Recall that it took seven votes for a proposition to prevail.) A motion to temporarily move to Annapolis lost 6-4. After letting the matter rest for a while, a compromise was reached to build two capitals, one near Trenton and the other near Georgetown, between which Congress would alternate. While awaiting the completion of these two capitals, Congress would alternate between Annapolis and Trenton. When the matter was called up for final passage, a delegate asserted his right to delay the vote for one day. In the end, Congress began the alteration between Trenton and Annapolis, but returned to New York after this plan proved unsatisfactory.

This episode over the choice of a permanent capital highlights two serious failings of the Confederation Congress's floor proceedings. First, the original proposal on the floor had no privileged position. If any one questioned a particular provision on a bill, it would take a majority of all the state delegations to keep the bill's language intact, rather than a majority to strike the

language.³ Second, there was no provision for the "previous question." Any member of Congress could assert the right to delay a vote and, if so moved, make another motion that would have to be debated and voted on. Taken together, these failings made it easy for floor proceedings to devolve into chaos, with no clear reversionary point or policy anchor, and for individuals to delay action in the hope of gaining from the ensuing delay and confusion.

Congress's weak ties to popular politics and weak internal institutions produced endless rounds of gridlock on virtually all issues that confronted it. Not only did popular sentiment eventually turn against Congress, but delegates themselves became disgusted with the body. Absenteeism became a serious problem. Ten to twenty percent of congressional delegates tended to be absent at any given time, with absentee rates periodically climbing above fifty percent. Clustering of absences among particular state delegations sometimes meant that it was exceedingly difficult to gain the ascent of seven states to pass minor legislation and virtually impossible to gain the support of the nine states that were necessary to pass major legislation, such as tax bills.

In a related phenomenon, turnover was high, too. Although the three-year term limit would lead us to expect that at least one-third of Congress would leave each year, congressional turnover in the second half of the 1780s hovered in the 50%-60% range from year-to-year.

³Note, also, that it would take a majority of all state delegations, not just state delegations present and voting, to keep a provision in a bill. This feature of the rules greatly advantaged minority states whenever attendance was spotty. In theory, a state delegation that was alone in objecting to a provision in a bill could make an amendment to the bill's language. If the vote in favor of retaining the original language received the support of six states and the opposition of one state, the original language would still be stricken out. The next vote to include the provision favored by the minority-of-one state would then lose on a one-to-six vote, leaving the bill silent on the provision. It was, therefore, quite easy for minority states to hollow out the language of bills.

Dissatisfaction with the national government and concern over the stability of state governments led to a movement, centered in individuals who had served in the Confederation Congress, to amend the Articles of Confederation. Their desire was to change the nature of the Articles so that the national government would not be reliant on the state governments to give life to their statutes, so that political ties could be forged between national politicians and voters, and so that the national legislature would be given the framework necessary for it to develop differentiated governing institutions. Efforts to amend the Articles first led to the Annapolis Convention, in 1786, called by political leaders in Virginia to examine deficiencies in the Articles of Confederation. The Annapolis Convention was met with disappointingly low attendance, but it did lead to a call for an amending convention in Philadelphia in 1787. It was this second convention that turned into the Constitutional Convention of history and legend. It is to the politics of that convention and the resulting legislative institution that we next turn our attention.

II. What the Framers Wrought

The delegates who came to Philadelphia in 1787 were not the agitated revolutionaries who had declared independence from England in 1776. They were, for the most part, seasoned veterans of state and national politics from the Revolutionary and post-Revolutionary era. Of the 55 delegates who appeared, 46 had served in a state legislature and 42 had served in the Continental or Confederation Congress.⁴ They were by-and-large already convinced of the need to change the Articles of Confederation so that the national government could be strengthened to provide more effective coordination of commerce among the states and to secure the states against internal and external military threats. In addition, they were determined to reconfigure the national Congress so that it could develop stronger internal institutions than were possible in the incumbent national legislature.

While the delegates to the Constitutional Convention mostly agreed upon broad general directions for the future of the Union, they disagreed on the specifics of how a new plan of government should be constructed. Such disagreement is prone to produce instability of the sort we discussed theoretically in Chapter 1 and discussed practically in the previous section. In addition to natural public choice instability, the Philadelphia delegates faced a looming external political problem — whatever they agreed to had to be ratified by a unanimous vote of the state legislatures. Because the logic of the Articles of Confederation was to make the national government an agent of the state legislatures, any plan to make it more independent of them was likely to be treated suspiciously.

⁴Martin Diamond, et al, "Framing the More Perfect Union," *The American Republic*.

The politics of the Constitutional Convention are well-recorded in the annals of American history. Our interest here is more narrow than most historical accounts of the Convention. In this section we will address three topics that were especially important in the design of Congress: representation, the internal organization of Congress, and the power of Congress.

Fig. II-1 The first and the third of these topics — representation and the power of Congress — were controversies that occupied the attention of the delegates throughout the Constitutional Convention. Figure II-1 sketches out an overview of how these issues developed, using the spatial model that we introduced in the previous chapter. Voting in the Constitutional Convention was by state, so we have provided a spatial representation of where state delegations tended to be on two dimensions: the equality of representation and the strength of the national government. States are arrayed along the "equality of representation" dimension according to their state populations at the time; small-state delegations valued the equality of representation more than large-state delegations. States are arrayed along the "power" dimension according to their delegations' willingness to support measures that would further strengthen the power of the national government at the expense of the state governments.

The first major plan to be considered by the Constitutional Convention was the "Virginia Plan," which originated from that state's delegation.⁵ It provided for a much stronger national government than had existed under the Articles of Confederation, including provisions such as a veto over state laws to be exercised by the national government. It also called for representation of states in Congress to be proportional to population. Although the Virginia Plan gained support

⁵This spatial accounting of the politics of the Convention is highly stylized and misses important details, some of which are examined further below. Students interested in how the Convention unfolded are referred to Jillson (1988) and Rakove (199*).

from a majority of state delegations, it did not garner the level of universal support that would be necessary to get the Constitution ratified in the states. The convention proceeded to modify the Virginia Plan, mitigating its strongest nationalist tendencies through a series of amendments. Unhappy with their loss of relative power in the national government under the Virginia plan, some small-state delegates proposed an alternative — the "New Jersey Plan" — which essentially restored the equal representation of states in Congress and granted the national government a few new powers, particularly the right to directly levy taxes.

Because this plan was barely different from the Articles and because the Virginia Plan had already been modified to meet the objections of most delegates, the New Jersey plan failed miserably. Yet, the disenchantment of the smaller states with the direction of the Convention presaged difficulties the Constitution would have in getting ratified. The Connecticut Compromise, therefore, provided for equal representation of the states in the Senate, thus pulling the final plan of the Constitution further back toward the representational plan favored by the small states, giving the Constitution a better chance of passing once it was sent to the states for ratification.

This summary only sketches out the gross politics of the Constitutional Convention using the standard spatial model. We now focus in further on the three sets of issues that were handled during the Convention and affected the future of Congress — representation, national power, and internal organization.

Representation.

Each state had one vote in the Confederation Congress. This equality of representation grew out of two factors, both practical. First, efforts to provide for weighted representation always washed up upon the shoals of bad data. During and after the Revolution, there were no reliable censuses of the population or wealth of states that could be used to implement representation in Congress according to their "importance" to the Union. Second, the Confederation of states that fought against England was built upon a theory that treated each state as a sovereign entity whose members only coordinated with other states when it was in their own interest. Taking these two problems together, it is not surprising that whenever the topic of somehow weighting representation in the Confederation Congresses was broached, the issue was always deferred to the future.

Small states were the most insistent that power in the national government be shared equally. Yet, most political leaders in these states realized that holding a hard line on this position would come at a cost. In particular, most of the large states such as Virginia, Massachusetts, and Pennsylvania, contained important commercial centers through which international trade passed. Leaders of smaller states were willing to consider some form of weighted representation in the national government, if the alternative was the larger states pulling out of the Union and boxing out their smaller neighbors economically.

The *Virginia Plan* was proposed by delegates from that state at the beginning of the Constitutional Convention to be a blueprint to guide the convention's deliberations. The plan was the brainchild of James Madison, who was among the most radical nationalists at the convention.

The Virginia Plan was strongly nationalist. It envisioned the national government as having the power, for instance, to veto the acts of state legislatures. It proposed replacing the single-chamber Congress of the Confederation with a two-chamber (bicameral) Congress, a large lower house and a small upper house.

The nationalism of the Virginia Plan was manifest through the design of congressional representation, in two ways. First, election to the large lower house would bypass the state legislatures; its members would be elected directly by the people. While state legislatures would nominate members of the small upper house, the lower house of the Congress would actually do the electing. The two chambers of Congress would then elect the president. Second, representation in both chambers would be weighted by population. In short, members of the the new Congress would be encouraged to forge political ties directly to the voters, rather than indirectly through the state legislatures, and regions of the country would be represented in proportion to what Madison considered to be each region's "importance" to the Union.

Convention delegates agreed to start their work by amending the Virginia Plan, which indicates the willingness of most delegates to move in the direction of weighted representation. As the work of the Convention progressed, however, the dissatisfaction of small-state delegations persisted, climaxing with the New Jersey delegation offering an alternative: to keep the same representational structure of the Articles of Confederation and to make minor amendments within that structure concerning the power of the national government. The New Jersey plan was defeated, but the political problem remained: how to convince the smaller states to accept a new constitution that reduced their voting power.

The compromise that ended the representational stand-off is associated with the Connecticut delegation. The Connecticut Compromise provided for different methods of representation in the two chamber, by population in the lower house and equally in the upper house.

Two frequently-overlooked points need to be made about the Connecticut Compromise. First, Connecticut's population was such that if Congress were apportioned according to population, it would have received roughly 1/13th of the members — the same proportion it would have received under equal representation. Connecticut's relative power under either system would have been roughly the same, and thus it was a natural direction to look in expecting a compromise to emerge in the Convention. Second, as debate proceeded on the Virginia Plan, most delegates came to realize that so long as the "Senate" was much smaller than the "House of Representatives" and each state was guaranteed at least one representative in each chamber, representation in the Senate would have to be much more equal across the states than in the House.

Tab. II-1 For instance, under the apportionment of the House that eventually emerged, the largest state (Virginia) received ten seats and the smallest two states (Delaware and Rhode Island) received one. The apportionment of a 26-member senate would have given Virginia four seats, New Hampshire, Rhode Island, Delaware, and Georgia one seat, and the rest of the states two or three seats. (See Table II-1.) Therefore, the mathematics of the situation constrained the Senate to have a significantly more equal distribution of seats than the House. Consequently, Virginia did not lose much by agreeing to equalize representation in the smaller of the two legislative chambers.

The power of the national government.

The other major issue that affected the flow of the Convention was the range of power given to the national government generally and to Congress particularly. Some, such as Madison, had become very suspicious of state governments, particularly state legislatures. Under the strains of the post-Revolutionary economic depression that gripped the country, many states adopted measures that strong nationalists considered grossly unsound, such as the nonpayment of debts and the establishment of paper money. As well, many state legislatures were unwilling to honor the international obligations that the Articles of Confederation had imposed on them or that treaties had bound the states to. For instance, states refused to honor their obligations under the Treaty of Paris to compensate English citizens for their economic losses during the Revolutionary War. In retaliation, England refused to vacate its military positions in upper New York State, imperiling the young nation's military position from the start.

Many of the delegates to the Convention considered proposals such as Madison's to be power grabs by a political elite. They reacted strongly. The fact remained, however, that without the power to impose certain economic and foreign policies on the entire country, the Union was an empty shell. It was neither an effective free trade zone nor an alliance whose international obligations would be honored. Thus, even the strongest opponents of Madison's grandest nationalist schemes were willing to accept some degree of enhanced power for the national government in commercial and foreign relations.

Most of the debate about the relative power of the national government concerned the organization of government as a whole and did not focus entirely on the organization of

Congress. In the end, the national government was strengthened only slightly in comparison to the Articles of Confederation. Madison's plans to allow the federal government wholesale power to veto state laws were not supported. The new power given Congress was quite limited. States, which had previously been given the power to make treaties with foreign countries, were no longer allowed to do so; treaty-making was reserved for the president and the Senate. States could no longer regulate the movement of goods across state borders, only Congress could do that. Beyond giving Congress sole authority over interstate commerce and shared authority (with the president) over treaty-making, the shift in legislative authority granted Congress under the Constitution was a marginal change compared to the grant under the Articles of Confederation.

Internal Organization of Congress.

One matter that entered the Constitution has rarely rated much comment in histories of the Convention, but should interest students of Congress greatly. That is the question of the internal organization of Congress. The Articles of Confederation were largely silent about the internal organization of the Confederation Congress, but the nature of the political union at that time made delegates to Congress reluctant to develop a strong set of internal rules. As we discussed in the previous section, this situation made it difficult for Congress to develop an independent committee system or to impose the will of the majority through rules of procedure. There were other difficulties, as well. For instance, as the problem of absenteeism became rampant, Congress began a series of debates about whether it could compel absent members to attend sessions. These debates were never conclusive, and the end result was that Congress was helpless as it found itself regularly lacking the necessary quorum to do business.

That there was a concensus to strengthen Congress's internal organization is evident in how quickly the current provisions concerning its organization entered the Constitution. The Committee on Detail's proposal that both chambers of Congress be allow to make up its own rules, judge its elections, and arrest absent members and force them to attend sessions of Congress remained in the Constitution, virtually unchanged, throughout its months of deliberations.

By giving both chambers of Congress the unambiguous power to govern themselves without regard to the special rights of states or minorities within the legislature, the groundwork was laid for a much more independently powerful and coherent legislature in the future. Of course, there is nothing in the *granting* of such wide latitude in the Constitution that required members of the new Congress to take full advantage of it. In future chapters we will discover that members of the earliest Congresses under the Constitution were, in fact, quite solicitous of individual and states rights when they first convened. But, when new generations of congressional members entered desiring to impose the will of the majority on the minority, there was no doubt that the *Constitution* would not stand in their way.

Summary.

Tab. II-2 A summary comparison of the Congress of the Confederation with the Congress of the Constitution is given in Table II-2. Note that in every particular, the plan for the new Congress implied a much more powerful and independent body than had existed under the Articles.

The details of the Constitutional provisions that emerged from the Convention are well-known to most Americans.⁶ Congress consists of two chambers, a House whose membership is apportioned among the states proportional to population, and a Senate whose members are drawn equally (two each) from each state. House members serve two-year terms, senators, six-year terms. One-third of the Senate is up for reelection every two years. (Unlike the Confederation Congress, there are no term limits on members of the Constitutional Congress.) House members must be 25 years old and have been citizens of the U.S. for five years; senators must be 30 years old and citizens for seven. Both members of the House and the Senate must be residents of the states they represent. (Although it is traditional — and politically expedient — there is no constitutional requirement that House members live in the *districts* they represent.) Originally, members of the House were elected directly by voters while senators were elected by state legislatures.

Article I, section 8 of the Constitution delineates Congress's legislative prerogatives. It first delineates a series of powers explicitly, such as the right to lay and collect taxes and to provide for post offices and post roads. These are often called Congress's *expressed powers*. Second, it contains two provisions that have been used over the years to expand the reach of Congress's legislative authority: the *commerce clause* and the *elastic clause*.

The commerce clause simply grants the power to "regulate commerce with foreign nations, and among the several states, and with the Indian tribes." Yet, as the United States grew as a commercial nation, there was very little that Americans did that was not, at least loosely

⁶The reader who wishes to reacquaint him- or herself with those provisions is invited to read the Constitution, which is reproduced in Appendix B.

considered, part of commerce. Thus, for instance, the Civil Rights Act of 1965 prohibited discrimination in any setting where interstate commerce was conducted, even if the only interstate commerce being conducted in an establishment was someone using the phone to call someone else in another state or a restaurant owner using a bottle of ketchup that was manufactured in another state.

Congress was also granted the power "to make all laws which shall be necessary and proper for carrying into execution the foregoing powers, and all other powers vested by this constitution in the Government of the United States, or in any department or office thereof." This "elastic clause" or "necessary and proper clause" also grants Congress great latitude to act. For instance, if Congress has the right to regulate the armed forces and make provisions for war fighting, it is arguable that it has the right to build roads around the country on which armies might travel. That is, in effect, how the interstate highway system was built in the United States — it was built with reference to the need to move military equipment around the country in wartime, even though virtually all the traffic on the system was likely to be civilian.

The expansion of congressional authority under the commerce and elastic clauses has been controversial. Indeed, some of the most fundamental cleavages in American history have arisen over how broadly to read these constitutional provisions. In the early years of the Republic, for instance, there were great political divisions over whether Congress had the power to create and regulate banks. Banks are not explicitly mentioned in the Constitution (nor is Congress's right to grant charters of incorporation), but it was argued that the national regulation of banks was essential for Congress to regulate commerce and to have a safe place to keep tax collections. Others argued that the creation of banks was a state function and that the regulation of commerce

or the collection of taxes didn't require the creation of *national* banks. In more recent times, conservatives have tended to read the elastic and commerce clauses more narrowly than liberals. Indeed, it could be this very debate that defines what it means to be a liberal or conservative and, therefore, what it means to be a Democrat or Republican.

While both chambers may generally originate legislation, the Constitution lodges special legislative powers with both chambers. All revenue-raising bills must originate in the House.⁷ The Senate is given special powers to act with the president in executive matters — to ratify treaties (two-third vote being required) and confirm executive appointments (where a majority vote is sufficient). All laws must pass both chambers in identical form before being sent to the president for his or her signature.

The requirement that the president sign legislation also makes the president a *de facto* third chamber of the legislature, though a chamber with no general agenda-setting power.⁸ If the president refuses to sign a piece of legislation, two paths are possible. The first route is the *veto*. Under the traditional veto, the president returns the bill to Congress, stating his objections to it. Both chambers of Congress must then give the bill a two-thirds vote of approval for it to become law. The second route is just to do nothing. If there are more than ten days left in the congressional session, the bill becomes law without the president's signature after ten days. If Congress adjourns within ten days of passing a bill and the president does not sign it, the bill dies — this is called the *pocket veto*.

⁷Spending bills also originate in the House, but that is by tradition, not constitutional requirement.

⁸Note that if we consider confirmation and treaty-making as legislative actions, then the president has tremendous formal agenda-setting powers in these realms.

Constitutional amendments since 1787 have affected congressional prerogatives in matters great and small. At the grandest level, the Bill of Rights and certain other amendments most directly affect the types of laws Congress can pass. At a more minor level, only a few constitutional amendments have affected the organization of Congress. The most significant constitutional amendment affecting congressional organization was the 17th amendment, ratified in 1913, which provided for the popular election of senators. In a recent fluke of constitutional history, one provision of the Bill of Rights that had failed to be ratified in the 1790s was resurrected and ratified in 1992. This amendment, now the 27th amendment to the Constitution, prohibits members of Congress from voting themselves pay raises. Any increase in congressional pay that is voted in one Congress may not take affect until after the next congressional election.

In some ways, the Constitution represented a radical departure from the Articles of Confederation. In other ways, it was only an incremental change from the past. From the perspective of institutional political scientists trying to understand congressional behavior, two things stand out about the Congress of the Constitution compared to the Congress of the Confederation. First, the Congress of the Constitution was given more latitude to build internal systems to overcome problems of social choice instability than had existed under the Articles of Confederation. Second, the Constitution created in Congress an institution that is probably the purest experiment with democracy we are ever likely to see, much more so than the Confederation Congress. This statement is not meant to be hyperbolic. Not only is the Constitutional Congress a representative institution, but more important to the theorist, members of Congress have absolute control over how they govern *themselves*. There are fewer constraints on the behavior of members of Congress than on any other collection of individuals in the

country, making Congress a great laboratory for applying social choice analysis. This contrasts sharply with the Confederation Congress whose members were frequently wracked with the question over whether they were allowed to govern themselves.

The Constitution of 1787 is a starting point for understanding all future congressional behavior. It is not the only starting point, since a wide variety of behaviors are consistent with the constitutional framework. And, it's not a starting point that is always guaranteed to be honored by members of Congress. (For instance, as we will see in later chapters, virtually every constitutional provision relating to Congress has been clearly violated with impunity at some point in American history.) But, practically speaking, it is the starting point that helps to distinguish most quickly congressional behavior from the behavior of legislatures in other nations. In subsequent chapters, the constitutional starting point will return as we visit questions concerning elections, policymaking, and internal organization.

III. Spatial Analysis of Constitutional Features

The Constitution created an institutional setting for the national legislature that was quite different from the Congress of the Confederation. From the perspective of spatial voting analysis, a number of features are particularly important. The most important features that we will review, because they affect the legislative process so fundamentally, are the effects of *bicameralism* (i.e., splitting Congress into two chambers) and the presidential veto.

Bicameralism requires that majorities of both chambers endorse a piece of legislation identically before it can be sent to the president for his signature. In order to understand the essential institutional characteristics of bicameralism we can ignore for the moment the effect that

the president has on legislation. In other words, we will assume that the president will sign anything that both chambers of Congress pass.

Fig. II-2 The primary effect of bicameralism is to restrict the range of feasible policy change compared to what either chamber would agree to do alone. Precisely *how* the range of policy change is restricted depends on what current policy is and how majorities in the two chambers are arrayed around the status quo. Figure II-2 helps to illustrate this point in the unidimensional setting. In Figure II-2a I have represented a policy status quo (Q) and the location of the median member of the Senate (S) and House (H). (To emphasize the core qualities of bicameralism, let us begin by assuming that both chambers vote using pure majority rule and that its members vote sincerely.) Immediately below the policy dimension I have indicated the length of the dimension that is included in the win set of the Senate, $W_S(Q)$, and the win set of the House, $W_H(Q)$.⁹ To pass out of a bicameral Congress, legislation must be in the win set of *both* the House and the Senate. Thus, the overall win set is the intersection of the two chambers' win sets: $W(Q) = W_S(Q) \cap W_H(Q)$.¹⁰

⁹Recall the corollary of the median voter result from Chapter 1: that for legislation to pass in a unidimensional world, the median voter must approve of it. Therefore, the win set of a legislature in a unidimensional setting is the space that the median prefers compared to the status quo. The application of a ruler to Figure II-2a will confirm that the win set of the House comprises the part of the policy dimension that is closer to the House median than the status quo.

¹⁰Without further articulation of the rules that govern passing legislation, we cannot specify precisely where in $W(Q)$ the final bill will be. We only know that for the bill to pass, it must lie within $W(Q)$. In reality all bicameral legislatures have rules that specify how different versions of the same bill are reconciled. In the U.S. Congress the most important mechanism for reconciling differences between the two chambers is the *conference committee*. In Chapter * we will examine the operations of conference committees in detail, particularly focusing on how the strategic balance in Congress is affected by relying on them.

We do not know precisely *where* in $W(Q)$ the final bill will be, but we know that the final bill must be *somewhere* in $W(Q)$, or else majorities of both chambers won't vote in favor of it. If the bill is to the left of Q , we know that majorities of both chambers would prefer to leave the status quo unchanged, and thus *neither* chamber would support a bill in that region. In the far right-hand part of the dimension a majority of the House would vote to change the status quo, but a majority of the Senate would balk due to the proposal's extremity. It turns out that in this example the overall win set is equal to the Senate's win set, since $W_S(Q)$ is a subset of $W_H(Q)$. In general, when the status quo is to the left of *both* the Senate and the House and the median senator is to the left of the median House member, successful legislation will be constrained by the median senator.

The other two parts of Figure II-2 demonstrate the effects of bicameralism when the other two configurations of preferences hold: when the status quo is between the median senator and House member and when the status quo is to the right of both the House and Senate medians. We can use the logic of the preceding paragraph to understand how policy movement is constrained in the other two scenarios. When the status quo lies between the median senator and House member, the intersection of the two chambers' win sets is empty. Although majorities in each chamber would vote to change policy, concurrent majorities cannot be found. Any policy shift that would please the median senator would displease the median House member, and vice versa, so there is a policy stalemate. Finally, when the status quo is to the right of both the House and the Senate and the median House member is to the right of the median senator, it is the median House member who constrains the overall win set the most. (In other words, the analysis

of the case when the status quo is to the right of both the House and the Senate is symmetrical to the case when the status quo is to the left of both.)

Fig. II-3 Not surprisingly, when we consider how bicameralism operates when politics is described with more than one dimension, the results are a little less determinate. This is easily seen in an example, illustrated in Figure II-3, with a "Senate" and "House," each of which has a majority that generally disagrees with the majority of the other chamber. In Figure II-3, solid circles represent the ideal points of three members of a "Senate," while O's represent the ideal points of five members of a "House." Two of the three senators cluster in the southeast corner of the figure while three of the five House members cluster in the northwest. The status quo (Q) in the example is located between the two clusters, making it similar to Figure II-2b, where the status quo was located between the medians of the two chambers. But, because it is meaningless to speak of medians in the multiple dimension case, the conclusion we draw here is slightly different. The intersection of the two win sets is now not empty, but notice nonetheless that the intersection is quite small compared to the separate House and Senate win sets. Thus, in the multidimensional case the imposition of bicameralism must reduce the range of possible policy changes, but bicameralism alone may not force absolute gridlock.

In general, the bicameralism of the Constitution reduces the maneuvering room that members of Congress have to change policy. When majorities of the House and Senate are similar, but not identical, policy is anchored more by the chamber in which support for the status quo is the stronger, but the range of possible policy movement can be quite large. When House and Senate majorities support quite different policy alternatives, the resulting constraint on policy change can be quite severe.

In addition to bicameralism, the other important legislative feature created by the Constitution was the presidential veto. In thinking theoretically about the veto, it is useful to start by imagining that the president's role is similar to that of a third body of the legislature. In other words, suppose Congress were *tricameral*, with one of its chambers consisting of simply one member. Because the president's preferences must be accommodated in passing legislation, in addition to majorities of the Senate and House, the range of possible policy change is further reduced.

Fig. II-4 In Figure II-4 I have augmented Figure II-3 by adding a hypothetical "President" to the figure. To aid in clarity of the figure, I have indicated only the intersection of the House and Senate win sets, to illustrate the policy regions where majorities of the two chambers could reach some agreement. The President has been located in the southeast corner of the figure, in the vicinity of a majority of the Senate. The president's preferred-to set has been superimposed on the figure. Note that there is no region of overlap between the overall win set and the president's preferred-to set, other than a single point — the status quo. In this case, therefore, the addition of the president's preferences as a constraint has created a policy equilibrium.

Yet, the president is *not* simply a third chamber of a legislature — the veto operates more subtly than that. In particular, for the veto to operate, Congress must first make a proposal to the president. The president may not amend the bill, but is only allowed to sign the bill or to return it

to Congress with a list of his objections.¹¹ If he vetoes the bill, then two-third of both Houses must vote to approve it, in order for it to finally pass.

The first part of the veto mechanism — the requirement to send all bills to the president for his approval — is referred to as the "presentation clause" of the Constitution, since it requires Congress to "present" all bills to the president. The second part of the veto mechanism is the two-thirds rule, requiring supermajorities in *both* chambers to override the president's veto. Both of these clauses have different effects on the exercise of the veto power, thus we will consider them in turn.

Fig. II-5

If the president's preferences are such that it is possible to change policy — in other words, the situation is *not* similar to the one sketched in Figure II-3 — then the presentation clause can give the advantage to legislative majorities in deciding where, within the overall win set, policy will eventually move to. This is illustrated in Figure II-5, which shows hypothetical ideal points for the Senate and House median, along with the president and the status quo. As before, the win sets for the House and Senate are illustrated, as is the preferred-to set of the president. Any bill that finally passes must be in the intersection of the two chambers' win sets *plus* the president's preferred-to set. I have indicated this region directly on the dimension as a bold line.

With the House and Senate acting jointly to present a bill to the president, we know that the bill they present to him should be on the bold section of the line that is to the right of the

¹¹The president does have the option of not signing the bill, which can lead to two results. If he holds onto the bill for ten days, the bill becomes law without his signature unless Congress has adjourned in the meantime. If Congress adjourns before the ten-day period is up, the bill dies. This latter course of action is referred to as a *pocket veto*. It is unusual enough for a president not to sign a bill that we ignore this constitutional wrinkle.

Senate's ideal point; there are potential bills to the left of S that both the House and Senate would prefer compared to the status quo, but all of those bills are inferior to any bill that lies between the Senate and House. For the sake of argument, let us suppose that the Senate and House pass a bill located at a on the line. Because the president prefers a to the status quo, he would sign the bill.

Notice what would happen if the presentation clause were reversed, with the president proposing a bill and the House and Senate voting on whether to approve it, but being given no power to amend it.¹² In that case the president could present a bill to Congress that corresponded perfectly with his ideal point. Because that point is also clearly better to both the House and the Senate than the status quo, the House and Senate would vote to accept it.

In this example, the policy difference represented by the physical distance between a and P represents the degree of agenda-setting power given to Congress through the presentation clause of the Constitution. If the Constitution had reversed the proposal power, policy outcomes would be different.

So much for the presentation clause. What effect does the two-thirds rule have on the veto? As with previous analyses of constitutional features, it is useful to start with the unidimensional case. And, because we know that bicameralism operates to constrict policy change compared to unicameralism, we can gain sufficient insight into this question by examining what happens when there is a unicameral legislature and then extrapolate to two legislative chambers.

¹²While this hypothetical situation may seem farfetched, it is not too far removed from the politics of executive nominations, where the president proposes and the Senate votes up or down on the nominee.

Fig. II-6 The two-thirds rule requires us to shift our focus in the one-dimensional case away from the chamber medians and toward the two members of the chamber who reside one-third of the way in from the two extremes of the issue dimension. In Figure II-6 I have constructed a hypothetical legislature, this time indicating three members of the House — H, who is the chamber median, H_* , who is located such that one-third of the House is to his left and two-thirds are to his right, and H^* , who is located such that one-third of the House is to his right and two-thirds are to his left.

Note what would happen if the bill that passed the House corresponded with the House median's ideal point. Because the bill would move policy away from the president's ideal point, he would veto it. H and H^* would vote to "override" the veto, but H_* (and everyone to his left) would support the president, since H_* is also made worse off by the bill. The veto would be sustained and no policy change would emerge. A little close inspection of Figure II-6 would further reveal that there is *no* bill that H would support that would also be supported by H_* , and hence the status quo is in equilibrium.

Fig. II-7 Finally, I have illustrated a case in Figure II-7 where a successful override is possible, but only if the House median is willing to be sophisticated. Suppose, for instance, the House passed a bill that corresponded with H's ideal point. Again, the president would veto the bill, since it moves policy away from his ideal point. In the vote to override the veto, H_* would support the president, since he would regard the bill as changing policy too drastically.

But, suppose the House median were willing to support a bill located at point a in Figure II-7. Again, the president would veto the bill. But, because a is located within H_* 's preferred-to set, he would vote to override the veto.

Here is a case where it is important to understand whether legislators are sophisticated or sincere in order to understand how a constitutional provision operates. If legislators are sincere, we should observe a multitude of vetoes whenever the president and both congressional medians lie on opposite sides of the status quo; policy should stagnate. If legislators are sophisticated, then we might or might not observe vetoes — depending on whether the president realizes that his vetoes will be overridden and thus are a waste of his time — but we should also observe policy changing at a much slower pace than would occur if the president and Congress resided on the same side of the status quo.

To summarize our discussion of the effects of the veto power in the Constitution, it is important to keep separate three effects that this power has on policymaking in the national government.

- (1) In general, the imposition of the president in the legislative process further reduces the range of possible policy movement, in addition to the restrictions imposed by the imposition of bicameralism.
- (2) Within the constricted space of possible policy change, the presentation clause of the Constitution can give some advantage to legislative majorities in deciding how precisely to change policy.
- (3) The two-thirds rule further reduces the range of possible policy change, particularly when the president and Congress are located across the ideological scale from each other. The two-thirds rule requires us to refocus our attention away from the chamber medians and toward the ideological extremes on the "president's side" of the ideological spectrum. Finally, the frequency of observed

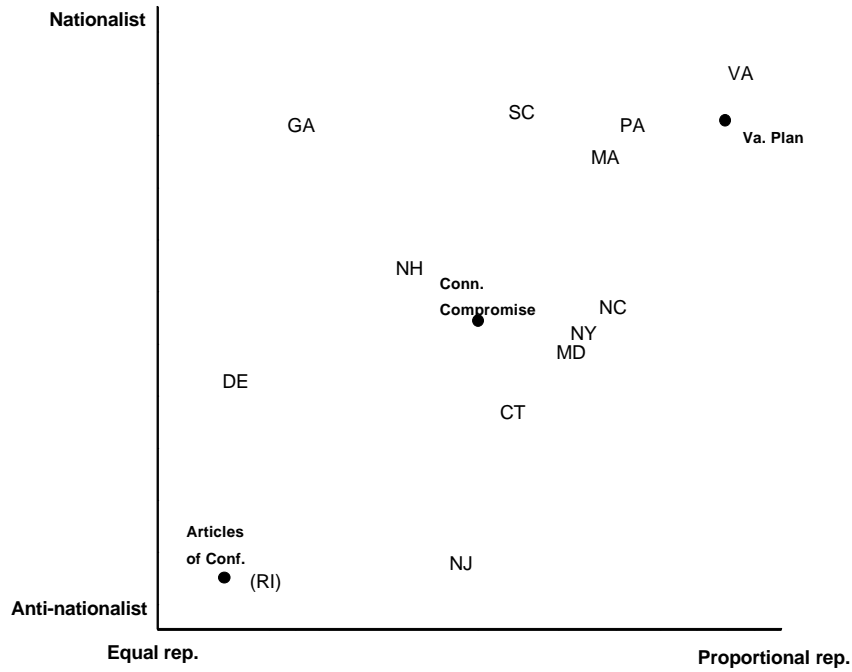
veto and pace of policy change when the president and legislative chambers disagree is a function of the tendency of members of Congress to act sincerely, as opposed to sophisticatedly.

One final insight should be clear to anyone who has read this far in this section: The precise impacts that bicameralism and the veto will have in any given situation are determined by the precise locations of preferences and alternatives. What I have done in this section is to demonstrate that spatial voting theory can be used to give greater specificity to our thinking about these constitutional features. Using these tools, we can make some general statements about constitutional features, but those statements rarely apply in all cases.

* * *

Policy observers frequently remark that the American political system tends toward "gridlock" and stalemate. These negative attributes of the political system are sometimes attributed to the ill will of political actors or even to the intransigence of the American people. Yet, it is equally likely that gridlock and stalemate were hard-wired into the American political process by two of the most important features of American constitutional government, bicameralism and the presidential veto. As we have seen, stalemate is most likely whenever House and Senate majorities have quite different preferences. Because elections to the House, Senate, and the presidency are by design uncoordinated, therefore encouraging different policy preferences in these institutions, it is perhaps more surprising that we get policy innovation at all at regular intervals, rather than unremitting stalemate.

Figure II-1. (Somewhat fanciful) spatial representation of major issues decided in the



Constitutional Convention.

Figure II-2. Spatial analysis of bicameralism – one-dimensional example.

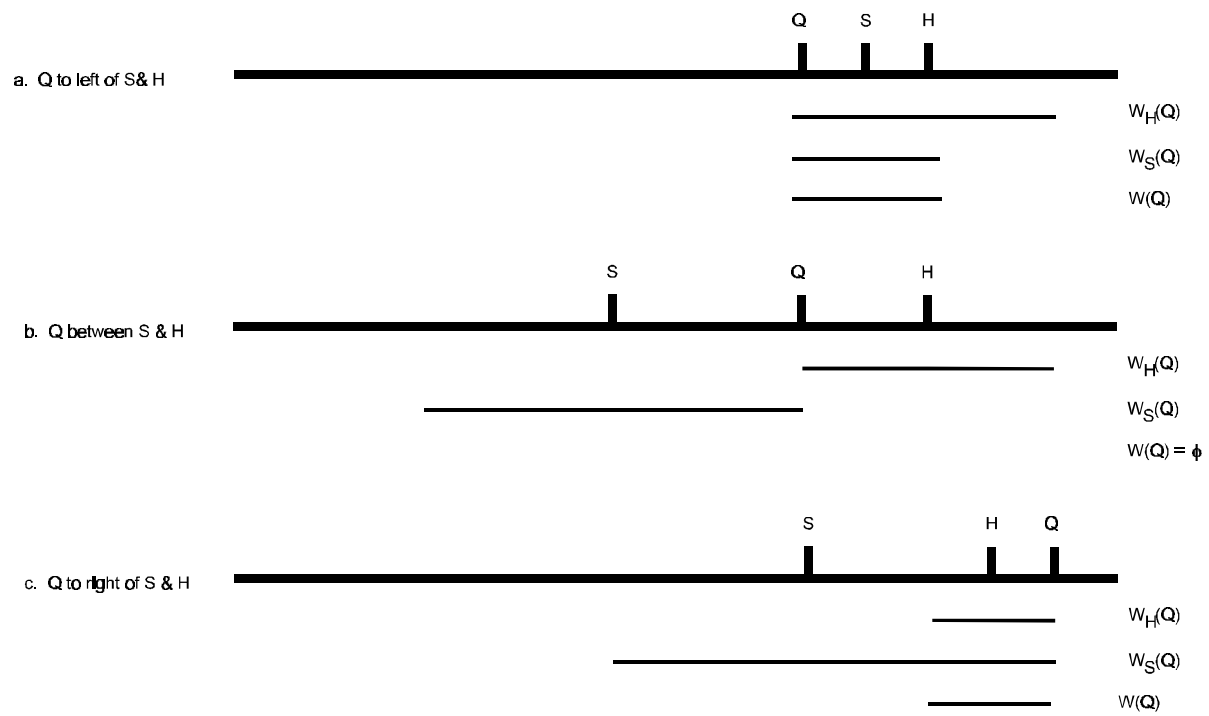


Figure II-3. Example of bicameralism in two dimensions.

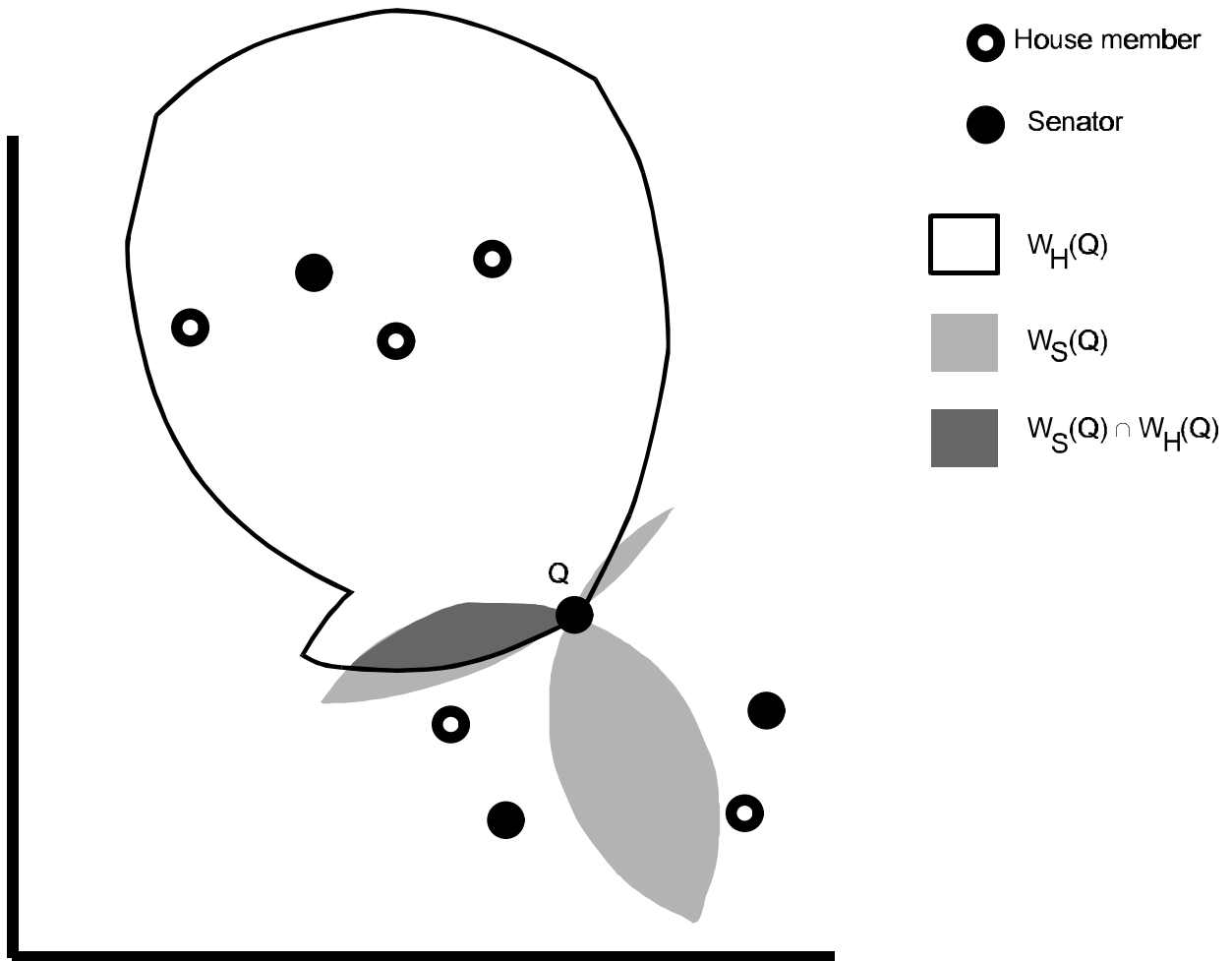


Figure II-4. Example of “tricameralism,” treating the president as a third chamber of Congress.

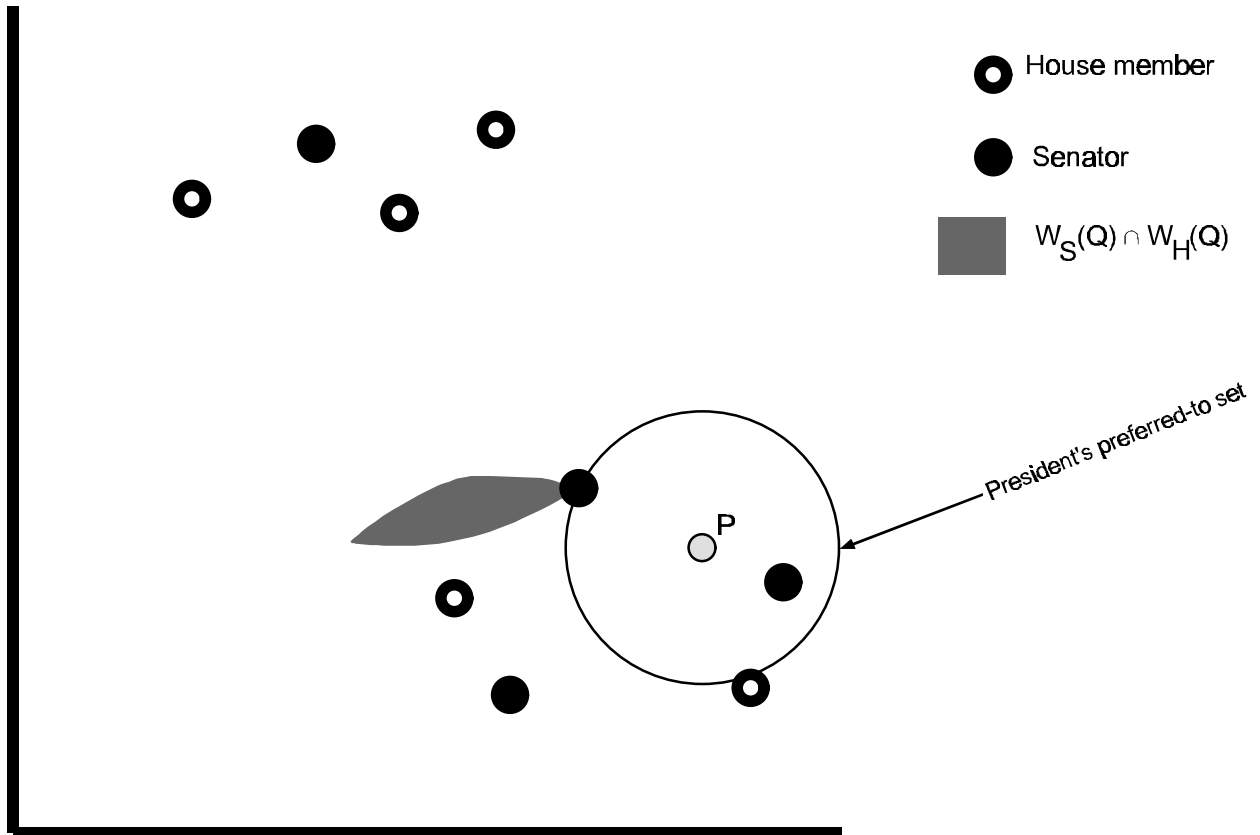


Figure II-5. Effect of the presentation clause.

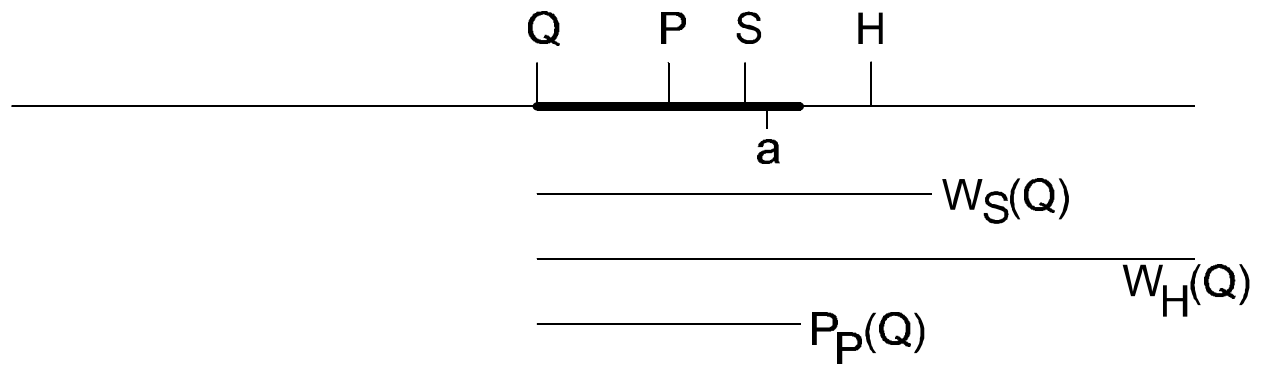
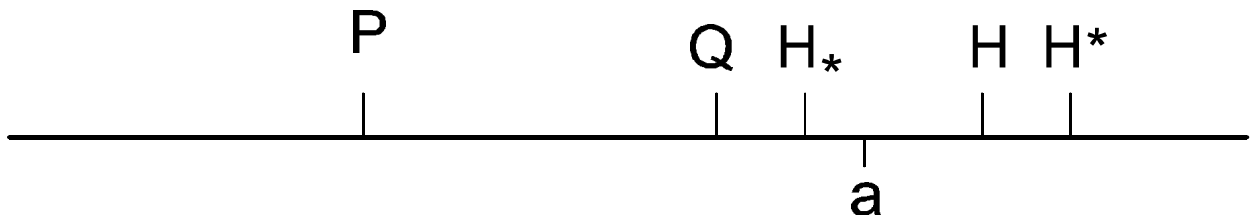


Figure II-6. Effect of requiring $2/3$ vote to override a presidential veto. In this example, there is



no majority-supported bill in the House that will withstand a presidential veto.

Figure II-7. Effect of 2/3 override rule. In this example, a strategic House majority can present



the president a bill that would sustain a veto.

Table II-1
Constitutional Apportionment of the House
along with Hypothetical Apportionment of the Senate

State	House members	Senators
New Hampshire	3	1
Massachusetts	8	3
Rhode Island	1	1
Connecticut	5	2
New York	6	2
New Jersey	4	2
Pennsylvania	8	3
Delaware	1	1
Maryland	6	2
Virginia	10	4
North Carolina	5	2
South Carolina	5	2
Georgia	3	1

Table II-2
Summary Comparison of the Confederation Congress with the Constitutional Congress

Item	Articles of Confederation	Constitution
General structure	Unicameral; each state gets one vote	Bicameral; each member gets one vote in the respective chamber
Apportionment	Each state allowed between 2 and 7 members; each state casts only 1 vote	House apportioned with respect to population; Senate apportioned equally
Terms of office	One-year term; three-year term limit	House: 2 years; Senate: 6 years; no term limits
Mode of election	Elected, paid, and recallable by state legislatures	House: mass elections; Senate: state legislatures; members paid out of fed. treasury; no recall; both chambers judge their own elections
Internal structure	No provisions	Both chambers given wide latitude to write rules and enforce them; both chambers may arrest to compel attendance
Legislative powers	Provide approval to treaties and foreign agreements entered into by states and foreign countries; declare war; recommend tax levees to states to pay for military; adjudicate differences between states over land claims; regulate mails between states; regulate coinage, weights, and measures; raise and equip an army and navy	Lay and collect taxes, not limited to military ends; ratify treaties; confirm executive nominees; regulate interstate and foreign commerce; declare war; provide post offices and postal roads; regulate coinage, weights, and measures; raise and equip and army and navy; provide for inferior federal courts; control federal district; "elastic clause"