

WHY “IT’S EVEN WORSE THAN IT LOOKS”*: PARLIAMENTARY PARTIES IN THE AMERICAN CONSTITUTIONAL SYSTEM

DRAKE LAW SCHOOL CONSTITUTIONAL LAW SYMPOSIUM

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Thanks, Mark [Kende]. Let me say how delighted I am to be here. This symposium really has gotten a great deal of attention and national renown over the years. It’s terrific to be a part of it and I’m tickled to have Neal Smith here. I’ve known Neal during the time that he was in Congress and he was a quintessential problem solver. Somebody who focused on finding ways—working both across the aisle and in-depth in his committees—to make things work. His presence here only makes me more acutely aware of how few problem solvers we have now.

What I’d like to do with my time this morning is first to talk a little bit about the thesis of the book that I wrote with my longtime collaborator Tom Mann that Mark mentioned, *It’s Even Worse Than It Looks*. And then focus a little bit on the larger subject: What do we do about the problems, if you agree that we have significant problems? How far can we

* THOMAS E. MANN & NORMAN J. ORNSTEIN, *IT’S EVEN WORSE THAN IT LOOKS: HOW THE AMERICAN CONSTITUTIONAL SYSTEM COLLIDED WITH THE NEW POLITICS OF EXTREMISM* (2012).

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go and how much can we resolve through structural remedies or even more dramatic constitutional change? I'm sure that many of the areas will come up again and again and many of them are discussed in the terrific collection of papers that have been done by my colleagues here.

The book that Tom and I did, which came out this past May, was actually the second that we have done in recent years on similar subjects. We did a book in 2006 called *The Broken Branch: How Congress Is Failing America and How to Get it Back on Track*.¹ And then six years later, this one. Now that book was a lament, *The Broken Branch*, about the decline—almost the demise—of the regular order in Congress and we cast blame fairly widely. But we were quite optimistic, at the end, that things would come around. This one is much less optimistic. I'm hoping there won't be a trilogy where the third one is called *Run For Your Lives*. But, basically, when we wrote this book we said that in the forty-three and a half years that both Tom and I have been immersed in our politics in Washington, [D.C.] at both ends of Pennsylvania Avenue, we have never seen it this dysfunctional. And we have seen plenty of periods of dysfunction. The two of us arrived in Washington, [D.C.] in the fall of 1969, when the country and the city were riven deeply, emotionally and bitterly, over America's involvement in Vietnam. We segued from that just a few years later to the impeachment of a President. And the impeachment of Richard Nixon—the process, those of you not around at the time or too young to remember—we really weren't even sure that the system could survive, that there might be a coup. This was uncharted territory for a very long period of time. The fact that we worked our way through that, ironically, made it much easier to impeach another President subsequently. But all of those were strained times and very difficult ones to get through, and it was easy at any given moment when you're in the middle of that process to think that "this is worse." You have to check yourself all the time. Dana Carvey had a character on Saturday Night Live many years ago, an old man who would say "In my day" to bring some perspective.

But this, we believe, really is different. Now, let me say it is different, in significant part, because of the sharp levels of ideological and partisan polarization, which are not difficult to document. In the book, and also Rick [Hasen] has put some of the charts in his paper, you can see this. And we've got very good political scientists who have been able to come up with ways of measuring voting patterns and Congress, going back to the first

1. THOMAS E. MANN & NORMAN J. ORNSTEIN, *THE BROKEN BRANCH: HOW CONGRESS IS FAILING AMERICAN AND HOW TO GET IT BACK ON TRACK* (2006).

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Congress, and this is different. It's dramatically different than what we've had before. But as we point out, it's not just ideological and partisan polarization. You can have sharp ideological differences or differences in worldview and still fairly easily find ways to either reach common ground or find ways to compromise to achieve a common set of goals of solving problems. This is tribal. And tribalism means that if you're for it, I'm against it—even if I was for it yesterday. One good and easy way to dramatize this, or to show this, under the current circumstances, is to look at at least one area of policy that has been central in the last few years—our attempts to deal with our debt and deficit problems. And of course you can see how polarization does not necessarily mean an inability to solve problems. When you look at the reality that every outside group that we have put together that spans the ideological spectrum—from the Simpson–Bowles Commission that was semiofficial to the Rivlin–Domenici Commission put together by the Bipartisan Policy Center, and then even turn to what was a “gang of six” inside the Senate ranging from Tom Coburn, who calls himself the most conservative member of the senate, all the way over to progressive Dick Durbin—they all came up with the same template as a way of resolving the issues.

Back in 2009, we saw a commendable bipartisan effort to try and deal with this. We had conservative Republican Senator Judd Gregg of New Hampshire join together with moderate Democrat Kent Conrad of North Dakota to propose a congressionally mandated commission with teeth that would have an expedited process, could come up with a resolution by majority, and get up or down votes in the House and Senate with the added impetus and cache of being done by law. And throughout 2009 and into 2010, there wasn't a day that went by when Senate Republican Leader Mitch McConnell didn't take to the Senate floor or give a speech or go on a television show and say, “You know we can resolve these issues. All we need is the Gregg–Conrad Commission. If we can get the Gregg–Conrad Commission we could come together, we could make this work, if only President Obama would endorse the Gregg–Conrad Commission.”

Then in 2010, President Obama endorsed the Gregg–Conrad Commission. Shortly thereafter there was a vote in the Senate: Fifty-three senators voted for the Gregg–Conrad Commission, but it was filibustered. And it died on a filibuster, fell seven votes short. Seven original Republican cosponsors of the Gregg–Conrad Commission and Mitch McConnell supported the filibuster and voted against the Commission. Now I've searched long and hard for another explanation for why you would vote against your own bill, [other] than if you're for it, we're against

it. And if somebody can come up with one, I'd be delighted to hear it. But it is a classic example of how tribalism works and we've seen it play out in many other ways. And it makes it even more difficult to figure out how you can resolve these problems.

Now in the larger sense, what we said and what Mark alluded to, and I think what will come up again and again, is as we begin to trace how we got to this point, it really is [political] parties over a forty-year period or more, for a variety of reasons—some built into larger patterns of population movement over a long period of time. Transforming the South, which had been a solidly Democratic region, into what it now is, which is the base of the Republican Party. Transforming the northeast New England and parts of the Midwest along with the West Coast from what had been strongholds of moderate republicanism into some of the bluest regions in the country. Our parties have moved further apart, become more homogenous, and become like parliamentary parties. Now they're not symmetric in that approach—the GOP has moved far more from the center than the Democratic Party—but it's happened and it has taken over and it is something that underscores the level of dysfunction. As we see it, there is a mismatch between the parties that we have now and our American political system of divided powers and checks and balances. Parliamentary parties are homogenous in nature, oppositional, often violently oppositional in character, and they work just fine in a parliamentary system. In a parliamentary system, you have a majority party that gets elected and a parliamentary culture where that majority can enact a program. The minority vociferously, vehemently, violently opposes, uses every tactic at its disposal to block those actions, but can't. And the culture accepts the legitimacy of the actions taken by the majority even if they don't like them, knowing that within three, four, or five years there will be an opportunity to vote and decide whether you like them enough to keep that party in place, to continue to move on its program or throw them out and bring the other side in.

But in our political system, it doesn't work that way. We have something designed in a very different fashion. I want to step back for a second and say I chose the title of our book, *It's Even Worse Than It Looks*, very deliberately because it never looks good. No political system functions in a fashion that is wonderful and efficient and everybody is happy with the process. The old saw that you should never watch laws or sausages being made has a real point to it. But ours is particularly difficult and it's because as the Framers worked through how they were going to set up a political system, they looked at a country that was very different from

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the models that they had seen. Not like a Britain—small geographically, homogenous in character—but this huge expanse with people coming from dramatically different backgrounds across these thirteen colonies, but also living radically different lives. What they called an “extended republic” ranging from those living in rural areas who literally might not see another human being for months at a time, all the way to densely packed urban areas in places like Philadelphia and New York that would make today’s New York look like it was all Central Park. How do you get those disparate kinds of people to accept the legitimacy of decisions made by a government? And, frankly, the classic problem that affects everybody at any level of government is a classic problem of human nature. Because, in effect, what you are doing is asking people to accept short-term pain and dislocation involved in almost every decision that makes significant policy for the promise that it will have some benefits down the road for you or for future generations. Nobody naturally inherently accepts that kind of a trade-off; the certainty of pain for the ephemeral promise of a gain sometime down the road. And that’s true in almost every area of life. I was reflecting on this a few months back on a Sunday evening as I was preparing for my colonoscopy the next morning. For those of you who have been through that know what I am talking about, it’s a vile process that is not anything you want to do and I asked myself multiple times that night: “Why am I doing this?” And, of course, I was doing it because experts I trusted told me: “This is important for you.” The dislocation caused otherwise would be much greater. We accept the legitimacy of the scientific community and of gastroenterologists much more than we do politicians.

So creating a system where there was a congress not a parliament, not just a different word but with meaning—*congress* comes from the Latin word meaning “to come together”—where you’re going to bring people together and they’re going to debate and deliberate, put themselves in other people’s shoes, see that they might have some legitimate viewpoint, go through an extended process and come up with decisions that with broad leadership consensus will be accepted by a public is different than a parliament, coming from the French word “to speak,” because the parliament is basically the agent of the government in that system.

Well, our system won’t work with parliamentary parties. And you can look at it in a time when separate elections for the President, the House, the Senate will result in a government that can act when one party has the majority in all three entities and can act in a parliamentary fashion. And that’s what we had in the first two years of the Obama Administration, but the country isn’t going to accept the legitimacy of actions taken by one

party with the vehement opposition of the other, and so we've seen an active attempt to delegitimize all the things that were done with the rush of activities in the first two years of the Obama Administration. And, of course, you had the added twist of those filibusters that Mark talked about, raising the bar from a majority to sixty votes in the Senate. Then we moved to the true nightmare which is where we are now, which is a vehement minority party acting as a parliamentary minority with divided government. And that makes it even more difficult to solve problems.

What do you do about this? And what do you do when this is amplified by a culture with tribal media that themselves are amplified by social media creating greater divisions? Where a set of problems in Washington, [D.C.,] have metastasized out now to cultural differences in many states, as state legislatures and governors are showing some of the same pathologies, and where we are beginning to see it happen more and more at the public level as well.

Some of us, like Sandy [Levinson], think we need a constitutional convention and we need to alter the system, and some have even talked about maybe accepting that reality and moving towards a parliamentary system. As I look at parliamentary systems, which have many advantages in a culture that would naturally accept it, but also if you look at how they're resolving policy differences now over terrific economic problems, it doesn't necessarily lead to better policy. But it wouldn't work here for us. I see a whole set of areas, and half of our book is devoted to looking at ways which, we might improve or ameliorate the problems. Some of them involve more dramatic change. I don't think we're going to get out of this without a change in the Supreme Court, frankly, that will alter the post-*Citizens United*² bleak world, which is an enormous factor contributing to these pathologies. Some would involve enlarging the electorate and moving beyond a smaller number of players at the fringes who continue to dominate the process. That in turn, if you look at some of the forces with money that are moving us in that direction, we might be able to ameliorate some of these problems. But if you're dealing with a set of problems that are now embedded in a culture and not just structural, it becomes much harder to figure out ways in which you can resolve or move in a different direction.

I would just end by saying that we've been through similar phenomena before. The period right before the Civil War, the period in the 1890s when it was a Democratic Party that veered way off the rails and

2. *Citizens United v. Fed. Election Comm'n*, 558 U.S. 310 (2010).

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took about a decade to bring it back. It's not clear to me that even a decade would make a great difference here, especially because there are no incentives for problem solvers to run for office now or to stay in office given the tribal culture, the cost of campaigns, and the money process. And we may have to look at other solutions as well. But if we don't start working on this now, and we just wait for the system to purge itself of the pathologies, then we may find more radical solutions coming up down the road.

Thank you.