

Munn v. Illinois
and the Historical Increase in Legislative Tenure*

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Abstract:

From the early years of the United States Congress to the present day, average U.S. Senator accrued tenure has more than doubled, and average U.S. Representative accrued tenure has increased by a factor of four. What explains the implicit value of holding federal legislative office? While the passage of the 16th Amendment, the income tax amendment, is a common hypothesis, the increase in tenure rates begins almost 30 years prior. The paper argues that *Munn v. Illinois*, a Supreme Court decision allowing legislative regulation, was the primary factor increasing the value of being a Congressman. The root cause of the initial increase in legislative tenure is the ability to regulate, not the ability to tax and spend.

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Introduction

In 1988, for the first time in the history of the United States, the average politician serving in the United States Senate or the United States House of Representatives had over 10 years of experience. This landmark of acquired legislative experience is not a culmination of trend of increasing tenure, but a guidepost; average tenure rates continue to rise with each passing Congress. But are ever-increasing tenure rates simply a characteristic of a legislative branch of government, and as such, have tenure rates been rising since the inception of the United States Congress in 1789? Or has the increase in tenure rates been limited to a portion of America's history? As will be shown, the latter proves to be true. This chapter considers the nature, as well as the causes, of the phenomenon of increasing legislative tenure in the United States Congress.

The forthcoming analysis provides a historical scope previously not available in the existing literature. The dataset collected for this article far surpasses any previous attempts at studying historical trends; whereby this analysis takes a full and complete view of legislative tenure, previous surveys have examined legislative tenure only over short time spans. Reed and Schansberg (1992) utilize a continuation rate approach necessary when analyzing an incomplete section of legislative history and show that the tenure of both U.S. Representatives and U.S. Senators increased from the early 1950s to the early 1990s; in particular, Representative tenure increasing notably, starting in the 1970s. Scully (1995) finds that tenure in the 86th Congress (January, 1959 to September, 1960) to be greater than that of the 57th Congress (March, 1901 to March, 1903), that this

increase in tenure can not be solely attributed to increases in life expectancy, and also identifies a correlation between higher tenure levels and lower per capita incomes in southern states. Gilmour and Rothstein (1996) show that congressional tenure of U.S. Representatives increased significantly from 1870 to 1930, and that 75% of this increase can be explained by declining incidences of retirement. In addition, Representative tenure continued to increase into the 1980s, though declining rates of electoral defeat largely account for this time frame's increase in tenure. Glazer and Grofman (1987) note that Representative and Senator tenure from 1953-1983 can be considered roughly equal, once factoring in for differences in term length between the two types of federal legislators.

Evolution of Tenure in the United States Congress

In order to calculate the average tenure rates of United States Representatives and Senators, total years of accrued tenure for every Representative and Senator from every state for every year was gathered from the Biographical Directory of the United States Congress. "Accrued tenure" is the total number of years previously served within the chamber of the United States Congress in which the legislator serves in year t . The analysis utilizes approximately 70,000 annual Representative-level accrued tenure values, and approximately 8,000 annual Senator-level accrued tenure values, to derive the average amount of accrued tenure across Representatives and Senators for each year throughout the history of the United States Congress.

Legislators serving discontinuous terms retained their previous experience; for example, a Senator serving exactly one full term, leaving office, then resuming the position began the second term with six years of accrued tenure. Representatives or Senators holding different seats within the same chamber retained their accrued tenure as well; for example, a Senator alternating between the two allotted seats within one states, as would a Representatives holding different seats within the same state.

[Figure 1 about here]

Tenure rates have evolved differently within the United States Congress over two distinct periods throughout American history. Figure 1 highlights average accrued tenure rates for United States Representatives and United States Senators from 1793 to 2004 using a moving five-year average.¹ The first period, from the inception of Congress in 1789 through the 1870s, exhibited fairly constant average tenure rates amongst both Representatives and Senators; average Representative tenure over the first eighty years of Congress hovered around two years, and average Senator tenure remained around five years.

However, during the 1870s, a second period of Congressional tenure emerges, characterized by consistently increasing rates of average tenure for both Representatives and Senators. From a stationary average tenure rate of about two years, average Representative tenure increased to an all-time high in 1992 of over eleven years, and was

at ten years in 2004. Similarly, average Senator tenure increased from a stationary value of five years to thirteen years by 2004.

Benjamin (1985) shows that the post-Civil War period emerges as a crucial period in the increasing strength of executive power in America, both at the state level and at the federal level. Indeed, it is around this time that the level of accrued tenure in U.S. Representative and Senators begins to rise. The remainder of this chapter will investigate the possible sources of such a shock to legislative tenure rates.

Possible Explanations for the Increase in Legislative Tenure

Implicitly, an increase in the length of time a legislator hold office denotes an increase in the value of holding office. The decision to run for office, to hold an elected position, and to pursue reelection are all economic decisions. As such, the balance between expected costs and expected benefits ultimately determines the election, serving, and reelection decisions outlined above.

While incidental costs of holding office exist, the most significant cost to the legislator is the foregone wage he could earn were he not in the public sector. For example, incidental costs could include travel, clothing, food or lodging—anything costly related to holding office that the individual would otherwise not incur. These costs are generally minor compared to foregone wages. As such, as the foregone wages of holding office rise, the expected cost of holding office would rise and we would expect average length

of time that legislators hold office to decrease. In other words, we would expect an average accrued tenure figure to fall. Similarly, as the expected costs of holding office decrease, we would expect public officials to hold office for longer periods of time.²

While expected costs mainly concern foregone wages, the expected benefits of holding office occupy a number of areas. As the expected costs of being a public servant are a function of foregone wages, expected benefits can be tied to the direct compensation received from serving. Therefore, when stipends for public service increase, we would expect longer terms of service; a reduction in stipends would have just the opposite effect. Individuals may also feel a “warm glow” from public service; this, too, would be an expected benefit.³ Thus, if the psychic benefit of serving your community rises—perhaps in response to a rise in patriotic fervor, as those that occurred after Pearl Harbor and September 11th—then we should observe a rise in the amount of time spent in office. Increased standing in social circles could also be an expected benefit; as social groups and societies as a whole value a public official’s service, average accrued tenure should rise as well.

However, one important facet of legislators’ expected benefit of holding office that did not exist early in American history has emerged. The ability to transfer income through the political process is a significant benefit of holding office; in fact, every possible expected benefit mentioned above could be amplified through regulation and redistribution. As increased salaries lead to longer average tenures, legislators can increase their financial well-being through favorable tax changes. Though independent

of salary, pointed public appropriations could have a similar effect of increasing one's wage. Additionally, legislators that favor particular interest groups can benefit by virtue of increased campaign contributions, fancy dinners, and the like. Allocating public projects to one's constituency is often viewed in very favorable terms; as such, a public servant's "warm glow" gets even hotter. Moreover, one's social status only increases with the ability to favor their neighbors at a non-neighbor's expense.

As previously alluded to, a legislator's ability to intervene into the economy largely falls within two non-exclusive areas: taxation/spending and regulation. The legislative branch of the United States federal government sets the range of taxes imposed upon businesses and private individuals. With this tax revenue, the legislature also determines the scope and nature of public expenditure. This process is the more visible of the two interventions; balance sheets and pocket books reveal clearly the amount of money paid in taxes to the federal government, though the overall impact on an economy can be difficult to isolate.

Legislatures may also regulate an economy. Instead of directly taxing individuals or companies, legislatures may craft rules that determine how companies must conduct business, with whom they transact, and under what circumstances market exchanges take place. While regulation could include additional taxation or fees, it is the manipulation of the "rules of the game" that characterize regulation.

Viewed through the lens of average legislative tenure, is it possible to discriminate between changes in the ability to levy taxes and allocate spending and changes to a legislator's ability to regulate in order to shed light on the potential causes for rising tenure in the United State Congress?⁴

While in any one year federal revenues may exceed (trail) federal spending, creating a surplus (deficit), the trend of federal revenues generally mirrors the trend of federal spending. As such, as federal outlays have evolved throughout American history, so too has the ability of legislators to levy taxes to fund this public spending. Since the tax-and-spend process can be utilized to make holding office more valuable for the legislator, comparing the trends in federal spending to the trends in tenure could reveal some common ground.

[Figure 2 about here.]

Figure 2 shows the evolution of federal spending per capita in the United States from 1792 through 2002. Beside a small bump in federal outlays due to the Civil War in the 1860s, federal spending on a per-person basis remained at a minimal level through the mid-1910s, when the onset of World War I caused a spike in spending that never receded. Aside from another spike in spending due to World War II, per capita federal spending has increased steadily for nearly an entire century.

Though many factors could contribute to an increasing level of federal spending, one significant factor must be the passage of the 16th Amendment by Congress on February 3, 1913. Its text is brief: “The Congress shall have the power to lay and collect taxes on incomes, from whatever source derived, without apportionment among the several states, and without regard to any census or enumeration.” The impact of the 16th Amendment was two-fold. First, Congress now had the power to directly tax incomes. Congress briefly had the ability to tax income due to the passage of the Wilson-Gorman Tariff Act in 1894, but one year later the Supreme Court effectively eliminated the ability of Congress to collect income tax revenue in *Pollock v. Farmers’ Loan & Trust Company*. No longer would incomes be off-limits to legislators in search of tax revenue.

The combination of World War I, which provided an outward shock to public sector demand for revenue, and the 16th Amendment, which eased the process by which the federal government could collect funds, generated an almost immediate increase in federal spending. At the inception of income taxes in 1913, the lowest federal tax bracket stood at 1% for those making an annual income of \$20,000, and the highest federal tax bracket was just 7%, applicable to those making \$500,000. By 1918, the lowest federal tax bracket jumped to 6%, and applied to incomes of \$4,000; the highest federal tax bracket, though pushed upwards to incomes of \$1,000,000, skyrocketed to 77%. As a result, federal spending increased by a factor of 10 from 1913 to 1918, from just under \$130 per capita to over \$1400 per capita.

The second important factor contributing to the increase in federal spending concerned the fact that taxation and its subsequent apportionment no longer was subject to the strictures of Article I of the Constitution; namely:

Article I, Section 2: "...direct Taxes shall be apportioned among the several States which may be included within this Union, according to their respective Numbers..."

Article I, Section 8: "The Congress shall have the Power To lay and collect Taxes, Duties, Imposts and Excises...but all Duties, Imposts and Excises shall be uniform throughout the United States."

Article I, Section 9: "No Capitation, or other direct, Tax shall be laid, unless in Proportion to the Census or enumeration herein before directed to be taken."

In essence, the Constitutional constraints on redistribution via taxation were removed with the 16th Amendment. Whereby Article I intentionally tied the hands of Congressmen with regards to legislative fiscal favoritism, the 16th Amendment cut these bounds. In the end, the income tax amendment allowed for a swelling of federal coffers by permitting taxation on previously unavailable sources of tax revenue, and introduced large scale redistribution of these bulging federal accounts by removing the Constitutional constraints against taxing one group and spending these funds on another.

However, while attributing, if not wholly, the increases in federal spending to the passage of the 16th Amendment appears prudent, a similar relationship between the income tax Amendment and the accrued tenure rates of U.S. Representatives and U.S. Senators can not be established. Though tenure rates rose after 1913, they began to rise well before the turn of the 20th century. While the 16th Amendment may have contributed to today's high tenure rates, it was not the initial cause of the rise that took place in the late 1870s.

From a historical perspective, it was the ability to regulate an economy that first caused the value of holding office to increase. Anderson and Hill (1980) investigate the impact of the Supreme Court throughout its first two centuries and its role in encouraging either productive activity, by solidifying property rights and aligning the self-interest of the individual with the welfare of society as a whole, or promoting transfer activity, whereby individuals can benefit through takings that generate individual gains at the expense of others, and creates a reduction in society-wide welfare. The authors identify a shift in constitutional interpretation beginning in 1877 with *Munn v. Illinois*, a case concerning the ability of the Illinois legislature to set grain storage rates. Munn & Scott, grain warehouse operators, sought to charge rates of their own choosing for the storage of grain. In turn, the state of Illinois argued that the warehousemen were “engaged in public employment,” and as such, their services were subject to regulation by law. (*Munn v. Illinois* (1877))

The agreement of the Supreme Court with the state of Illinois' interpretation of private property in light of public use was crucial towards modifying the Constitution's stance on

property as a whole. Property is used for market transactions, either itself (i.e., a bushel of grain) or as a means of providing other goods and services (i.e. a warehouse by which to store grain for future transactions). Market transactions involve voluntary participation between agents; insofar that property involved in exchange involves more than one individual—either a transfer of ownership or a venue for transactions—nearly all property can be viewed as “public” in nature, per the arguments of the state of Illinois. (See also Justice Field’s dissent in *Munn v. Illinois* below.) Previous to *Munn*, owners of private property decided how to allocate their assets; property may be accessible by and privy to transactions between a large portion of a community, but ownership was never mistaken for frequency of use.

The majority opinion in *Munn v. Illinois* highlights this new understanding of private property. Chief Justice Morrison Waite wrote:

“When, therefore, one devotes his property to a use in which the public has an interest, he, in effect, grants to the public an interest in that use, and must submit to be controlled by the public for the common good, to the extent of the interest he has thus created. He may withdraw his grant by discontinuing the use; but, so long as he maintains the use, he must submit to the control.”

The submission of property owners to the will of the legislature is the lasting precedent of *Munn v. Illinois*. Anticipating the impact of establishing property to this perception of

“public use,” Justice Stephen Johnson Field highlights the exact implications of the Court’s decision in his dissent:

“If this be sound law, if there be no protection...all property and all business in the State are held at the mercy of a majority of its legislature. The public has no greater interest in the use of buildings for the storage of grain than it has in the use of buildings for the residences of families...The public is interested in the manufacture of cotton, woolen, and silken fabrics, in the construction of machinery, in the printing and publication of books and periodicals, and in the making of utensils of every variety, useful and ornamental; indeed, there is hardly an enterprise or business engaging the attention and labor of any considerable portion of the community, in which the public has not an interest in the sense in which that term is used by the court in its opinion...”

Munn v. Illinois legitimized the regulation of any private property that could be classified as ‘in the public interest,’ and, in doing so, provided legislatures the ability to intervene into markets much further than previously allowed. As such, the foundations for rent-seeking via regulation were established.

The *Munn* decision headlines a group of lawsuits known as the Granger cases, a series of eight lawsuits that dealt with the ability of states to regulate the railroad industry in addition to grain storage. Building upon this regulatory momentum, Congress

established the Interstate Commerce Commission through the Interstate Commerce Act of 1887, which became the blueprint by which future regulatory agencies were modeled after.

Given the relationship between taxation/spending and regulation viewed through legislative tenure, the assertion that the 16th Amendment must be viewed as endogenous can be revisited in a slightly new light. Holcombe (1999) notes:

“While it is indisputably true that the federal government could not have grown nearly as much in the 20th century without the income tax, the passage of the income tax must be viewed as endogenous, added to the Constitution in order to fund the increased demand for expenditures.”

Since regulation caused the initial upward shock to tenure rates in the 1870s, increasingly tenured legislators looking to expand their reach beyond regulation needed new avenues in which to act. The 16th Amendment was not an exogenous shock to the United States economy; instead, it was a step subsequent to allowing legislative regulation that increased the economic influence of elected officials. It was not, however, the initial cause for the increased value in holding office, reflective in higher average tenure rates.

Conclusion

This article looks to isolate the nature of legislative tenure throughout the entire history of the United States Congress. Average accrued tenure evolved through two distinct phases. The first phase, from the inception of Congress until the late 1870s, was characterized by relatively constant accrued tenure rates across federal legislators. The second phase, starting in the late 1870s and continuing to the present day, is characterized by constantly increasing accrued tenure rates by both U.S. Representatives and Senators. If the value of holding office derives from the ability of legislators to direct funding to their constituents, then the 16th Amendment, which allowed for an income tax, would seem a natural cause of rising tenure rates. However, average tenure rates began to rise over thirty years before the passage of the 16th Amendment. Instead, a more likely cause of the increase in legislative tenure was *Munn v. Illinois*, an 1877 United States Supreme Court ruling that, for the first time, allowed legislatures to regulate economies. The analysis provides support for the theory that regulation, not taxation and spending, first caused an increase in the value of holding office in the United States Congress, reflective in the amount of average accrued tenure across both houses.

While previous studies have taken a statistically limited approach towards making assertions about the trends of legislative tenure over time, this analysis provides a comprehensive overview of accrued tenure rates that has not been performed to the knowledge of the author. By looking at every year of the United States Congress, subtleties in trend movement can be isolated to particular points in time. Previous studies can make only broad statements of tenure trends; this analysis can pinpoint tenure evolution much more precisely.

The value of the analysis is reflexive. As put forth in this analysis, accrued tenure rates can be analyzed in a global sense, and points of particular interest within the overall trend can be studied in light of historical events. For example, a significant shock to legislative tenure rates occurred at some point during the late 1870s; given this shock, events surrounding this time period that have a legislative impact must be considered as possible causes. However, the robustness of the data allows for the opposite to be done. Should any events be considered influential towards the value of holding office, particular tenure rates over any conceivable time span can be analyzed to provide an empirical basis to the claim that the value of holding office changed due to an exogenous shock.

This research, while isolating a major breakpoint in the evolution of accrued tenure rates throughout American history, focuses on only one (albeit significant) cause of the rise in tenure rates of federally elected legislative officials. There may be other contributing factors outside of *Munn v. Illinois* and the Granger cases that contributed to the initial rise in accrued tenure in the last quarter of the 19th century. In addition, due to the robust nature of the data, other periods of significant changes to average tenure rates can now be isolated and investigated in a similar manner to this analysis. For example, the 1970s appear to contradict an otherwise steadily climbing average accrued tenure trend throughout the 20th century; to what could we attribute as a cause of this sudden and rapid decline?

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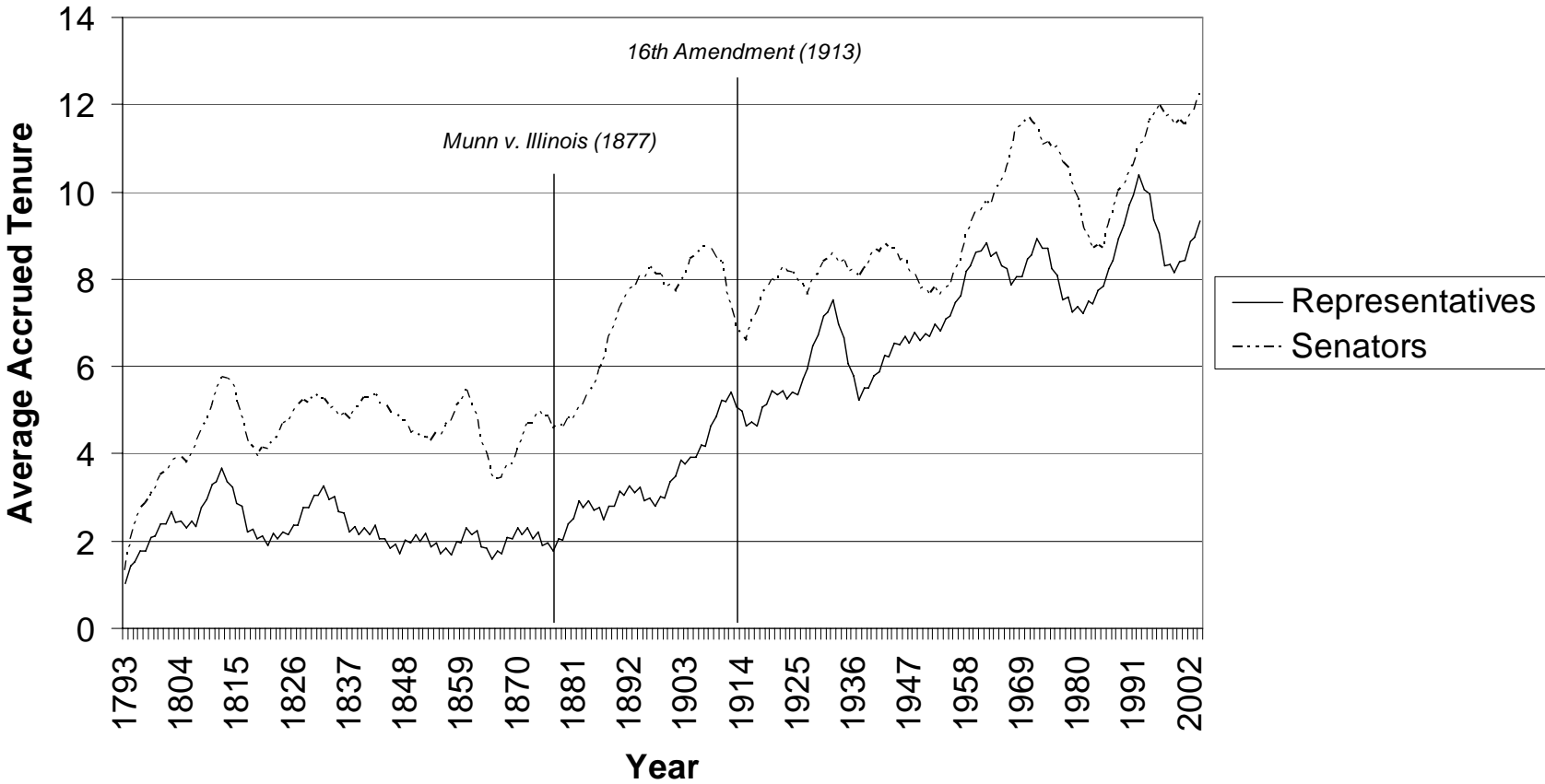
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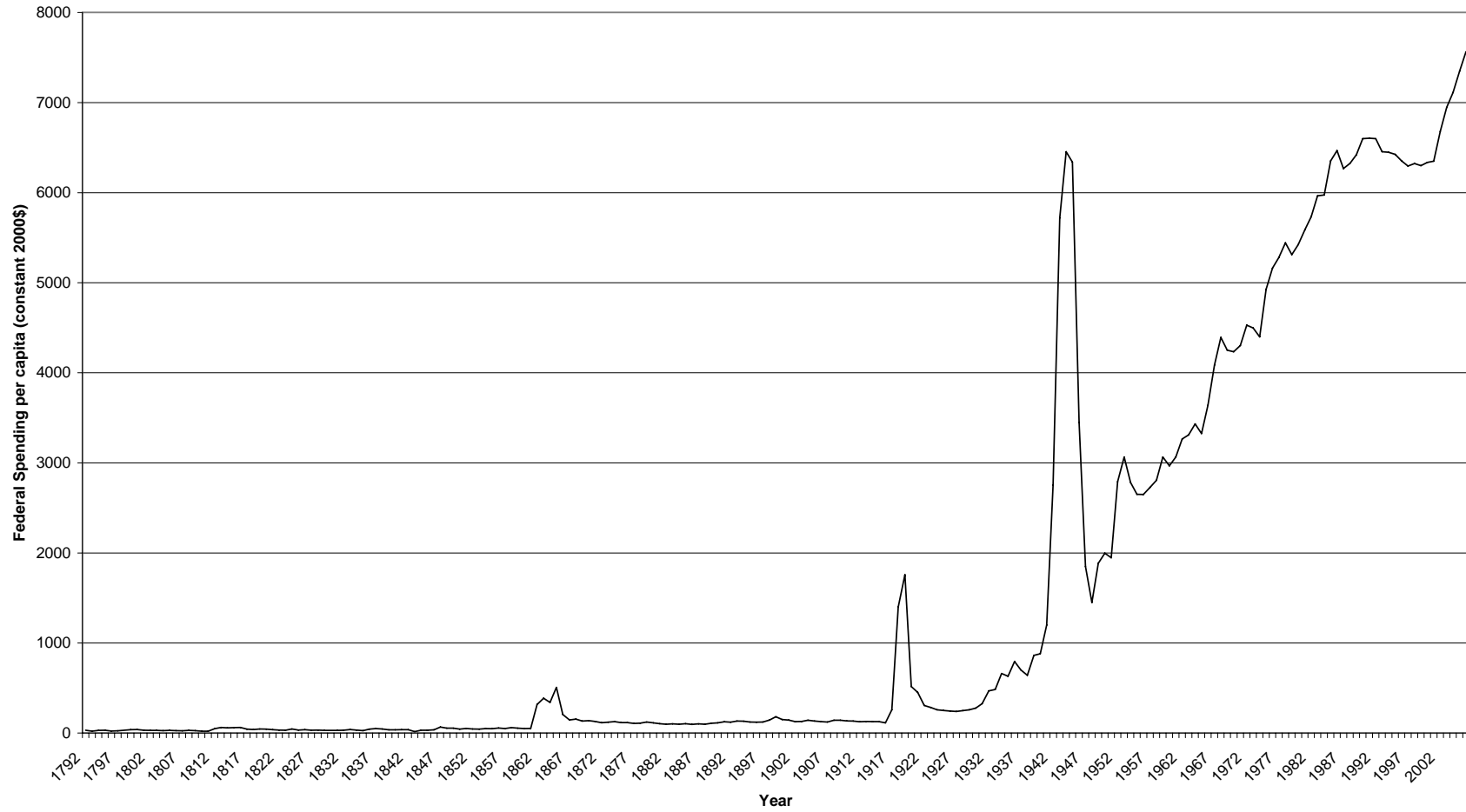
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**Figure 1: Average Accrued Tenure, in years,
for U.S. Congressmen, 1793-2004**



Data Source: Biographical Directory of the United States Congress

Figure 2: Federal Spending per Capita, 1792-2006 (constant 2000\$)



Source: Holcombe (1999).

¹ A moving five year average is calculated such that the value at year t is the five-year average of average accrued tenure rates from year t to year $t-4$. This creates a smoother presentation of the evolution of tenure rates throughout history; a graph showing average accrued tenure rates without a five-year average adjustment provides a choppy picture, due to the fact that elections in both houses occur every other year. The five-year adjustment does not change the structure of the graph in any significant manner.

² The previous and forthcoming discussion of the partial effects of various factors on average accrued tenure is done independent of the impact of term limit laws. Clearly, the existence of a law limiting the number of years an individual can serve in office creates an upper bound for average accrued tenure; no marginal change in the factors discussed can increase the amount of accrued tenure of a legislator at this upper bound. While unlikely, the average accrued tenure across a group of legislators could (briefly) also remain constant at this upper bound should every individual in the group be at the legal limit of time in office.

³ Palfrey and Prisbrey (1997) isolate a “warm-glow” associated with giving, independent of the benefit received from the gift. Correspondingly, regardless of the benefit received by the community by the service, a “warm-glow” from serving the community may exist.

⁴ As previously mentioned, a rise in compensation would, *ceteris paribus*, cause average tenure rates to rise. However, while Congressional salaries rose in 1865 from \$3,000 to \$5,000 annually, they remained at this level (except for a two-year period from 1871-1873) until 1907. Given the nature of steadily rising tenure rates throughout the last quarter of the 19th century, it is unlikely that Congressional salary spurred an increase in tenure. Source: United States Senate