

To the Columbia Legal Theory Workshop participants:

I realize that the attached draft is rather long. So if you are pressed on time, you can skip Part I and begin reading at p. 22. I'm glad to get comments on Part I, of course, but my presentation will focus on the remainder of the paper.

Thank you and looking forward.

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PUBLIC POLICY AND THE METHODOLOGY OF STATUTORY DESIGN

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By now, we all know that this is the age of statutes, that statutory enactments are the means by which we formulate and implement our most basic decisions about the way our society is governed.¹ But we have no theory or academic discourse about the way that statutes should be designed and drafted. Legal scholars regularly address normative arguments to courts about the best way to decide cases in general, as well as the best way to resolve particular issues.² Policy analysts and political scientists offer recommendations to executive agents regarding general decision making strategy, in addition to discussing potential solutions to specific problems.³ But

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¹ See Guido Calabresi, *A Common Law for the Age of Statutes* 1-7 (1985); Jürgen Habermas, *The Theory of Communicative Action: Vol 1: Reason and the Rationalization of Society* 243-71 (Thomas McCarthy, trans., 1984); Niklas Luhmann, *Law as a Social System* 243-62 (Klaus A. Ziegert, trans., 2004); Brian Z. Tamanaha, *A General Jurisprudence of Law and Society* 133-70 (2001). Western European legal systems have been dominated by statutes, or positivized, for at least two centuries.

² To give just one prominent example, the entire debate in constitutional law about the relative merits of textualism, originalism, an evolutionary approach, or something in between is essentially a discussion of the methodology that judges should use in interpreting the Constitution. See, e.g., Akhil Reed Amar, *Intratextualism*, 112 *Harv. L. Rev.* 747 (1999); Jack M. Balkin, *Framework Originalism and the Living Constitution*, 103 *Nw. L. Rev.* 549 (2009); Michael C. Dorf, *Legal Indeterminacy and Constitutional Design*, 78 *N.Y.U. L. Rev.* 875 (2003); Richard H. Fallon, *How to Choose a Constitutional Theory*, 87 *Cal. L. Rev.* 535 (1999); John F. Manning, *Clear Statement Rules and the Constitution*, 110 *Colum. L. Rev.* 399 (2010); Adrian Vermuele & Ernest A. Young, *Hercules, Herbert and Amar: The Trouble with Intratextualism*, 113 *Harv. L. Rev.* 730 (2000). For general discussions of this point, see Paul Brest, *The Fundamental Rights Controversy: The Essential Contradictions of Normative Constitutional Scholarship*, 90 *Yale L.J.* 1063 (1981); Edward Rubin, *The Practice and Discourse of Legal Scholarship*, 86 *Mich. L. Rev.* 1835 (1988); Mark Tushnet, *Legal Scholarship: Its Causes and Cures*, 90 *Yale L.J.* 1205 (1981). A well critique of legal scholarship argues that it is not sufficiently focused on providing advice to judges. Harry Edwards, *The Growing Distinction Between Legal Education and the Legal Profession*, 91 *Mich. L. Rev.* 34 (1992)

³ Leading works in this field not only address executive policy makers, but often do so in highly pragmatic terms. See, e.g., Eugene Bardach, *A Practical Guide for Policy Analysis: The Eightfold Path to More Effective Problem Solving*, 3rd ed. (2009); William N. Dunn, *Public Policy Analysis*, 5th ed. (2011); Stuart S. Nagel, *Handbook of Public Policy Evaluation* (2002); Malcolm K. Sparrow, *The Regulatory Craft: Controlling Risks, Solving Problems and Managing Compliance* (2000); Edith Stokey & Richard Zeckhauser, *A Primer for Policy Analysis* (1978). For discussions of the theory of public policy analysis, and specifically its effort to address policy-based arguments to real world decision-makers, see, e.g., Frank Fischer, *Reframing Public*

few scholars, in these disciplines or any other, address similarly normative arguments to legislatures, the primary statute-making institution in the American system of governance,⁴ about the way to draft effective statutes. As Victoria Nourse and Jane Schacter point out, the academic community has devoted little effort or attention to improving the way that the most important decisions about our legal system are made.⁵

There are, to be sure, a relatively small number of books and articles that provide advice or instruction about drafting statutory language.⁶ A notable feature of this literature is that it is addressed to a hypothesized expert, a policy analyst who is envisioned as drafting a statute that will subsequently be submitted to a legislature. In fact, as David Marcello observes, the underlying assumption of this work is that the drafter is viewed as a value-neutral technician who simply translates her client's instructions into statutory language.⁷ A much larger body of scholarly literature addresses expert organizations, most notably the American Law Institute and the National Conference of Commissioners on Uniform State Laws, that draft uniform statutes for submission to state legislatures.⁸ Finally, there are some articles that propose a new statute or

Policy: Discursive Politics and Deliberative Practices (2003); Aaron Wildavsky, *Speaking Truth to Power: The Art and Craft of Policy Analysis* (1979); Elinor Ostrom, *Institutional Rational Choice: An Assessment of the Institutional Analysis and Development Framework*, in Paul Sabatier, ed., *Theories of the Policy Process* 35 (2nd ed., 2007)

⁴ The legislature's role in designing statutes is more limited in a parliamentary democracy, as opposed to our presidential democracy. See Ivor Jennings, *Parliament* 183-246 (rev. ed., 1969); Kaare Strøm, Wolfgang C. Müller & Torbjörn Bergman, *Delegation and Accountability in Parliamentary Democracies* (2006); Patrick Malcolmson & Richard Myers, *The Canadian Regime: An Introduction to Parliamentary Government in Canada* 116-29(4th ed., 2009). In those systems, the executive generally drafts legislation and the legislature, generally after debating it and sometimes after amending it, approves the government bill. To reject such a bill, at least an important one reflecting government policy, represents a vote of no-confidence in the government and will generally lead, through an election to either a new government or a different group of legislators.

⁵ Victoria F. Nourse & Jane S. Schacter, *The Politics of Legislative Drafting: A Congressional Case Study*, 77 *N.Y.U. L. Rev.* 575, 576 (2002): "Articles about statutory interpretation fill the pages of law reviews, but the vast majority of this scholarship focuses on courts. If the scholarship looks at legislatures at all, it does so from an external perspective, looking at Congress through a judicial lens. Little has been written from the legislative end of the telescope.")

⁶ See, e.g., Aldo Sammit Borda, *Legislative Drafting* (2010); F. Reed Dickerson, *Legislative Drafting* (1954); Robert J. Martineau & Michael B. Salerno, *Legal, Legislative and Rule Drafting in Plain English* (2005); Ian McCleod, *Principles of Legislative and Regulatory Drafting* (2009); William P. Statsky, *Legislative Analysis and Drafting* (2nd ed. 1984); G.C. Thornton, *Legislative Drafting* (4th ed., 1996); David A. Marcello, *The Ethics and Politics of Legislative Drafting*, 70 *Tulane L. Rev.* 2438 (1996)

⁷ Marcello, *supra* note [].

⁸ For general discussions of the uniform law process, see, e.g., John P. Frank, *The American Law Institute, 1923-1998*, 26 *Hofstra L. Rev.* 615 (1997); Kathleen Patchel, *Interest Group Politics, Federalism, and the Uniform Law Process: Some Lessons*

the improvement of an existing one.⁹ Although these would appear to be addressed to legislators, they often seem to be general policy recommendations cast in statutory terms for the sake of concreteness. In fact, none of these bodies of scholarship address themselves directly to legislators, and thus none engage with the institutional practices that determine the way modern legislation is actually designed and drafted.

Legislative methodology refers to these institutional practices. While political scientists and other scholars have devoted extensive attention to describing them,¹⁰ virtually no scholar addresses normative arguments to legislators about the way that the process should be carried out.¹¹ But this is a mode of scholarship in which legal scholars, who regularly employ a normative as well as a descriptive discourse, should engage and in which political scientists might engage as well.¹² The premise that would underlie such scholarship is that it can potentially improve the effectiveness of statutes, measured in terms of either the stated goals of

from the Uniform Commercial Code, 78 *Minn. L. Rev.* 83 (1993); Kenneth E. Scott, *Corporation Law and the American Law Institute Corporate Governance Project*, 35 *Stan. L. Rev.* 927 (1983); Alan Schwartz & Robert E. Scott, *The Political Economy of Private Legislatures*, 143 *U. Penn. L. Rev.* 595 (1995); G. Edward White, *The American Law Institute and the Triumph of Modernist Jurisprudence*, 15 *Law & Hist. Rev.* 1 (1997). The scholarly literature addressing these expert bodies is voluminous, and occupies a substantial portion of the work on the subjects that the uniform laws process has addressed, including commercial law, criminal law, corporate law and family law. Because the literature is addressed to an expert body, it pays virtually no attention to the state legislatures that must ultimately enact the statutes that the ALI and NCCUSL design.

⁹ E.g., L. Elizabeth Chamblee, *Time for Legislative Change: Florida's Stagnant Standard Governing Competency for Execution*, 31 *Fla. St. U.L. Rev.* 335 (2004); John V. Jacobi, *Prosecuting Police Misconduct*, 2000 *Wis. L. Rev.* 789 (2000); Daniel G. Moriarty, *Dumb and Dumber: Reckless Encouragement to Reckless Wrongdoers*, 34 *S. Ill. L. J.* 647 (2010); Richard H. Stern, *An Attempt to Reconcile Floppy Disk Claims*, 17 *John Marshall J. Computer & Info. L.* 183 (1998)

¹⁰ See pp. [] *infra* (discussing public choice scholarship, histories of specific statutory enactments, and general accounts of the legislative process).

¹¹ A partial exception is Nourse & Schacter, *supra* note []. This article is essentially descriptive; it consists of an empirical study of the way that legislative drafting is carried out, *id.* at 578-80. Nonetheless, the detailed account the authors provide of the actual drafting process, which is quite rare, suggests possibilities for normative discourse, and the article concludes (after offering recommendations to judges) with a brief discussion of possible improvements in the legislative process itself, see *id.*, at 621-23.

¹² To be sure, the normative stance of legal scholarship has been much criticized, see Lawrence Friedman, *The Law and Society Movement*, 38 *Stan. L. Rev.* 763, 775-78 (1986); Edward L. Rubin, *The Practice and Discourse of Legal Scholarship*, 86 *Mich. L. Rev.* 1835, 1847-65 (1988); Pierre Schlag, *Normativity and the Politics of Form*, 139 *U. Pa. L. Rev.* 801 (1991); Mark Tushnet, *Legal Scholarship: Its Causes and Cure*, 90 *Yale L.J.* 1205, 1208-15 (1981). But one basis of the criticism is that the normative discourse, which has been directed almost exclusively to judges, makes legal scholarship too "juriscentric" and ignores the realities of the modern statutory and administrative state. Another criticism is that this judicially-oriented normativity displaces the analytic description of judicial action, a task that would seem to fall primarily to legal scholars. This is not a problem with respect to legislatures, however, since political scientists have produced a vast and illuminating body of scholarship on this topic.

the statute's proponents or a critical observer's view of beneficial social policy.¹³ It is difficult to think of any field of legal or political science scholarship that would be more important to the welfare of our nation.

An obvious explanation for the lack of normative scholarship regarding legislative methodology is that scholars regard legislators as motivated by exclusively political considerations, specifically the desire to be re-elected. To be sure, when empirical studies are conducted, it generally turns out that legislators are often deeply concerned about the effect of their enactments on the nation.¹⁴ But the scholars who conduct these studies do not act on this conclusion, they do not proceed to address legislators as rational decision makers and recommend ideas that would make their work product more effective.¹⁵ What makes this omission even more remarkable is that scholars, as just noted, do not adopt this same approach to other government officials. This is not because they are so naïve as to assert that judges and executive agents are selfless servants of the public who are never motivated by individual self-interest.¹⁶ The premise of normative scholarship in other areas is that public officials act from a

¹³ See pp. [] infra for a discussion of the distinction between these two criteria.

¹⁴ See, e.g., Bernard Asball, *The Senate Nobody Knows* (1978) (account of Senator Edmund Muskie); James D. Barber, *The Lawmakers: Recruitment and Adaptation to Legislative Life* (1965); Elizabeth Drew, *Senator* (1979) (account of Senator John Culver); Christopher J. Deering & Steven S. Smith, *Committees in Congress 78-95* (3rd ed., 1997); Richard Fenno, *Congressmen in Committees* (1973); Martha Derthick & Paul J. Quirk, *The Politics of Deregulation* (1985); Steven Kelman, *Making Public Policy: A Hopeful View of American Government* 58-66 (1987); Arthur Maass, *Congress and the Common Good* (1983); William K. Muir, *Legislature: California's School for Politics* (1982); Eric Redman, *The Dance of Legislation*, 189-209 (rev. ed., 2001) (account of Senator Warren Magnuson).

¹⁵ One possible exception that in fact supports the general observation is Hans A. Linde, *Due Process of Lawmaking*, 55 Neb. L. Rev. 197 (1976). Judge Linde makes a number of sage suggestions about the way a legislature should design legislation, but he does not think it worthwhile to address the legislators in offering his suggestions. Rather, he addresses the judiciary (since judges are rational beings, after all), and urges them to use rationality review under the due process clause to impose minimal standards on the presumptively intractable legislature. He is acutely aware of doctrinal and separation of powers difficulties that this suggestion involves, but apparently sees this as the only area of normative purchase on the legislative process.

¹⁶ Despite our current beliefs about legal formalism, it is possible that legal scholars never accepted the idea that judicial decisions are governed exclusively and definitively by legal doctrine. See Brian Tamanaha, *Beyond the Formalist-Realist Divide: The Role of Politics in Judging* (2010). If they did, however, they were disabused of that belief by the legal realists. See, e.g., Jerome Frank, *Law and the Modern Mind* (1930); Felix S. Cohen, *Transcendental Nonsense and the Functional Approach*, 35 Colum. L. Rev. 809 (1935); Karl N. Llewellyn, *A Realistic Jurisprudence: The Next Steps*, 30 Colum. L. Rev. 431 (1930). More recently, political scientists who conduct judicial attitude studies often conclude that judges are primarily, if not exclusively motivated by political beliefs and considerations. See, e.g., Lawrence Baum, *The Supreme Court* (2009); Lee Epstein & Jack Knight, *The Choices Judges Make* (1997); Jeffrey Segal & Harold Spaeth, *The Supreme Court and the Attitudinal Model*

mixture of personal and public-regarding motivations. Thus, these officials will be receptive to recommendations about the best way to serve the public, and their decision-making will benefit from such recommendations, even if their motivations are mixed, or if they sometimes consider only their own personal advantage. Why then are scholars unwilling to take the same, seemingly reasonable approach to legislators, particularly when empirical evidence supports that approach?

The issue becomes more urgent when one considers the bad repute from which our national legislature currently suffers.¹⁷ To some extent, this is irremediable; a legislature is, by design, an arena of political conflict, and people generally find conflict distressing.¹⁸ But at least part of the public's towering dissatisfaction with Congress seems to stem from the sense that it is disorganized and chaotic, that it is unable to manage conflict in a systematic way and produce desirable results.¹⁹ The academic assumption that the Members of Congress are a group of

Revisited (2002); Glendon Schubert, *Judicial Policy Making: The Political Role of Courts*, rev. ed. (1974); Barbara Yarnold, *Politics and the Courts: Toward a General Theory of Public Law* (1990).

Policy analysis cannot be separated from politics, of course, since the policy analyst, unlike the judge, is either giving advice to, or carrying out the decisions of, a politician. In theory, it is possible to imagine both tasks being governed by purely instrumental rationality, see Max Weber, *Economy and Society* 24-26 (Guenther Roth & Claus Wittich, eds., 1978); Max Weber, "Objectivity" in *Social Science and Social Policy*, in Max Weber, *The Methodology of the Social Sciences* 50 (Edward A. Shils & Henry A. Finch, trans., 1949). Contemporary policy analysis, however, emphasizes the need to mediate between instrumental rationality and the political dynamics of actual policy making contexts. See, e.g., Michael Barzelay, *The New Public Management: Improving Research and Policy Dialogue* (2001); David Braybrooke & Charles E. Lindblom, *A Strategy of Decision: Policy Evaluation as a Social Process* (1963); Fischer, *supra* note []; John Friedman, *Planning the Public Domain: From Knowledge to Action* (1987); Robert A. Heineman, William T. Bluhm, Steven A. Peterson & Edward N. Kearny, *The World of the Policy Analyst*, 3rd ed. (2001); Alice Rivlin, *Systematic Thinking for Social Action* (1971); Deborah Stone, *Policy Paradox: The Art of Political Decision Making*, rev. ed. (2002)

¹⁷ Kyle Leighton, CBS/NYT Poll: Congressional Disapproval At An All-Time High (Aug. 4, 2011), <http://tpmdc.talkingpointsmemo.com/2011/08/cbsnyt-poll-congressional-disapproval-at-an-all-time-high.php> (accessed on July 15, 2012) (Congress' approval rating down to 14%, lowest since poll began in 1977); Samuel C. Patterson & David C. Kimball, *Unsympathetic Audience: Citizens' Evaluations of Congress*, in Herbert F. Weisberg & Samuel C. Patterson, *Great Theater: The American Congress in the 1990s*, at 52 (1998); Lydia Saad, *Congress Approval Rating Remains Historically Low, Now 16%* (July 14, 2012), <http://www.gallup.com/poll/155720/Congress-Approval-Remains-Historically-Low.aspx> (accessed on July 15, 2012) (approval ratings have been almost steadily declining since 2002, now the lowest since poll began in 1976).

¹⁸ The first writer to observe that conflict could be a source of strength, rather than weakness to a polity, was probably Machiavelli. See Niccolò Machiavelli, *The Discourses* 113-27 (Bernard Crick, ed., 1970) (Bk 1.4-1.7). See *id.* at 113 ("those who condemn the quarrels between the nobles and the plebs, seem to be cavilling at the very things that were the cause of Rome's retaining her freedom . . . [I]n every republic there are two different dispositions, that of the populace and that of the upper class and . . . all legislation favorable to liberty is brought about by the conflict between them."). This observation, although astute, remains counter-intuitive to most people.

¹⁹ There is certainly an argument that this approval rating is justified, and that it results from the excessive partisanship of the current Congress. See John Hibbing & Elizabeth Theiss-Morse, *Congress as Public Enemy* (1995); 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); Sarah Binder, *Elections, Parties and Governance*, in Paul Quirk & Sarah Binder, *The Legislative Branch* (2005). This might suggest that many current members are more concerned about discomforting their opponents than about

wild political beasts who cannot be addressed in rational terms probably contributes to this popular belief. While the ordinary citizen is not reading legal and political science literature, this literature does affect the general public discourse, and perhaps even the legislators' views about their own institution.²⁰ Certainly, a complete absence of scholarly discussion about ways that Congress can function more effectively can only exacerbate the general view that it cannot function at all.

I have written previously about the possible reasons for this scholarly lacuna;²¹ the purpose of this article is to document, refute and rectify it. Part I identifies the absence of normative, policy-oriented discourse in the extensive scholarship about American legislatures, particularly the U.S. Congress. Part II argues that this omission is mistaken. There is, with respect to virtually every statute, a policy space, an area where political considerations are weak or non-existent and where legislators are at least potentially open to rational, policy-based arguments about the way they should design the statute. The scope of this policy space may vary from one situation to another, its boundaries may be porous and its terrain uncertain, but it is always present and often extensive. The third Part of the article argues that the current method of designing legislation is outdated and ineffective, and the last Part advances some specific

making good public policy decisions. Mann and Ornstein's thesis is that this situation represents a serious deterioration of the attitudes that prevailed in previous Congresses. If that is correct, then it suggests that non-partisan changes in methodology that would improve the performance of Congress would be particularly welcome at this point.

²⁰ On the influence of academic writing, see Martha Derthick & Paul J. Quirk, *The Politics of Deregulation* (1985); John W. Kingdon, *Agendas, Alternatives and Public Policies* 53-57 (2nd ed., 2003)

²¹ Edward L. Rubin, *Beyond Camelot, Rethinking Politics and Law for the Modern State* 191-226 (2005). The basic argument is that we still think of statutes in terms of the pre-modern concept of law, that is, as a coherent body of rules governing human conduct that are accessible to reason and derived from a combination of natural law and social norms. This view prevails in modern jurisprudential definitions of law, see, e.g., Ronald Dworkin, *Law's Empire* (1986); Lon Fuller, *The Morality of Law* (rev. ed., 1969); H.L.A. Hart, *The Concept of Law*, 1961). Modern statutes, however, are administrative in nature; in addition to establishing rules for human conduct, they perform functions foreign to the pre-modern state, such as distributing benefits and creating social welfare institutions. Their expanded scope and enormously increased numbers precludes any effort to treat them as a coherent body of rules. Rather, modern statutes emerge from a process of formulating and implementing social policy, with the legislature concerned with major (and sometimes minor) policy formation while administrative agencies responsible for the remainder of the process. Under these circumstances, statutes are no longer declarations of norms, but effort to achieve identified effects on society. As long as the view of statutes as pre-modern law is displaced, scholars will generally not be motivated to overcome the idea that legislators are entirely political and at least attempt to treat them as society's primary policy makers.

recommendations to improve the process. In other words, it proposes a new legislative methodology.

The ineffectiveness of our current legislative methodology might seem to contradict the claim that legislators care about enacting effective public policy, and to provide evidence that they are motivated only by the desire to be re-elected. But the defects that lead to this ineffectiveness offer no apparent political advantage. They are products of inadvertence and tradition.²² They result, in part, from the tendency of institutions to resist change, but also from the failure of anyone in the academic community to address the issue of legislative methodology and suggest alternative ideas. In other words, the assumption that scholars cannot possibly advance any recommendations to legislators about the way to design effective statutes has become a self-fulfilling prophecy. That is the situation that this article attempts to remedy.

I. The Scholarly Lacuna

A. Public Choice

In documenting the observation that scholars have ignored legislative methodology because they assume that legislators are motivated by exclusively political considerations, public choice theory comes most readily to mind.²³ This theory, an extension of microeconomics to the

²² Rubin, *supra* note [], at 1-12, 191-203 (general failure to think about government in modern, administrative terms, and specific failure to think about legislation in that way).

²³ See generally James M. Buchanan & Gordon Tullock, *The Calculus of Consent* (1962); Anthony Downs, *An Economic Theory of Democracy* (1957); Dennis C. Mueller, *Public Choice III* (2003). For discussions of this field's relationship to law, see Daniel A. Farber & Philip P. Frickey, *Law and Public Choice: A Critical Introduction* (1991); Maxwell Stearns, *Public Choice and Public Law* (1997); Jerry L. Mashaw, *Greed, Chaos and Governance: Using Public Choice to Improve Public Law* (1997); Jonathan R. Macey, *Public Choice: The Theory of the Firm and the Theory of Market Exchange*, 74 *Cornell L. Rev.* 43 (1988); Fred S. McChesney, *Rent Extraction and Rent Creation in the Economic Theory of Regulation*, 16 *J. Legal Stud.* 101 (1987); David B. Spence & Frank Cross, *A Public Choice Case for the Administrative State*, 89 *Geo. L.J.* 97 (2000).

political realm,²⁴ is explicit in its assertion that legislators are only concerned about maximizing their chances of re-election.²⁵ In fact, public choice offers only a limited explanation for the scholarly lacuna in question. It is limited because public choice scholars, being so scrupulously clear in stating their assumptions, have revealed the empirical frailty of those assumptions. No one questions that legislators are sometimes motivated by the desire to be re-elected. But empirical studies consistently reveal that they have other motivations as well, and that the claim that re-election is their exclusive motivation is unsupportable.²⁶

One possible response to this difficulty, apart from simply ignoring it, is that the test of validity, in social science as in natural science, is prediction.²⁷ Quantum mechanics is regarded as a valid theory because it allows us to predict, with impressive accuracy, precisely what will happen when sub-atomic particles interact.²⁸ Similarly, public choice scholars can assert that

²⁴ See Mueller, *supra* note [], at 1-2 (“The basic behavioral postulate of public choice, as for economics, is that man is an egoistic, rational, utility maximizer”); Macey, *supra* note [], at 43 (public choice “applies game theory and microeconomic analysis to the production of law by legislatures, regulatory agencies, and courts”).

²⁵ See, e.g., Morris Fiorina, *Congress: Keystone of the Washington Establishment* 38 (1977) [hereinafter, Fiorina, *Congress*]; Morris Fiorina, *Representatives, Roll Calls and Constituencies* 31, 35-38 (1974) [hereinafter, Fiorina, *Representatives*]; David Mayhew, *Congress: The Electoral Connection* 13-17 (1974); R. Michael Alvarez & Jason L. Saving, *Congressional Committees and the Political Economy of Federal Outlays*, 92 *Pub. Choice* 55 (1997); Randall S. Kroszner & Thomas Stratmann, *Interest Group Competition and the Organization of Congress: Theory and Evidence from Financial Services’ Political Action Committees*, 88 *Am. Econ. Rev.* 1163 (1988)

²⁶ See note [] (citing sources). Empirical confirmations of public choice hypotheses do not demonstrate that legislators are not motivated by other considerations. Even apart from methodological defects that may call the empirical validity of public choice studies into question, see Donald Green & Ian Shapiro, *Pathologies of Rational Choice Theory: A Critique of Applications in Political Science* (1994), the problem with drawing any comprehensive conclusions from these empirical confirmations is that the subject matter is being selected by the researcher. The fact that rivers and harbors legislation is driven by re-election based behavior, see John Ferejohn, *Pork Barrel Politics: Rivers and Harbors Legislation, 1947-1968* (1974) does not demonstrate that civil rights legislation, environmental legislation, consumer legislation or social welfare legislation are driven by the same motivations.

²⁷ See Pierre Duhem, *The Aim and Structure of Physical Theory* 28 (Philip P. Weiner, trans., 1991) (“The highest test, therefore, of our holding a classification as a natural one is to ask it to indicate in advance things which the future alone will reveal.”). The emphasis on prediction leads directly to the idea that a hypothesis must be capable of being falsified in order to qualify as scientific. Karl R. Popper, *The Logic of Scientific Discovery* (1959). See Imre Lakatos, *Falsification and the Methodology of Scientific Research Programmes*, in Imre Lakatos, *The Methodology of Scientific Research Programmes* 8 (John Worrall & Gregory Currie, eds., 1978) (falsification as successive problem solving). This concept of scientific truth has been heavily challenged in modern epistemology, see, e.g., Paul Feyerabend, *Against Method* (4th ed. 2010); Thomas Kuhn, *The Structure of Scientific Revolutions* (2nd ed., 1970); Bruno Latour & Steve Woolgar, *Laboratory Life: The Social Construction of Scientific Facts* (2nd ed., 1986). For present purposes, however, this critique, which would otherwise weigh heavily against a prediction-based test of validity for public choice, see Edward L. Rubin, *Public Choice, Phenomenology, and the Meaning of the Modern State: Keep the Bathwater, but Throw Out That Baby*, 87 *Cornell L. Rev.* 309 (2002), can be ignored. Even if predictive ability is a genuine criterion for truth, it would not preclude normative discourse.

²⁸ What is being predicted, however, is a set of probabilities, see Murray Gell-Mann, *The Quark and the Jaguar: Adventures in the Simple and the Complex* 165-99 (1994); Richard Morris, *The Nature of Reality* 169-189 (1987). This is not only responsible

theirs is the only theory that allows us to predict the behavior of legislators.²⁹ It can do so because, like microeconomics, it models human behavior as attempting to maximize a single, readily definable goal – material wealth in the economic realm, re-election in the political realm.³⁰ This means that the individual actor will proceed along an externally observable path, and will continue moving in the same direction unless blocked or diverted by other, equally observable factors. Allowing different motivations, such as the desire to advance an ideology, to make good public policy, to benefit others, or to impress one’s colleagues, may be more realistic in certain cases, but it will not lead to predictions about legislative behavior that can be proven true or false.

Any effort to evaluate this preference for prediction will quickly become enmeshed in the complexities of modern epistemology. For present purposes, the crucial point is that prediction is distinct from policy recommendation. Prediction is designed to observe the world as it is, and its standard of value is the correspondence between the scholar’s statement and that external world; recommendation is designed to improve the world, and its standards derive from normative judgments about what constitutes improvement. To assert that a descriptive theory precludes normative recommendation is to commit the most elemental form of Hume or Moore’s

for the theory’s level of precision, but also provides a satisfying analogy to social science. But see Andrew Pickering, *Constructing Quarks: A Sociological History of Particle Physics* (1984) (theory is socially constructed because it could have taken a different direction under different social conditions).

²⁹ See Dennis Chong, *Rational Choice Theory’s Mysterious Rivals*, in Jeffrey Friedman, ed., *The Rational Choice Controversy* 37 (1996); Frank H. Easterbrook, *Some Tasks in Understanding Law Through the Lens of Public Choice*, 12 *Int’l Rev. L. & Econ.* 284 (1992); James Bernard Murphy, *Rational Choice Theory as Social Physics*, in id. at 155. To quote Easterbrook, *supra* at 286: “One cannot put any model to the ultimate test (indeed, definition) of science – falsifiability – unless it is comprehensive enough to make predictions and comparable enough to other models to allow different persons working in the same field to converse.” Public choice scholars regularly advance predictions and then use the confirmation of those predictions as indicating the validity of the original hypothesis. See, e.g., James B. Kau & Paul H. Rubin, *Voting on Minimum Wages: A Time-Series Analysis*, 86 *J. Pol. Econ.* 337 (1978) (number of high-wage workers and African Americans in a district predicts vote on minimum wage); Geoffrey Miller, *The True Story of Carolene Products*, 1987 *Sup. Ct. Rev.* 397, 422-28 (size of the dairy industry in a state predicts the legislators’ vote on prohibition of dairy substitutes); Jeffrey M. Netter, *An Empirical Investigation of the Determinants of Congressional Voting on Federal Financing of Abortions and the ERA*, 14 *J. Legal Stud.* 245 (1985).

³⁰ See Downs, *supra* note [], at 28-30; Fiorina, *Representatives*, *supra* note [], at 29-38; Mayhew, *supra* note [], at 13-17.

naturalistic fallacy,³¹ the version that has not been challenged by subsequent philosophic thought.³² A policy recommendation to a legislature is an imperative statement grounded in practical reason:³³ “you should read the bill before you vote for it because that is your responsibility.” There is no basis on which one can conclude that a description of legislative behavior prohibits the speaker from making such a statement, or arguing in favor of its normative validity.³⁴ Legal scholars certainly do not commit an error of this sort with respect to judges. They share the aspiration of public choice scholars to describe the world, in their case the world of legal doctrine,³⁵ but no legal scholar would assert that a treatise describing an area of law, however accurate, invalidates the efforts of other scholars to frame normative recommendations to the judiciary.³⁶

³¹ See David Hume, *Treatise of Human Nature*, 455-76 (1992) [1738] (Book III, Part I); G.E. Moore, *Principia Ethica* 25-38 (2011) [1903]. For further discussion, see R.M Hare, *The Language of Morals* (1952); Richard Rorty, *Philosophy and the Mirror of Nature* (1981)

³² For challenges to the claim that naturalism is a fallacy, see, e.g., Sabina Lovibond, *Realism and Imagination in Ethics* (1983); Mary Midgely, *Beast and Man: The Roots of Human Nature* (2002); Arthur N. Prior, *Logic and the Basis of Ethics* (1949); Hilary Putnam, *Reason, Truth and History* 127-49 (1981); Hilary Putnam, *Realism with a Human Face* 135-92 (1990). In a sense, social constructivism of this sort also challenges the fact-value dichotomy, although from an epistemological rather than an ethical perspective, see Peter L. Berger & Thomas Luckmann, *The Social Construction of Reality: A Treatise in the Sociology of Knowledge* (1966); Hans-Georg Gadamer, *Truth and Method* (1988); Nelson Goodman, *Ways of Worldmaking* (1978). The possibility that some normative statements can be derived from factual ones, either generally or in a particular social context, could hardly mean that there is no possibility of making meaningful normative statements that are not based on factual observation. Rather, the conclusion to be drawn from the modern attack on the naturalistic fallacy is not the realist claim that values can be derived from facts, but rather the idea that facts are inevitably determined by values. In this sense, the attack on the falsifiability criterion in natural science, see note [], supra, is based on the same epistemological stance.

³³ J.L. Austin, *How to Do Things with Words* 67-82 (2nd ed., 1975); Habermas, supra note [], at 273-337; Bernard Williams, *Ethics and the Limits of Philosophy* 120-31 (1985).

³⁴ See Marcello, supra note [], at 2463: “drafters are continually called upon to exercise personal judgment in the performance of their duties. Such judgments are frequently policy judgments, and drafting decisions are often influenced consciously or unconsciously by the advocacy agenda of the individual drafter.”

³⁵ The leading example is the legal treatise, which aspires to provide a comprehensive description of legal doctrine in a given field, but many law review articles and notes share this same descriptive aspiration on a smaller scale. See Peggy Cooper David, *Casebooks, Learning Theory, and the Need to Manage Uncertainty*, in Edward Rubin, *Legal Education in the Digital Age* 230, 231-35 (2012); Richard A. Posner, *Legal Scholarship Today*, 115 *Harv. L. Rev.* 1314, 1320-21 (2002).

³⁶ Of course, public choice scholars could claim that their approach, while it cannot disprove the validity of any recommendation to a legislator, demonstrates that the legislator would never listen to such a recommendation. To maintain that position, however, they would need to demonstrate that their behavioral assumption, the assumption that legislators attempt to maximize their chance of re-election, is the legislators’ only motivation. But, as just discussed, they cannot make that demonstration. The way public choice escapes from its inability to do so is to assert that the other motivations cannot yield predictions, and thus should be excluded from descriptions of legislative behavior. This may make public choice the best descriptive theory of legislative behavior, as its proponents claim. But because it is based on an epistemological premise, not an empirical demonstration, it does not preclude the possibility that recommendations to legislators can have some effect, and thus be of at least some pragmatic value.

B. Historical Accounts of Statutes' Enactment

If public choice were the only account of the legislative process, then its obvious and acknowledged limitations might have left room for the development of a separate, normative discourse about legislation. In fact, other studies of legislation have also ignored or discounted the possibility of such a discourse. It is these accounts, not public choice, that create the real scholarly lacuna regarding legislative methodology. One simple reason is that they are older, dating back to the very beginnings of empirical political science.³⁷ Another is that they are in fact more empirically sustainable, since they allow for a more realistic variety of motivations. This would seem to leave room for legislative methodology; the fact that such a discourse has failed to develop suggests that the idea of addressing normative recommendations to a legislature is not being only being rejected but ignored, which is a more difficult position to combat.

Consider, for example, the relatively small body of historical and political science literature that traces the history of particular statutory enactments.³⁸ These are often lively and well-researched accounts, but they focus largely on the political disputes that led to passage of the law in question. They almost never discuss the way that bill was actually drafted, the design decisions that generated its particular provisions. None of them reprints the text of the final statute, or any significant portion of it, to say nothing of the initial bill or subsequent markups.

In other words, these narrative accounts all describe statutory debate, not statutory design.

³⁷ Mueller dates the beginning of public choice to 1948. See Mueller, *supra* note [], at 2. In the U.S., empirical political science can be dated to the 1880's and 90's, with the publication of works such as John Burgess, *Political Science and Comparative Constitutional Law* (1893); W.W. Willoughby, *Government and Administration of the United States* (1891); Woodrow Wilson, *Congressional Government: A Study in American Politics* (1885). See generally Bernard Crick, *The American Science of Politics: Its Origins and Conditions* (1959).

³⁸ E.g., Steven K. Bailey, *Congress Makes a Law* (1954); Daniel A. Berman, *A Bill Becomes a Law: The Civil Rights Act of 1960* (2nd ed., 1966); Eugene Eidenberg & Roy D. Morey, *An Act of Congress* (1969); Paul Light, *Artful Work: The Politics of Social Security Reform* (1985); Costas Panagopoulous & Joshua Schank, *All Roads Lead to Congress: The \$300 Billion Fight Over Highway Funding* (2007); Redman, *supra* note []; Charles & Barbara Whalen, *The Longest Debate: A Legislative History of the Civil Rights Act of 1964* (1985); Daniel Lipinsky, *Navigating Congressional Policy Processes: An Internal Perspective on How Laws Are Made*, in Lawrence C. Dodd & Bruce I. Oppenheimer, *Congress Reconsidered* 337, 347-56 (2009).

One well-known and vividly presented account of this sort is Eric Redman's *The Dance of Legislation*,³⁹ a first person narrative of the author's involvement with enactment of the National Health Service Corps,⁴⁰ debated by the Senate during the 91st Congress and signed by President Nixon in 1971. Redman documents the political debates about the bill and describes the compromises that resulted in modification of specific provisions. But where did the bill come from in the first place? According to Redman, it was suggested to him, as a member of Senator Warren Magnuson's staff, by Abe Bergman, a physician and "political activist" who served as an "unofficial advisor to Senator Magnuson."⁴¹ In a visit to Magnuson's office, Bergman told Redman that "National Health Service Corps schemes were discussed increasingly in medical circles" as a solution to the shortage and maldistribution of doctors.⁴² The schemes involved drafting doctors to serve the needs of the poor rather than serving in the military, but ran into the political problem that such a draft would be characterized as socialized medicine. Bergman's proposal was to use doctors who had joined the Public Health Service to avoid being subject to the draft, and were thus already government employees.⁴³ He gave Redman a "copy of a proposal developing this idea . . . written by Dr. Laurence Platt, a young commissioned

³⁹ Redman, *supra* note [], (originally published in 1973).

⁴⁰ P.L. 91-623, 91st Cong., 2nd Sess. (1970), codified as amended in 42 USC § 254d. The legislation has been amended several times, adding a scholarship program, a loan repayment program and a volunteer program. See Office of Technology Assessment, *Health Care in Rural America* 352-59 (1990). The report characterized the National Health Service Corps as "the single most direct Federal program addressing health personnel distribution during the last two decades." *Id.* at 352.

⁴¹ Redman, *supra* note [], at 27-28. According to Redman, it was Bergman's stated concern about injuries caused by power mower that induced Magnuson to begin thinking about the safety of consumer products and ultimately to sponsor the major legislation on this topic that bears his name, the Magnuson-Moss Warranty-Federal Trade Commission Improvement Act, Pub. L. No. 93-637, 88 Stat. 2193 (1975), codified at 15 U.S.C. §45.

⁴² *Id.* at 33.

⁴³ As Redman explains, the PHS doctors did not receive a deferment from the draft; rather, their service in the PHS was a tour of duty that satisfied their military obligations. Diverting the 600 doctors per year who entered the PHS for two-year terms from military to civilian service would not have a major impact on the military, Bergman reasoned, since it already had 16,000 doctors. *Id.* at 34.

officer of the PHS,”⁴⁴ and revised by Bergman to embody the necessary changes in PHS’ authorizing statute.⁴⁵

From that point on, Redman’s account focuses exclusively on politics.⁴⁶ He does not tell us anything about Bergman and Platt’s decision-making process or any alternatives they might have considered. He does not tell us how the bill was written, how many provisions it had, or which provisions were not subject to political debate. To reiterate, what we see is the legislation being debated, but not designed; the design process itself is virtually invisible in this account. In one way or another, a draft of the bill simply appears; the technical term is that it is “introduced,” as if it were an existing human being coming to a dinner party, rather than a constructed artifact.

Charles and Barbara Whalen’s justly famous “legislative history” of the 1964 Civil Rights Act reveals the same obliviousness to statutory design.⁴⁷ One might imagine that the drafting of this momentous statute would be a major part of the authors’ story. But the first sentence of their book reads as follows: “Congress, the 535-headed creature, whose strongest instinct was self-preservation, sprawled lazily on Capitol Hill, blinking in the morning sun and nervously eying the package that had been sent up from the White House – John F. Kennedy’s

⁴⁴ Id. at 34.

⁴⁵ Id. at 34-37. Redman’s account of the bill’s origins occupies about six pages of a nearly 300-page book.

⁴⁶ It is important to note, however, that while Redman portrays the process as purely political, he does not view Magnuson in those terms. Consistent with a number of other observers who have studied individual legislators, see Asball, *supra* note []; Drew, *supra* note [], Redman describes Magnuson as motivated by the desire to enact good public policy (as he regarded it, of course), although also concerned about re-election and assiduous in trying to secure pork barrel benefits for his state. See Redman, *supra* note [], at 189-209. There is, admittedly, a tendency toward hagiography when one spends a substantial amount of time studying one person, but there is also a countervailing temptation toward exposé, and Redman, Asball and Drew are all astute observers who are not likely to be fooled. In the particular case of Magnuson, Redman ascribes his motivation for sponsoring the NHSC Act as a policy-based, albeit intermittent interest in health care. Id. at 29. Interestingly, Redman’s account is that Magnuson became substantially more public-oriented after a near-death electoral experience in 1962, *id.* at 194-95. The standard account, even if allowing for some scintilla of public motivation, would assume an opposite reaction. If Redman is correct, and his view is strongly supported by Magnuson’s observable behavior, his account reveals the complexity of human motivation and a kind of risk-prone personality type among elected legislators, see note [] *infra*. Most important for present purposes however, is that, according to Redman’s account, there is no point in Magnuson’s career where he would not have been at least amenable to policy-based arguments.

⁴⁷ Whalen & Whalen, *supra* note [].

civil rights bill.”⁴⁸ This is wonderful prose, but its charm may distract the reader from realizing that the story is beginning with a completely drafted bill.⁴⁹ In the course of the Congressional deliberations, the bill was altered, of course, and the political dynamics of this process are recounted in detail,⁵⁰ but the process itself is not described. We get one small glimpse of it, not because the authors consider this subject important, but because the bill’s leading opponent raised it during the hearings for rhetorical purposes. Howard Smith, chair of the House Rules Committee, questioned William McCulloch, the bill’s leading Republican supporter, about the actual authorship of the compromise measure. McCulloch’s answered: “I assisted in writing this bill, staff people of the Judiciary Committee participated in redrafting this bill, [and] duly constituted and appointed people in the Department of Justice helped write the bill . . .”⁵¹ And that is all we learn about these seemingly significant decisions.

C. Political Science Accounts of the Legislative Process

A much larger body of empirical political science literature describes the operation of American legislatures, most particularly Congress, in more general terms. Voluminous though it is, this work almost universally exhibits the very same lacuna – it describes the way legislation is

⁴⁸ Id. at 1. The first chapter is preceded by an introduction. A brief but moving account of American civil rights legislation, it ends with a long quote from a speech by President Kennedy, and then the following sentence: “Eight days later John F. Kennedy sent up to the Congress a long overdue bill that would try to correct the wrongs of almost 350 years.” Id. at xx. In other words, the account skips over the process by which the statute was actually designed.

⁴⁹ The sentence is followed by a half-page summary of the bill that does not quote any of the bill’s actual language. The account then immediately moves into a discussion of the political forces that were at work.

⁵⁰ Id. at 29-70. There is also a vivid and engaging description of the procedures that govern floor debate in the two chambers. Id. at 101-02 (House), 131-32 (Senate).

⁵¹ Id. at 93. The authors regard this question as a stratagem by Smith to trap McCulloch, and treat McCulloch’s response as escaping from the trap by means of a non-committal, somewhat vacuous response. But if the response is taken as minimally accurate, whatever its rhetorical effect, it reveals a complex statutory design process that merits detailed exploration. Other accounts of the legislative process also reveal extensive staff-level contacts between Congressional committees and administrative agencies. See Nelson Polsby, *Congress and the Presidency* 143 (4th ed., 1986); Edward V. Schneier & Bertram Gross, *Legislative Strategy: Shaping Public Policy* 104-05 (1993); Charles Tiefer, *Congressional Practice and Procedure: A Reference, Research, and Legislative Guide* 156-57 (1989). This is hardly surprising, but it reflects a potentially significant approach to merits more extensive investigation. See note [], *infra*.

debated, but not the way it is designed. Because the design process is thus rendered invisible, the implicit message is that it is non-existent. Legislation, it would seem, is never designed; it simply appears. Then the real action begins: legislators take sides, they argue with each other on political grounds, they try to rally their allies and undermine their opponents and they make deals of various sorts. The proponents compromise on certain provisions, accepting weaker versions of their original proposal, while some of the opponents, having secured crucial concessions, join or drift into the sponsoring coalition. The Members then debate the measure on the floor, making last minute emendations to secure or forestall its passage. All of this is well documented, and there can be little doubt that it actually occurs in very much the way the political science literature depicts. But we are never told how much of the bill was subject to this political dynamic, and how much of it originated from a design process rendered invisible by its omission.

Consider, for example, a well-known book about Congress with the promising title of *Legislative Strategy: Shaping Public Policy*.⁵² While written as a description of Congress, the authors – Edward V. Schneier and Bertram Gross – actually set their description in a normative frame. The audience they are addressing, however, is not the Members of Congress who actually “shape public policy,” but anyone who might be interested in implementing a particular policy by inducing Congress to enact it.⁵³ This is a large, amorphous group of people, needless to say, and the authors do not pay much attention to its composition or motivation. They do not

⁵² Schneier & Gross, *supra* note [].

⁵³ The book begins as follows: “For those who want to see their policy preferences enacted into law, the task is simple: win the votes of 218 representatives, 51 senators, and one president.” *Id.* at 1. Of course, the authors go on to explain that this is no easy task, and the book constitutes an insightful exploration of its complexities. But the first sentence states the framing premise, which is advice to those who want to implement their policy preferences through legislation. The first chapter then elaborates on this premise, discussing how members of the imagined audience should “prepare for battle,” *id.* at 2-6, how they should decide whether to pursue the legislative effort, *id.* at 6-11, what the advantages of legislation are for achieving their policy goals, *id.* at 11-17, and what the disadvantages are, *id.* at 17-19.

need to do so, since there are many other political science studies focusing on lobbyists,⁵⁴ and Schneier and Gross are using their imagined interlocutors as a device for organizing their book, not as a subject of study. But it is interesting that they are able to regard this amorphous group as an audience that can be rationally addressed, while Congress, the subject of their study, is treated as an arena of purely political forces.

Of course, no one would deny that politics exerts a powerful, and often decisive effect on Congressional action. In chapters such as “Contestants for Power,” “Establishing Influence” or “Organizing Support,” all incontrovertibly important topics to address when describing the legislative process, political considerations play a dominant role, as one would expect.⁵⁵ These considerations also play a dominant role, however – in fact a virtually exclusive one – in the chapters about equally important topics such as “Legislative Parenthood” and “The Art of Drafting.”⁵⁶ The chapter on legislative parenthood begins with a discussion of process by which Members of Congress decide to sponsor bills.⁵⁷ But where do these bills come from? Later on in the chapter, we are told that most bills are drafted by a number of people, that they are often based on prior legislation, that the executive often drafts legislation these days, and that lobbyists sometimes do so as well.⁵⁸ But legislators are only described as sponsoring bills, not designing them; according to the authors’ unstated assumption, all of Congress’ children are adopted.

⁵⁴ See, e.g., Jeffrey M. Berry, *Lobbying for the People* (1977); Anthony J. Nownes, *Total Lobbying: What Lobbyists Want (and How They Try to Get It)* (2006); Karl Schriftgiesser, *The Lobbyists: The Art and Business of Influencing Lawmakers* (1951).

⁵⁵ Schneier & Gross, *supra* note [], at 21-38, 57-72, 140-58.

⁵⁶ *Id.* at 94-117, 118-39.

⁵⁷ *Id.* at 95. The authors write: “Although some MCs take pride in crafting their own bills, most have complex origins and are drafted by skilled draftsmen on the Hill, in executive agencies or in the offices of private associations. Occasionally, the sponsor knows little or nothing about the bill that bears his or her name.” This is stated in passing, as a way of explaining that sponsorship is not the same as authorship. But having acknowledged the “complex origins” of bill the authors then proceed to ignore these origins, even though the term “parenthood” that they use in the title might suggest that these origins would be at issue.

⁵⁸ *Id.* at 100-05. This observation is empirically confirmed by Nourse & Schacter, *supra* note [], at 584-91, 610-13. Naming the various people who draft legislation, however tells us nothing about the way the legislation is designed. The closest the authors come to a description of the design process is to note that “almost all new laws are incremental, based on a series of ‘successive limited comparisons’ with existing statutes.” *Id.* at 100-01, citing Charles Lindblom, *The Science of Muddling Through*, 19 *Pub. Admin. Rev.* 79 (1959). This seems like an exaggeration. More seriously, although the authors note that an

We might expect this apparent oversight to be remedied in the following chapter, devoted to “The Art of Drafting.” This art, however, turns out to be a rather dark one. The chapter begins with an inquiry into who will benefit from the proposed legislation and who will be disadvantaged.⁵⁹ The authors then proceed to describe the various components of a completed bill: the title, statement of purpose, use of subdivisions, its relation to existing law, and the strategic use of euphemisms and misleading provisions.⁶⁰ This is characterized as a “design for combat,”⁶¹ the combat being the political struggle to enact the bill of course, and particularly its ability to withstand the “arsenal of amendments”⁶² that can be launched at it during the floor debate. In short, the art of drafting, according to the authors, consists of various strategies to get the bill enacted; once again, the actual design of the bill itself has been rendered invisible. All we know is that it apparently does not come from Congress.

What makes Schneier and Gross’ approach particularly striking is that they are not devotees of public choice. They have a more balanced view of legislators’ motivations and affirmatively state, at various points in their book, that Members of Congress strive to enact good

incremental approach resembles common law, and cite Frank E. Horack, Jr., *The Common Law of Legislation*, 23 *Iowa L. Rev.* 43 (1951), they also describe this approach as a “clever crafting together of issues,” as “dust[ing] off the failed bills for reintroduction,” and as “stealing.” *Id.* at 101. But they do not offer any explicit critique of legislative incrementalism; we are left, therefore, with a cursory description of one drafting technique, some veiled suggestion that it is improper, but no analysis of its effectiveness, no discussion of the way it is used, and no proposed alternatives.

⁵⁹ Schneier & Gross, *supra* note [], at 120-22. See *id.* at 120: “The greater the number of groups for which one asks benefits, the broader the potential base for support, although this must be balanced by the fact that the more numerous the portions cut from the pie, the smaller each portion becomes. . . Most MCs are adept at discerning how the pie is cut.” As is noted further below, see pp. [] *infra*, the claims being made are embodied in the use of language, rather than being argued for or even explicitly asserted. “Asking benefits” for a group suggests that the legislator is acting at the group’s behest; cutting a pie suggest that spoils are being divided in a zero sum situation. The exact same point could be made as follows: The greater the number of groups that the legislator wants to benefit, the broader base for support, although this must be balanced by the fact the benefits secured must be divided among a larger number of groups.” The image is now one of a public oriented legislator, and it becomes conceivable for a scholar to address that legislator about the most effective way to draft the statute.

⁶⁰ *Id.* at 123-34. This list, with the exception of the last item, is a staple of the drafting literature. See note [] *supra* (citing sources).

⁶¹ *Id.* at 130. Military metaphors pervade the book, and in fact constitute a pervasive theme. The authors build on the word “strategy,” which admittedly has military origins (from the Greek word “strategos” or army leader, *id.* at 2), but which is now in general usage. In their view, however, “in its most fundamental outline the campaign for legislation follows the same essential contours as a military battle plan.” See *id.* at 4, 27, 238 (citing and quoting von Clausewitz). This is not correct. Armies engaged in warfare represent opponents in a win-lose situation, not two groups with different visions for a single polity. Although Schneier and Gross claim to be using military metaphors to elucidate conclusions that they have reached by observation of the legislature, one must question whether the use of these metaphors colors, or even determines, the nature of their observations.

⁶² *Id.* at 134-39.

public policies.⁶³ The problem is that they then proceed to ignore, and even attempt to refute, their own observations when these observations seem to lead to the apparently inconceivable idea that legislators might actually have attitudes that would induce them to design effective legislation. To take one example, the authors note that “[i]nterviews show us clearly . . . that lobbyists score few conversations, pressure almost no one, are seldom mentioned as sources of information on issues, and are far more likely to interact with those who already share their attitudes than with those who need to be persuaded.”⁶⁴ Rather than drawing the obvious conclusion from this rather definitive sounding observation, however,⁶⁵ Schneier and Gross then proceed to explain why it does not negate the assumption that legislation is motivated exclusively by politics: “it takes only one strategically placed [Member of Congress] to insert a special-interest amendment in the tax code, one small clique to insure a protective tariff for glass, one cotton subcommittee to mark up a cotton subsidy program and push it through.”⁶⁶ In other words, if 434 Representatives and 99 Senators are free of, or resistant to, political influence regarding a particular statute, the one remaining Member from each chamber who has met with a lobbyist will determine the nature of that statute, even though he or she did not feel pressured by that lobbyist. A fair question to ask in response is what evidence could possibly convince Schneier and Gross that the legislators are motivated by the desire to enact effective public policy if their own observations about the limited influence of lobbyists are not sufficient?

⁶³ See, e.g., *id.* at 68: “While it is true that subjective factors such as personal likes and dislikes play an important role in the legislative struggle, the desire to make good public policy is a significant variable.”; *id.* at 137: “It is testimony to the desire of many MCs to make good public policy that amendments of this kind are not uncommon.” (regarding a legislator making helpful amendments to bills that she opposes).

⁶⁴ *Id.* at 85.

⁶⁵ It is moreover, a balanced and plausible one that has been corroborated by other observers. See, e.g., Kingdon, *supra* note [], at 125-27; Rogan Kersh, *The Well-Informed Lobbyist: Information and Interest Group Lobbying*, in Allan J. Cigler & Burdett A. Loomis, *Interest Group Politics* 389 (7th ed., 2006).

⁶⁶ Schneier & Gross, *supra* note [], at 85.

There is no definitive way to prove a negative, but examples of this sort could be multiplied ad infinitum. Schneier and Gross' book serves as a useful example because it is a notably balanced and comprehensive account of Congress, but more particularly because it frames its approach in a manner that seems to raise the issue of legislative methodology, only to move right past it. Another such account is *Deliberative Choices: Debating Public Policy in Congress*, by Gary Mucciaroni and Paul J. Quirk.⁶⁷ The task the authors set themselves, in their own words, is to determine “how Congress deliberates about public policies and . . . why it sometimes performs well in such situations and yet at other times performs poorly.”⁶⁸ They identify two questions to be answered in pursuing this inquiry: “First, how well informed is Congress when it considers legislation?” “Second, what factors determine how well legislators deliberate?”⁶⁹ It would be difficult to articulate a better research plan for investigating the question of legislative methodology.

To answer the questions they have posed for themselves, the authors conduct a carefully researched empirical study of the floor debate on three statutes considered in the years 1995 to 2000.⁷⁰ In other words, they move almost as far away from the design of the legislation in question as possible, and consider the way that Congress debates a completed or nearly completed bill.⁷¹ Like Schneier and Gross, Mucciaroni and Quirk reject the public choice assumption of re-election maximizing on empirical grounds and reach conclusions that are

⁶⁷ Gary Mucciaroni & Paul J. Quirk, *Deliberative Choices: Debating Public Policy in Congress* (2006).

⁶⁸ *Id.* at 3

⁶⁹ *Id.*

⁷⁰ The three debates are as follows: the debate on welfare reform, leading to enactment of the Personal Responsibility and Work Opportunity Reconciliation Act of 1996, Pub. L. No. 104-193, 110 Stat. 2105, codified in scattered sections of 42 U.S.C., see Mucciaroni & Quirk, *supra* note [], at 55-91; the debates on the various bills to repeal the Estate Tax in 1999 and 2000, including the Death Tax Elimination Act of 2000, H.R. 8, 106th Cong., 2nd Sess., which was vetoed by President Clinton, H.R. Doc. No. 106-292 (2000), see Mucciaroni & Quirk, *supra* note [], at 92-121, and the debate on the Telecommunications Competition and Deregulation Act of 1996, P.L. No. 104-104, 110 Stat. 56 (1996), codified in scattered sections of 47 U.S.C., see Mucciaroni & Quirk, *supra* note [], at 122-55

⁷¹ Although the book focuses on debates about the various provisions of the two statutes that were enacted, and the various bills to repeal the estate tax, no language from these bills is quoted at any length, nor are the actual provisions of the bills described in any detail.

convincing in their plausibility and balance.⁷² The quality of the floor debates in the two chambers, and with respect to different bills, varies substantially, they observe; overall, they are fairly critical of Congress, and find the quality of the debates “more troubling than reassuring.”⁷³ But they also find the Members “rely most heavily on claims that have considerable empirical support. For claims at a given level of political force, they use the more sustainable, empirically supported claims more often.”⁷⁴

The conclusion that would seem to flow from these observations is the one that scholars who address themselves to judges and policy analysts have reached: public officials have mixed motives, some of which prevent them from considering normative arguments about their decision making methodology and some of which induce or impel them to consider such arguments. Recognizing this, Mucciaroni and Quirk actually hazard some recommendations that might improve the process of floor debate on which they focus, proposing that the legislators spend more time debating major proposals, allow for the cross-examination of speakers on the floor and avoid omnibus bills.⁷⁵ They even suggest that external monitoring could be used to encourage legislators to avoid distortion of empirically established facts, and raise the possibility that a “new congressional staff agency could be established modeled after the Congressional Budget Office (CBO) and other support arms of Congress; that is, it would be non-partisan, professionally staffed, and managed to ensure neutral competence.”⁷⁶ But these recommendations are offered at the very end of the book and advanced rather timidly and

⁷² See Mucciaroni & Quirk, *supra* note [], at 181-98 (stating the conclusions of their study). Despite the large quantity of data they have gathered, and their scrupulously detailed analysis of it, see *id.* at 214-26, the authors never veer into overly precise description. They categorize the quality of features such as the information value of debates as very good, good, fair, poor, and very poor, *id.* at 52-54, and concede the impressionistic character of such judgments.

⁷³ *Id.* at 200

⁷⁴ *Id.* at 161 (emphasis omitted). This is not to say, of course, that they are disinterested, objective policy analysts. “When political force and credibility are in conflict, advocates trade off one for the other. Legislators abandon unsupported claims that also have lesser political force; but they only deemphasize, without abandoning, unsupported claims that have greater force.” *Id.*

⁷⁵ *Id.* at 205-10.

⁷⁶ *Id.* at 211

apologetically.⁷⁷ More significantly for present purposes, they focus their consideration of the deliberative, policy-making actions of the legislature on the very end of the process, far, far down the road from the statute's original design. The methodology of the design process remains invisible in their account, not because of their assumptions about legislators' motivation or their observations about legislators' behavior. It is invisible because they simply do not consider it.

Another way in which political analysis makes legislative design invisible, and the final example that will be offered here, is by treating proponents and opponents of a bill as equivalent and then focusing on the opponents. R. Douglas Arnold's discussion of the way that "citizens policy preferences depend on the incidence of costs and benefits",⁷⁸ provides a series of examples: "House members refused to be associated with a surcharge on local telephone bills of six dollars per month because they feared that citizens would notice such an increase and they would care";⁷⁹ "[b]anks bombarded their customers with announcements of how Congress had just enacted a tax-withholding system for bank accounts and then watched their customers bombard Congress with letters of protest";⁸⁰ "TIA-CREFF, the pension fund for college teachers, sent letters to its 1.1 million members in 1986 showing how an obscure provision in the tax reform bill would end the fund's tax exemption and thereby reduce teachers' pensions."⁸¹ These examples of self-interest driven opposition do not demonstrate that the same phenomenon necessarily determines legislative design. When people oppose a bill, they often do so because they object to one of the bill's particular provisions, or they rally opposition around one

⁷⁷ Id. Mucciaroni and Quirk quickly reject their own suggestion about a new staff agency, for example: "It is unlikely, however, that Congress will ever create a staff unit with the necessary credibility and independence for such a role, or that such a unit would long survive the constant partisan conflicts in which it would unavoidably become embroiled." See pp. []infra (discussing Congressional agencies).

⁷⁸ R. Douglas Arnold, *The Logic of Collective Action* 28 (1990).

⁷⁹ Id.

⁸⁰ Id.

⁸¹ Id. at 30-31.

provision for strategic reasons. That may be the only provision which is capable of eliciting voter concern, but that is all they need; if they prevail, the bill will not become a law.

Proponents, in contrast, must design every provision of the bill they ultimately enact. Perhaps one of these provisions has the same connection to citizen self-interest as the provision that has rallied the opponents, and on that provision, they may need to be equally attentive to citizen attitudes. But the way they designed all the other provisions of the bill remains unexplained.

II. The Policy Space in the Legislative Process

An academic discourse about legislative methodology would address legislators themselves and offer recommendations about the best way to design effective legislation. It would be essentially equivalent to legal scholarship about the methodology of judicial decision making – how judges should interpret the Constitution, how they should interpret statutes, how they should decide common law cases, the extent to which they should follow judicial precedents, and so forth. It would also be equivalent to the public policy scholarship on the way that executive agents should reach decisions. For a discourse of this nature to make sense – to be something more than arid speculation -- there must be some possibility that legislators could conceivably act upon it, that they would be willing to consider some institutional structure because it might lead to more effective legislation. This depends on the legislators' concern about enacting effective legislation, as opposed to merely getting themselves re-elected. The area where such a public-oriented motivation would prevail can be described as the policy space of the legislative process.

As discussed in the previous section, this policy space is largely invisible in academic literature on legislation, but this section argues that it is actually quite extensive. It thus aspires to map uncharted territory. Much of this conceptual cartography repeats well-known descriptions and observations of the legislative process, and simply insists that scholars take their existing descriptions and observations seriously. As the discussion proceeds, however, it will reach deeper into the terra incognita of the policy space and discuss mysterious recesses that virtually no scholar even describes. This happens to be the process of actually writing the statute.

A. The Motivations of Legislators

To begin with, there is extensive biological, psychological, sociological, anthropological, and game theoretic evidence that people are partially motivated by the desire to cooperate, to help each other and to contribute to the common good, in addition to being motivated by self-interest.⁸² This observation represents a simple and convincing demonstration that a policy space always exists for legislation, that at least some legislators will be motivated to enact good public policy with respect to virtually any legislative enactment. As noted above, it has been repeatedly confirmed in the specific case of legislators by scholars who interview them personally, interview their staffs, observe them in action, or analyze their votes,⁸³ and by

⁸² See, e.g., Robert Axelrod, *The Evolution of Cooperation* (1984) (game theory); C. Daniel Batson, *Altruism in Humans* (2011) (individual psychology); Christopher Boehm, *Moral Origins: The Evolution of Virtue, Altruism, and Shame* (2012) (biology); Samuel Bowles & Herbert Gintis, *A Cooperative Species: Human Reciprocity and Its Evolution* (2011) (biology); Joseph Henrich & Natalie Henrich, *Why Humans Cooperate: A Cultural and Evolutionary Explanation* (2007) (sociology); Martin A. Nowak, *Super Cooperators: Altruism, Evolution, and Why We Need Each Other to Succeed* (2011) (biology and game theory); Tom Tyler, *Why People Cooperate: The Role of Social Motivations* (2010) (social psychology); Colin M. Turnbull, *The Forest People* (1962) (anthropology). Another work by Turnbull demonstrates the same point with an opposite example. The Ik people of Uganda, forced into impoverished by disruption of their traditional life, have degenerated into a group of selfish, distrustful, hyper-competitive individuals. In becoming virtually a model of “economic man,” they have produced a dysfunctional society, an social environment that dramatically diverges from more familiar setting where self-interest is moderated by cooperation, trust and altruism. See Colin M. Turnbull, *The Mountain People* (1972).

⁸³ See note [], *supra* (citing sources). My own research on the history of the Truth-in-Lending Act, see Edward L. Rubin, *Legislative Methodology: Some Lessons from the Truth-in-Lending Act*, 80 *Geo. L.J.* 233 (1991). The sponsor of the Act, and

empirical studies that measure the role of ideology in Congressional decision making.⁸⁴

Moreover, even if legislators are exclusively motivated by the desire to be re-elected, their constituents may be motivated by considerations other than self-interest,⁸⁵ including public regarding considerations, which means that the re-election oriented legislators would adopt public-regarding positions in response to these constituents.⁸⁶

Even if we ignore this evidence, however, and assume that both legislators and constituents are predominantly motivated by self-regarding considerations, the assertion that legislators are exclusively concerned with reelection cannot be directly derived from this assumption. While scholars who write about legislators often seem to conflate the failure to be re-elected with death or with an immediate loss of personal wealth, this is obviously not the

its leading proponent during most of the time it was being considered, was Senator Paul Douglas (D-Ill.). Senator Douglas had died by the time I conducted the research, but I interviewed all the members of his staff who had worked with him on the legislation. They all described Senator Douglas as being totally committed to the issue on the basis of experiences and ideas that pre-existed his election, see *id.* at 242-43. He of course tried to rally support from various interest groups for his bill, but none of his former staff members thought that the effect of the bill on his re-election was never a motivating factor for him.

⁸⁴ See Kenneth T. Poole & Howard Rosenthal, *A Political-Economic History of Roll-Call Voting* (1997); R.T. Carson & Joe A. Oppenheimer, *A Method of Measuring Personal Ideology of Political Representatives*, 78 *Am. Pol. Sci. Rev.* 163 (1984); Robert Higgs, *Do Legislators' Votes Represent Constituency Preference? A Simple Way to Evaluate the Senate*, 63 *Pub. Choice* 175 (1989); Joseph P. Kalt & Mark A. Zupan, *The Apparent Ideological Behavior of Legislators: Testing for Slack in Political Institutions*, 33 *J. L. & Econ.* 103 (1990); John R. Lott & Stephen G. Bronars, *Time Series Evidence on Shirking in the U.S. House of Representatives*, 76 *Pub. Choice* 125 (1993); Joseph P. Kalt & Mark A. Zupan, *Capture and Ideology in the Economic Theory of Politics*, 74 *Am. Econ. Rev.* 279 (1984); James B. Kau & Paul H. Rubin, *Self-Interest, Ideology and Logrolling in Congressional Voting*, 22 *J. L. & Econ.* 365 (1979). Some of these findings have been contested, see, e.g., Rodney D. Fort, William Hallagan, Cyril Morong & Tesa Stegner, *The Ideological Component of Senate Voting: Different Principles of Different Principals*, 76 *Pub. Choice* 39 (1993); Charles Tien, *Representation, Voluntary Retirement and Shirking in the Last Term*, 106 *Pub. Choice* 117 (2001). But the evidence indicating that legislators are motivated by ideological considerations is certainly sufficient to justify a normative discourse that addresses legislators on the basis of this motivation.

⁸⁵ See, e.g., Alberto Alesina & Howard Rosenthal, *Partisan Politics, Divided Government and the Economy* (1995) (Americans vote on the basis of perceptions regarding the relative competence of the two major parties, and on the basis of an affirmative desire for divided government); Thomas Frank, *What's the Matter with Kansas: How Conservatives Won the Heart of America* 67-77 (2004) (Americans vote on the basis of ideology, and against their economic interests); V.O. Key, *The Responsible Electorate* (1966) (Americans vote on the basis of history, i.e., retrospectively, rather than on the basis on current concerns).

⁸⁶ See Arnold, *supra* note [], at 17-36; Cass Sunstein, *After the Rights Revolution: Reconceiving the Regulatory State* 57-69 (1990). As Arnold observes:

people value many things that do not directly contribute to their own material welfare. . . . Programs that assist the blind, the physically handicapped, and the mentally ill are, in fact, quite popular among the sighted, the able-bodied and the sane. Many citizens also support governmental programs that are designed to save whales they will never see, preserve Arctic wilderness they will never visit, and protect endangered species they never know existed.

Arnold, *supra* note [], at 33.

case.⁸⁷ One of the great virtues of a functioning democracy is that people who lose their political office suffer no disadvantages beyond the loss of the office itself.⁸⁸ They are not executed or imprisoned by their successors, they are not socially ostracized, and they are not precluded from earning an income.⁸⁹ In fact, unless one has lost one's seat due to scandal, being a former legislator is generally a position of honor in our society.⁹⁰ The most frequent reason why Members of Congress leave their position is that they voluntarily retire,⁹¹ which suggests that life after Congress holds relatively few terrors for the average Member.⁹²

Nor can the prevalence of strategic behavior among legislators, the bread and butter of political science literature about Congress,⁹³ be taken as evidence of self-interested behavior. Both legislators and their constituents disagree about what they think is good for the country,

⁸⁷ In other words, the desire to be re-elected cannot be linked directly to a basic human instinct, like the desire to survive or maximize one's material well-being. It is role behavior. Because virtually all Members of Congress have acted in other roles, and have family, friends, and former colleagues who are doing so, it is always psychologically possible, and often psychologically easy, for them to separate themselves from their status as legislators and imagine doing something else.

⁸⁸ See Alexander Baturo, *The Stakes of Losing Office: Term Limits and Democracy*, 40 *Brit. J. Pol. Sci.* 635 (2010); James D. Fearon, *Self-Enforcing Democracy*, 126 *Q.J. Econ.* 1661 (2011)

⁸⁹ See Peter F. Drucker, *The New Society* 210-12 (1951); Hugh R. Trevor-Roper, *The Last Days of Hitler* 3-10 (1947).

⁹⁰ See Rebekah Herrick & David L. Nixon, *Is There Life After Congress? Patterns and Determinants of Post-Congressional Careers*, 21 *Legis. Stud. Q.* 489 (1996) (many former Members get positions with government or interest groups; those that do not obtain new positions do so by choice generally because they are ill or elderly).

⁹¹ Sean Theriault, *Moving Up or Moving Out: Career Ceilings and Congressional Retirement*, 23 *Legis. Stud. Q.* 419 (1998).

⁹² Moreover, the belief that legislators are primarily motivated by the desire to be re-elected also depends on the idea that they are risk averse. If they are risk prone, then they will be willing to take chances, willing to endanger their prospect for re-election even though this is a desired goal. The assumption that people are risk averse is a staple of modern micro-economics and public choice theory, see David Besanki & Ronald Braeutigam, *Microeconomics* 574-91 (3rd ed., 2007); Paul Krugman & Robin Wells, 544-51 (2nd ed., 2009); John W. Pratt, *Risk Aversion in the Small and in the Large*, 32 *Econometrica* 122 (1964); Matthew Rabin, *Risk Aversion and Expected-Utility Theory: A Calibration Model*, 68 *Econometrica* 1281(2000). There is some empirical evidence suggesting that this assumption is true for bureaucrats. See John R. Gist & R. Carter Hill, *The Economics of Choice in the Allocation of Federal Grants: An Empirical Test*, 36 *Pub. Choice* 63 (1981); Cotton M. Lindsay, *A Theory of Government Enterprise*, 84 *J. Pol. Econ.* 1061 (1976) Frank Knight, however, speculated that entrepreneurs may be risk-prone, rather than risk averse, see Frank R. Knight, *Risk, Uncertainty and Profit* (rev. ed., 1965). Legislators may well be more similar to entrepreneurs than bureaucrats with respect to risk. For most members of Congress, after all, the odds are against their rising to this level of prominence through the electoral process (in contrast, let us say, to the odds of becoming a successful lawyer if one goes to law school) are not particularly favorable. Cf. David Rhode, *Risk-Bearing and Progressive Ambition: The Case of Members of the United States House of Representatives*, 23 *Am. J. Pol. Sci.* 1(1979) (Members are primarily motivated by ambition; a considerable number can be classified as risk-takers).

⁹³ See Oleszek, *supra* note [], at 23-26; Redman, *supra* note [], at 138-62, 216-59; Schneier & Gross, *supra* note [], at 151-55; Sinclair, *supra* note [], at 144-57; Whalen & Whalen, *supra* note [], at 29-70, 149-93; John Ferejohn, *Logrolling in an Institutional Context: A Case Study of Food Stamp Legislation*, in Gerald C. Wright, Leroy N. Rieselbach & Lawrence C. Dodd, *Congress and Policy Change* 223 (1986); Thomas Stratman, *Logrolling in the U.S. Congress*, 33 *Econ. Inquiry* 441 (1995); Thomas Stratman, *The Effects of Logrolling on Congressional Voting*, 82 *Am. Econ. Rev.* 162 (1992)

often more intensely and more fractiously than they disagree on the basis of self-interest.⁹⁴

People who want something, on behalf of others as well as for themselves, will typically engage in instrumental behavior in order to get it.⁹⁵ All the log-rolling, vote-trading, procedure-manipulating, opponent-misleading behavior that is such a staple of the scholarly literature about legislation will occur regardless of legislators' source of disagreement.⁹⁶ The sense that such behavior is cynical and corrupt, rather than an understandable effort to implement one's public policy goals, is often little more than an artifact of the language that scholars employ. In many accounts of the legislative process, ideas are described as stratagems or devices, plans are called plots, and people who work as part of a team are trying to "cover their tracks."⁹⁷ Voting on the basis of one's beliefs, rather than the desire to be re-elected, is described as "shirking."⁹⁸ The process of combining the three streams of problems, policy proposals and politics that flow through a system is labeled a "garbage can" approach to decision making.⁹⁹ Agreements become compromises, compromises become concessions, concessions become surrenders,¹⁰⁰ and

⁹⁴ See note [] (citing sources regarding attitudes of legislators); note [] (citing sources regarding attitudes of citizens).

⁹⁵ As previously observed, it was not until Machiavelli, see note [] supra, that conflict was viewed as a productive force, as the idea remains counter-intuitive for many people to this day.

⁹⁶ See, e.g., William Riker, *The Art of Political Manipulation* (1986); Kau and Rubin, supra note [].

⁹⁷ Schneier & Gross, supra note [], at 102.

⁹⁸ Lott & Bronars, supra note []; Tien, supra note []. The idea, of course, is that the legislators are shirking their responsibility to represent their constituents' preferences. The characterization incorporates an unstated preference for one approach to representation, the conduit approach, as opposed to its equally well-justified rival, the trusteeship approach, see Hannah Pitkin, *The Concept of Representation* (rev. ed., 1972). Even worse, it implies that legislators who do not follow their constituents preferences are engage in some sort of self-indulgent or selfish action, rather than making decisions on the basis of their beliefs about what is best for the nation.

⁹⁹ The term was introduced in Michael Cohen, James March & Johan Olsen, *A Garbage Can Model of Organizational Choice*, 17 *Admin. Sci. Q.* 1 (1972), and relied on extensively by Kingdon, supra note [], at 19, 84-88. Again, this is lively terminology, but it achieves its effect through unexplained and unjustified disparagement. It implies first, that the contents of the problem awareness, policy proposals and political considerations that contribute to Congressional decisions is of little or no value, and that there is no organized way by which these factors are, or can be, combined. It is, moreover, a mixed metaphor, since it identifies three contributory streams, and streams are not necessarily garbage (especially not after Congress designed and enacted the Clean Water Act, one might add). If one wants to keep the stream image, then the natural metaphorical continuation is that they are intermixed, or unified, to form a river, a positively viewed natural feature that serves as a pathway, a source of sustenance, and an aesthetic inspiration, see Martin Heidegger, *The Question Concerning Technology*, in Martin Heidegger, *Basic Writings* 283, 297 (David Farrell Krell, ed., 1977). Recharacterizing the factors that contribute to decisions as something more structured than streams would yield further revisions of the image.

¹⁰⁰ Arnold, supra note [], at 88-118. To take one example, Arnold makes the familiar point that "[o]ne way of masking legislators' individual contributions is to delegate responsibility to for making unpleasant decisions to the president, bureaucrats, regulatory commissioners, judges or state and local officials." *Id.* at 101. With the terms "masking" and "unpleasant," Arnold implies that the basic legislative process in the modern state, the delegation of authority to implementation agents, see Rubin,

everything is described in terms of war or battle.¹⁰¹ While much academic writing can certainly benefit by being spiced up with more vivid language, the relentless scorn embodied in descriptions of legislative action reveal (one might say “betray”) unsubstantiated assumptions about the cynicism and corruption of the legislative process.¹⁰² Such language then acquires a force of its own, subtly implying that the process bereft of concern for the public good.

B. The Political Profile of Statutory Provisions

Suppose, however, we ignore all the evidence about the multiplicity of human motivations and the contingent character of the legislative role as a means of satisfying those motivations, and accept the premise that legislators are primarily motivated by the desire to be re-elected. It will nonetheless be true that most legislation will be located in the policy space, for the simple reason that the legislators’ votes on that legislation will not affect their re-election. To begin with, incumbents tend to be re-elected, a tendency that seems to become more pronounced as time goes on.¹⁰³ This is not to say that they can freely declare themselves to be Communists or atheists, and a juicy scandal will generally end of the political career of even the

supra note [], at 203-21, is an underhanded ruse, rather than a means of achieving efficiency, see Jerry L. Mashaw, *Prodelegation: Why Administrators Should Make Political Decisions*, 1 *J. L. Econ & Org.* 81 (1985), granting legal rights to individuals, recognizing federalism and empowering local government.

¹⁰¹ See Schneier & Gross, supra note [], at 2 (“in its most fundamental outline the campaign for legislation follows the same essential contours as a military battle plan”)

¹⁰² See, e.g., Oleszek, supra note [], at 94 “Considerable pre-introductory jockeying on major bills also may take the form of behind-the-scenes battles between or among committees.” Oleszek is a careful scholar who evinces no particular hostility toward Congress, but he offers no support for this emotionally charged description. On the basis of his evidence, one could just as well say: “Considerable pre-introductory discussions on major bills may also take the form of confidential negotiations between or among committees.”

¹⁰³ The classic study is David Mayhew, *The Case of the Vanishing Marginals*, 6 *Polity* 295 (1974). His study is now nearly forty years old, of course, but more recent work confirms his basic observation. See Mark J. Hetherington & Bruce A. Larson, *Parties Politics and Public Policy in America* 154 (11th ed., 2010); Gary Jacobson, *The Politics of Congressional Elections* 21-30 (2001); Stephen Ansolabehere & Alan Gerber, *Incumbency Advantage and the Persistence of Legislative Majorities*, 22 *Legis. Stud. Q.* 161, 166-67 (1997); Gary W. Cox & Jonathan N. Katz, *Why Did the Incumbency Advantage in U.S. House Elections Grow?*, 40 *Am. J. Pol. Sci.* 478, 492 (1996); Robert K. Goidel & Todd G. Shields, *The Vanishing Marginals, the Bandwagon and the Mass Media*, 56 *J. Politics* 802 (1994).

most politically secure Member of Congress.¹⁰⁴ But most Members have a good deal of leeway; they can adopt whatever positions they choose on all but a few issues without seriously impairing their chance of re-election.

Even if they come from a hotly-contested district or state, most of the issues that the Members of Congress consider will have only a marginal effect on their re-election. The classic examples are bills that have no direct impact on their constituencies – a farm bill for a representative from an urban district, a mass transit bill for a representative from a rural one.¹⁰⁵ But there are many other bills with low political salience as well.¹⁰⁶ Electoral campaigns may focus on minute details of the candidates' personal lives (“my opponent was arrested for driving without a license,” “my opponent’s company was cited for improper disposal of chemical waste”),¹⁰⁷ but they tend to deal with public policy in generalities. A Democrat will be accused of soft-headed, budget-busting profligacy, a Republican will be accused of being an anti-environmental, anti-consumer tool of big business interests.¹⁰⁸ It is possible to combat such

¹⁰⁴ See Susan Davis, Public Shows Little Patience for Bizarre Antics of Lawmakers (July 13, 2012) (<http://www.usatoday.com/news/washington/story/2012-07-14/antics-prompt-resignations-from-congress/56205160/1> (accessed July 9, 2012) (listing recent resignations from Congress due to sexual improprieties) (accessed July 14, 2012).

¹⁰⁵ See Schneier & Gross, *supra* note [], at 150: “There is a marked tendency toward neutrality and inactivity on the part of groups that are not directly affected by a given issue.”

¹⁰⁶ Arnold, *supra* note [], at 31, 80. As he states, “For many proposals a citizen will notice neither costs nor benefits, and thus will have no policy preference at all.” *Id.* at 30. A countervailing factor, which Arnold notes, is that various interest groups rate legislators on the basis of their votes, and then publicize these ratings. For example, at least seven organizations regularly rate members of Congress regarding their position on abortion related issues: NARAL Pro-Choice America, National Organization for Women, National Right to Life Committee, National Women’s Political Caucus, Planned Parenthood, Republican National Coalition for Life PAC, Susan B. Anthony List, and Women’s Campaign Forum. See Project Vote Smart, <http://votesmart.org/interest-groups> (accessed July 12, 2012). These ratings can potentially increase the salience of otherwise unnoticed legislation by making it a factor in a rating to which constituents pay attention. It seems unlikely, however, that any particular vote would have enough of an impact on a members’ rating to be a decisive factor in his or her decision making.

¹⁰⁷ See Stephen Ansolabehere & Shanto Iyengar, *Going Negative: How Political Ads Shrink and Polarize the Electorate* (1996); Emmet H. Buell, Jr. & Lee Sigelman, *Attack Politics: Negativity in Presidential Campaigns Since 1960* (2nd ed., 2009); John Geer, *In Defense of Negativity* 64-84, 111-35 (2006); Richard R. Lau & Gerald M. Pomper, *Negative Campaigning: An Analysis of U.S. Senate Elections* (2004); Darell M. West, *Air Wars: Television Advertising in Election Campaigns, 1952-2008*, at 45-73, 135-38 (2009). Observers disagree on whether or not the frequency and virulence of personal attacks is increasing, and whether such attacks are effective, but there is not disagreement that such attacks are a prominent feature of modern electoral campaigns.

¹⁰⁸ There is evidence to suggest that political polarization has increased in recent years, both in Congress, see Keith T Poole & Howard Rosenthal *Congress: A Political Economic History of Roll Call Voting* (1997); Sinclair, *supra* note [], at Keith T. Poole & Howard Rosenthal, *D-NOMINATE After 10 Years: A Comparative Update to Congress: A Political History of Roll Call Voting*, 26 *Leg. Stud. Q.* 5 (2001); Barbara Sinclair, *Unorthodox Lawmaking: New Legislative Processes in the U.S. Congress* (2007); Binder, *supra* note [], and among the public, see Edward G. Carmines & James A. Stimson, *Issue Evolution: Race and*

charges by being consistently moderate, but trying to do so by pointing out an individual vote that went in the other direction is unlikely to be an effective response.

Let us now assume, however that people are predominantly motivated by self-regarding concerns, that those concerns consistently translate into legislators' desires to maximize their chance of re-election, that their re-election is being contested, and that their votes on legislation will have strong effects on their chances of prevailing in those hard-fought contests. There is, nonetheless, an extensive policy space for virtually every bill that they consider. It consists of the bill's specific provisions, the actual legislative measures that will determine whether the bill, if enacted, will achieve its goals or serve the interests of the public. This is the real terra incognita of the policy space. It is simply invisible in virtually all of the account of the legislative process. Somehow, a bill appears and then the fight begins, the knives are drawn, the game is on, the wolves attack. All these vivid and engaging descriptions of the process function to suppress discussion of the way the bill is actually written because complex, verbal material is not produced on the battlefield or the playing field. It emerges from the age-old, virtually unalterable process of a person sitting at a desk, generally indoors, and using a stylus, a quill pen, a ballpoint pen, a typewriter or a laptop to record words in communicable form. Even detailed histories of specific legislation, like Redman's account of the National Health Service Corps¹⁰⁹ or the Charles and Barbara Whalen's account of the Civil Rights Act¹¹⁰ fail to describe this process.

the Transformation of American Politics (1989); Marc J. Heatherington, Resurgent Mass Partisanship: The Role of Elite Polarization, 95 *Am. Pol. Sci. Rev.* 619 (2001) (public polarization caused by polarization among the elite); James A. Stimson, *Public Opinion in America: Moods, Cycles, and Swings*, (2nd ed. 1999); James A. Stimson, *Tides of Consent: How Public Opinion Shapes American Politics* (2005). Even without this trend, however, the general policy orientations of two competing parties are likely to be fairly clear.

¹⁰⁹ Redman, *supra* note [].

¹¹⁰ Whalen & Whalen, *supra* note [].

This recondite and unexplored process of actually writing the legislation exists largely in the policy space. No matter how responsive legislators are to their constituents, no matter how completely they are motivated by the desire to be re-elected, the design of the bill will remain in the policy space because the voters align themselves in support or opposition on the basis of the bills general goals, not its particular provisions. Perhaps using the term “democracy” to describe our government misleads us into imagining the Athenian Assembly or a New England town meeting with the citizenry debating the content of particular enactments.¹¹¹ Modern politics is not so fine-grained, and the modern voter is not so heavily engaged. There is a good deal of evidence to suggest that voters base their votes on the personality of the candidates or a highly generalized impression of their political orientation, rather than on more specific assessment of their positions on particular issues, to say nothing of particular statutory provisions.¹¹²

Economists describe people’s refusal to learn about the details of their decisions as rational ignorance, a calculation that any marginal gain in the decision’s quality is not worth the expenditure of time required to obtain more information.¹¹³ Legislators’ and constituents’ lack of concern about the specifics of the legislation they support or oppose, however, is entirely

¹¹¹ For a more extensive discussion of this point, see Rubin, *supra* note [], at 110-43; Edward L. Rubin, *Getting Past Democracy*, 149 U. Penn. L. Rev. 711(2001).

¹¹² See Warren E. Miller & J. Merrill Shanks, *The New American Voter* 326-413 (1996) (voters base their decisions on the candidates’ general perceptions of the issues); Benjamin I. Page & Robert Y. Shapiro, *The Rational Public: Fifty Years of Trends in Americans’ Policy Preferences* (1992) (voters decisions are stable, long-term preferences on major issues); Donald R. Kinder, Mark D. Peters, Robert P. Abelson & Susan T. Fiske, *Presidential Prototypes*, 2 *Pol. Behav.* 315 (1980) (voters base their decisions on the personalities of the candidates); Theresa E. Levitan & Warren E. Miller, *Ideological Interpretations of Presidential Elections*, 73 *Am. Pol. Sci. Rev.* 751 (1979) (voters base their decisions on party affiliations)

¹¹³ Iis Birchler & Monica Büttler, *Information Economics* 233-41 (2007); Silvain Bromberger, *Rational Ignorance*, 74 *Synthese* 47 (1988). For applications to politics, see, e.g., Roger D. Congleton, *Rational Ignorance, Rational Voter Expectations and Public Policy: A Discrete Informational Foundation for the Fiscal Illusion*, 107 *Pub. Choice* 35 (2001); César Martinelli, *Rational Ignorance and Voting Behavior*, 35 *Int’l J. Game Theory* 315 (2007); Mancur Olson, *Rational Ignorance, Professional Research, and Politicians’ Dilemmas*, in William H. Robinson & Clay H. Wellborn eds., *Knowledge, Power and the Congress* 130 (1991). For applications to law, see, e.g., Shawn Bayern, *Rational Ignorance, Rational Closed Mindedness, and Modern Economic Formalism in Contract Law*, 97 *Cal. L. Rev.* 943 (2009); Mark A. Lemley, *Rational Ignorance at the Patent Office*, 95 *Nw. U. L. Rev.* 1495 (2001).

rational, whether ignorant or not.¹¹⁴ The reason lies in the adversarial nature of politics. Suppose, for example, a legislator who strongly favors environmental protection is sponsoring a bill to limit natural habitat destruction. It is likely that her opponent will oppose this legislative effort on the ground that it will be deleterious to the economy. In that common situation, environmentally oriented voters will support the legislator and the bill she is sponsoring, regardless of its particular provisions. What else can they do?¹¹⁵ Their indifference to the particular provisions of the bill does not depend on the level of knowledge they possess. It is true for the uneducated sentimentalist who doesn't want brown-eyed, furry animals to be killed, and equally true for the NRDC analyst, who almost certainly knows more about the bill than the legislators who are voting on it. Only a provision that undermines the effect of the bill in its entirety would induce either of these voters to abandon their support for the legislator. Thus, the bill's particular provisions – the way it was written by the person with the stylus, pen, typewriter or laptop -- are not governed by politics. They are located in the policy space, where the best way to achieve the bill's purposes can be considered.

The policy space defined by the bill's specific features is not inviolate, of course. To begin with, it can be invaded if the voting public is aware of the bill's provisions, in addition to its general goals, and feels strongly about them.¹¹⁶ The provisions of a bill can rise into public consciousness if the bill is extremely important and controversial, as was the case with the Affordable Care Act (ACA).¹¹⁷ At least four issues in the bill – the “public option,” the

¹¹⁴ See Page & Shapiro, *supra* note []. For evidence that voters are in fact very ignorant, see Larry M. Bartels, *Uninformed Votes: Information Effects in Presidential Elections*, 40 *Am. J. Pol. Sci.* 194 (1996).

¹¹⁵ See David S. Lee, Enrico Moretti & Matthew Butler, *Do Voters Affect or Elect Policies: Evidence from the U.S. House*, 119 *Q. J. Econ.* 807 (2004). The authors conclude that politicians cannot make credible commitments to moderate their views. Voters therefore must choose between opposing views, which function essentially as a pair of fixed positions, rather than being able to influence the views of those they vote for.

¹¹⁶ This is potentially true for any legislative provision; a political entrepreneur, either the legislator's opponent or a special interest group, for example, can try to defeat the legislator by pointing to some specific provision he sponsored or supported, as Douglas Arnold points out. Arnold, *supra* note [], at 28-31.

¹¹⁷ Pub. L. No. 111-148, 124 Stat. 119 (2010) (to be codified in scattered sections of the U.S. Code).

“individual mandate,” the extent to which benefits were provided for abortions, and the voluntary end-of-life consultations, or “death panels” became issues in the public debate.¹¹⁸ The sponsors ultimately decided to compromise by eliminating the public option and redrafting parts of the bill to clarify that it would not subsidize either abortion or euthanasia.¹¹⁹ Clearly, this was politics at work, and while the abortion and euthanasia objections could be dealt with by cosmetic changes, the elimination of the public option was a major alteration of the bill.¹²⁰

But the ACA was not merely the most controversial measure of its legislative session or the President’s administration. It was the most controversial of an entire historical era, the issue having been under active legislative consideration at least since the National Health Service Corps controversy in 1969-71 that Redman describes,¹²¹ and having been at the forefront of political debate for the two decades since Clinton’s election.¹²² Even so, the four provisions that became the subject of controversy represented only a small fraction of this gigantic bill’s provisions.¹²³ Most of the statute remained unknown to the general public, and even to many of the legislators.

¹¹⁸ Lawrence R. Jacobs & Theda Skocpol, *Health Care Reform and American Politics* (2010), see id. at 78-82 (public option); 84 (death panels); 90-91 (individual mandate); 118 (abortion). This massive statute included a number of other major issues that did not emerge into public consciousness, such as medical insurance reform, expansion of Medicare benefits, family eligibility for young adults, and increased coverage of wellness care.

¹¹⁹ Id. at 80-82, 118.

¹²⁰ The individual mandate, of course, remained in the bill and became the subject of a series of constitutional challenges, see, e.g., *Florida ex rel. Bondi v. U.S. Dep’t of Health & Human Servs.*, 780 F. Supp. 2d 1256 (N.D. Fla 2011), *aff’d in part and rev’d in part*, 648 F.3d 1235 (11th Cir. 2011); *Virginia ex rel. Cuccinelli v. Sebelius*, 728 F. Supp. 2d 768 (E.D. Va., 2010), *vacated*, 656 F.3d 253 (4th Cir. 2011). The ACA’s constitutionality was ultimately upheld, see *National Fed. Of Ind. Business v. Sebelius*, 567 U.S. ___ (2012). While the litigation is not directly relevant to this discussion (unless one wants to argue that the Court’s invalidation of a statute demonstrates that the statute was poorly designed), it indicates the controversial nature of the provision in question, particularly since many of the lawsuits were brought by elected officials (or officials appointed directly by elected officials) who could well have been responding to their constituencies.

¹²¹ Redman, *supra* note [], at 39-52 (political issues at the outset of the effort to enact the bill).

¹²² For an account of President Clinton’s effort to institute national health care, see Theda Skocpol, *Boomerang: Clinton’s Health Security Effort and the Turn against Government in U.S. Politics* (1996). See generally Carol Weissert & William G. Weisert, *Governing Health: The Politics of Health Policy*, 3rd ed. (2006).

¹²³ Moreover, two of the four issues that did feature in public discourse, the “death panels” and the abortion coverage, were not real issues, but debating points. Jacobs and Skocpol, admittedly advocates of reform but also careful scholars, refer to the death panel issue as a “ridiculous lie” about the contents of the bill, id. at 84. This is not to disparage the depth of the opposition, which was intense. See, e.g., *Repealing the Job-Killing Health Care Law Act*, H.R. 2, 112th Cong., 1st Sess. (2011) (bill passed by House of Representatives as soon as it has a Republican majority to repeal the ACA); *Virginia Health Care Freedom Act*, Va. Code Ann. § 38.2-3430.1:1 (2010) (state law precluding operation of the ACA); Robert J. Blendon & John M. Blensson, *Health*

By comparison, none of specific provisions in the second most important legislative enactment of the Obama administration, the Wall Street Reform Act (Dodd-Frank),¹²⁴ played a significant role in public debate. The creation of the Consumer Finance Protection Board surfaced into public awareness when the appointment of its first director became a human-interest story.¹²⁵ But people aligned themselves in support or opposition to the Act itself on the basis of their general attitude toward regulation, and they were right to do so. It seems unlikely that alteration of its provisions would have made the Act palatable to those who dislike federal regulation, nor would any alteration, other than the complete evisceration of the Act, have undermined the support of those who think such regulation crucial. Even for such a major, controversial piece of legislation, its design – the particular provisions that determined how it would affect its subject matter -- remained in the policy space.¹²⁶

III. Statutory Design in the Policy Space

A. The Current Methodology in Congress

Care in the 2010 Congressional Election, *New Eng. J. Med.* 363, Nov. 11, 2010 (Republican voters strongly opposed ACA). The point, rather, is that the opposition, as the foregoing examples indicate, was largely to the statute in its entirety, and the reference to particular provisions was often merely a rhetorical device, not a substantive objection, since two of the provisions which garnered public attention were not actually part of the statute. See Jacobs & Skocpol, *supra* note [], at 76-78.

¹²⁴ Pub. L. No. 111-203, 124 Stat. 1376 (2010) (to be codified in scattered sections of 12 U.S. Code). See Viral V. Acharya et al., *Regulating Wall Street: The Dodd-Frank Act and the New Architecture of Global Finance* 1-6 (2011)

¹²⁵ See Amy Bingham, *Obama Sidesteps Elizabeth Warren, Picks Richard Cordray to Lead Consumer Financial Protection Bureau*, ABC News, July 18, 2011, <http://abcnews.go.com/blogs/politics/2011/07/obama-sidesteps-elizabeth-warren-picks-richard-cordray-to-lead-consumer-financial-protection-bureau/> (accessed Aug. 5, 2012).

¹²⁶ The policy space can also be invaded by trade-offs and compromises regarding particular provisions of the bill in question. Sometimes these arrangements are purely political, as the classic image of the legislative process suggests. A member of Congress will agree to support a regulatory bill if a provision is added excluding an industry in the member's district from its coverage; the member thus increases her chance of re-election, while the sponsors secure an ally. The claim that a significant policy space exists for virtually every important bill that Congress enacts does not mean that there is some inviolate space that politics can never penetrate. To assert that because the policy space is permeable it does not exist is to commit a logical error, akin to asserting that since any given person can get sick, no one can possibly be healthy.

The current way in which legislation is drafted – the prevailing legislative methodology - ignores that fact that it is drafted largely in the policy space. It does so because the policy space is invisible; legislators do not recognize it and scholars have failed to draw their attention to it. Whether the legislators have misled the scholars or the scholars have misled the legislators is an interesting question, but it will not be considered here. For present purposes, the important point is the result, which is that current legislative methodology is envisioned largely as an adversarial process, a kind of domesticated battle. The planning and design of legislation simply does not appear in this account, any more than a treatise on military strategy or the process of designing a machine gun would appear in the description of a battlefield confrontation.

To demonstrate this, it is not necessary to go much further than *Schoolhouse Rock*¹²⁷ in describing the current method of drafting legislation.¹²⁸ The process begins, in nearly every account, when a Member of Congress introduces a bill in his or her session of the legislature. Any Member can introduce a bill; there is no constraint on this part of the process whatsoever.¹²⁹ Typically, the bill is introduced as a completed piece of legislation, ready for enactment and incorporation into the Federal Code.¹³⁰ It is then assigned to a committee on the basis of its

¹²⁷ *Schoolhouse Rock* was a series of educational shorts, generally musical, that ran on ABC from 1973-1986 and then briefly thereafter. <http://www.imdb.com/title/tt0069627> (accessed Aug. 15, 2012). “The Bill,” certainly one of the best-known episodes, can be accessed at <http://www.youtube.com/watch?v=H-eYBZFEzf8>.

¹²⁸ For more scholarly, or at least more sober accounts of the process, see Walter Oleszek, *Congressional Procedures and the Policy Process* Steven S. Smith, Jason M. Roberts & Ryan J. Vander Wielen, *The American Congress*, 7th ed., at 217-48 (2011); John V. Sullivan, *How Our Laws Are Made*, HR Doc. 110-49, 110th Cong, 1st Sess. (2007) (report of the House Parliamentarian); Tiefer, *supra* note [], at 32-39.

¹²⁹ See Oleszek, *supra* note [], at 93; Polsby, *supra* note [], at 138-39; Schneier & Gross, *supra* note [], at 94-95; Sinclair, *supra* note [], at 11, 43-44. The perfunctory description of this process given by Sinclair is particularly notable because her illuminating work, which will be discussed at a number of subsequent points, focuses on the many ways in which contemporary legislative processes diverge from the traditional model. Apparently, however, she did not discover any changes in the way that bills are introduced.

¹³⁰ The *Schoolhouse Rock* song begins with a bill, named “Bill,” depicted as a rolled up piece of paper with a face on its upper half and two little feet sticking out of its open bottom. It remains in this form throughout the whole process, retaining its basic structure until the much-desired designation “Law” is pinned onto it. In the song, Bill describes his birth as follows: “Some folks back home decided they wanted a law passed so they called their local Congressman and he said, ‘You’re right, there ought to be a law,’ and he sat down and wrote me out and introduced me to Congress and I became a bill.”

subject matter, usually determined by the implementing agency that the bill itself has named.¹³¹

Sometimes, the sponsors engage in political maneuvering to steer a bill into a more amenable committee.¹³² The committee, either by majority vote or, more commonly, by action of its chairperson, can kill the bill at this point by refusing to schedule hearings, and often does; in fact, this is the single most important filter, or veto gate, for legislative proposals.¹³³ Powerful sponsors, however, can generally force the committee chair to move forward with a bill, and the administration can nearly always do so.¹³⁴

Moving forward generally means that the committee holds hearings on the bill.¹³⁵

Hearings consist of testimony by witnesses and questioning by the Members of the committee or subcommittee to which the bill has been assigned.¹³⁶ Other Members of Congress who want to testify are always invited to do so, as are administration officials.¹³⁷ They are followed by witnesses whom the committee or subcommittee Members invite. Those most commonly invited are representatives of major interest groups, both special and public, but various others, such as ordinary people who might be helped or harmed by the bill, celebrities, and experts from the

¹³¹ The Speaker of the House and the Presiding Officer of the Senate are officially responsible for the referral of legislation to committees, but, as a practical matter, the referrals are made by the parliamentarian of each chamber. See Oleszek, *supra* note [], at 97-102; Sinclair, *supra* note [], at 11-12, 44; Tiefer, *supra* note [], at 111-13. The parliamentarian is a non-partisan official appointed by each chamber who carries out a variety of functions, including the eponymous one of advising the Speaker or Presiding Officer about parliamentary procedure. See Tiefer, 199-200; 503-16.

¹³² See Kelman, *supra* note [], at 48-49; David C. King, *Turf Wars: How Congressional Committees Claim Jurisdiction* (1997); David C. King, *The Nature of Congressional Committee Jurisdictions*, 89 *Am. Pol. Sci. Rev.* 48 (1995); Oleszek, *supra* note [], at 100-02; Polsby, *supra* note [], at 139-41; Schneier & Gross, *supra* note [], at 48-49; Tiefer, *supra* note [], at 113-18.

¹³³ See Deering & Smith, *supra* note [], at 2-20; Tim Groseclose & David C. King, *Little Theater: Committees in Congress*, in Weisberg & Patterson, *supra* note [], at 135, 137; Oleszek, *supra* note [], at 107-09; Tiefer, *supra* note [], at 137-40. In some cases, more often in the House than the Senate, the committee's power is exercised by its subcommittees, and the chair asserts his or her authority by staffing the subcommittees. See Deering & Smith, *supra* note [], at 150-62; Tiefer, *supra* note [], at 140-45. This makes the process more complex, of course, but does not affect its basic structure or the proposals suggested here.

¹³⁴ Oleszek, *supra* note [], at 96-97.

¹³⁵ In addition to hearings on legislation, the House and the Senate regularly hold oversight hearings of various kinds, and the Senate, of course, holds hearings on Presidential appointments. See Joel D. Aberbach, *Keeping a Watchful Eye: The Politics of Congressional Oversight* (1991); Laura Cohen Bell, *Warring Factions: Interest Groups, Money and the New Politics of Senate Confirmation* (2002); Lance Cole & Stanley M. Brand, *Congressional Investigations and Oversight: Case Studies and Analysis* (2010); Lee Epstein & Jeffrey A. Siegel, *Advice and Consent: The Politics of Judicial Appointments 87-118*(2007); Oleszek, *supra* note [], at 335-65 (oversight). These are not necessarily irrelevant to the legislative process, but since they do not relate to it directly, they will be ignored in the interest of simplicity.

¹³⁶ For general descriptions, see Oleszek, *supra* note [], at 111-17; Schneier & Gross, *supra* note [], at 160-75; Tiefer, *supra* note [], at 149-63. With increasing specialization, particularly in the House, hearings are held with increasing frequency by subcommittees.

¹³⁷ Polsby, *supra* note [], at 145.

academy might also be invited.¹³⁸ The witnesses typically file a written statement in advance, make an opening statement when testifying, and then respond to questions from the Members.¹³⁹ Those committee Members who disagree with the witness will tend to cross-examine, and are often quite skillful in this art.¹⁴⁰

At the conclusion of the hearing, the bill goes to markup, a session or series of sessions where committee Members and staff revise the language that has been introduced.¹⁴¹ This is usually the first time that the language of the bill is changed, and often the time where the most extensive changes are made. Generally speaking, the markup process is heavily driven by the language of the original bill, even if extensive changes are being made.¹⁴² In a typical markup session, the bill in question is read line-by-line and the discussion focuses on the specific language that is being read.¹⁴³ When there are multiple sets of hearings, or hearings on the same legislation over different Congressional sessions,¹⁴⁴ there will typically be multiple markups.¹⁴⁵

¹³⁸ Oleszek, *supra* note [], at 115; Polsby, *supra* note [], at 145-46.

¹³⁹ Schneier & Gross, *supra* note [], at 172

¹⁴⁰ Rubin, *supra* note [Truth-in-Lending], at 274-77; Schneier & Gross, *supra* note [], at 173-4.

¹⁴¹ See generally Oleszek, *supra* note [], at 117-23; Polsby, *supra* note [], at 146-48; Schneier & Gross, *supra* note [], at 175-80; Tiefer, *supra* note [], at 167-70.

¹⁴² A typical markup session consists of the committee or subcommittee chair, after offering some general comments reading the bill line by line and entertaining comments and suggestions. Oleszek, *supra* note [], at 118; Polsby, *supra* note [], at 146-47; Schneier & Gross, *supra* note [], at 176. Schneier & Gross describe the process as follows: describe the typical markup session as follows:

Prompted by spur-of-the moment ideas, or carefully briefed by staffers or lobbyists, members suggest the striking of several lines, the change of key words or the substitution of an entirely new section for the old. On controversial bills, lobbyists crowd the committee room and adjacent corridors to offer last-minute hand signals or winks, or to pass suggested drafts to friendly members.

Id. In other words, even if interested parties are strongly contesting the bill's provisions, their objections tend to be channeled by the original bill's language and structure. Schneier and Gross describe this process as a "valuable intellectual discipline," *id.*, but it might also be described as a dysfunctional intellectual strait-jacket.

¹⁴³ If there are multiple versions of the bill under consideration by the committee or subcommittee, the chair can often exercise a powerful effect on the outcome by choosing which version will be the "mark," or "vehicle," that is, will be the subject of consideration. Tiefer, *supra* note [], at 167-68. This illustrates the inordinate influence that the particular language of the original proposal can wield.

¹⁴⁴ Because there is a new House every two years, a new bill must be introduced if the consideration of proposed legislation is carried over to a new session.

¹⁴⁵ On major legislation, it is possible, particularly in the House, that a subcommittee will markup the bill and then the full committee will repeat the process. See Tiefer, *supra* note [], at 169

Once the bill has gone through markup, the committee or subcommittee will vote on it, and if they vote favorably, it will go to the floor of the chamber. There, the bill will be debated and amendments will often be proposed, either to improve the bill, to weaken the bill, to expand its group of supporters, to contract its group of supporters, or for some other strategic purpose.¹⁴⁶ The entire process must of course be repeated in the other chamber,¹⁴⁷ although there is sometimes an agreement that one of the chambers will play a leading role. If the two chambers have passed different versions of the bill, as is quite common, particularly when there are floor amendments, the bill must be referred to a House-Senate conference committee, which establishes a single text.¹⁴⁸ The natural assumption is that the conference committee provisions will be located in the middle ground between the House and Senate version, but “middle” is more difficult to define for language than for numbers, and recent conference committees have been exercising a considerable amount of initiative. In fact, as Barbara Sinclair observes, the entire legislative process has been heavily varied and altered during the past three decades, perhaps as a result of Congress’ increasing polarization.¹⁴⁹

B. The Concept of Public Policy Formation

¹⁴⁶ See Oleszek, *supra* note [], at 176-210, 248-88; Polsby, *supra* note [], at 152-55; Schneier & Gross, *supra* note [], at 182-201; Sinclair, *supra* note [], at 35-42, 61-72; Tiefer, *supra* note [], at 339-462, 623-90. For a discussion of the quality of the debate on the House and Senate floor, see Mucciaroni & Quirk, *supra* note [].

¹⁴⁷ A major difference between the House and the Senate is that the House generally considers legislation on the basis of a rule passed by the Rules Committee, see Oleszek *supra* note [], at 143-62; Bruce Oppenheimer, *The Rules Committee: The House Traffic Cop*, in 2 *Encyclopedia of the American Legislative System* (Joel Silbey, ed., 1994), while the Senate considers legislation by unanimous consent, the pragmatic alternative to the official motion to proceed. See Oleszek, *supra* note [], at 232-44; Tiefer, *supra* note [] at 563-84. One of the major ways in which the standard legislative procedure has given way to “unorthodox lawmaking,” in Barbara Sinclair’s terms, see Sinclair, *supra* note [], is the proliferation of special rules, see *id.* at 25-32. The primary purpose of these special rules, however, is to “make it easier for the majority party to advance its legislative goals,” *id.* at 42. Sinclair adds: “The leadership now has more flexibility to shape the legislative process to suit the particular legislation at issue.” This would appear to make the design of legislation at the initial stage, that is, the stage at which it is introduced or marked up in committee, even more important than it was before.

¹⁴⁸ See Oleszek, *supra* note [], at 294-326; Polsby, *supra* note [], at 155-57; Schneier & Gross, *supra* note [], at 203-11; Tiefer, *supra* note [], at 767-848

¹⁴⁹ See Sinclair, *supra* note []. These changes are significant, but since they involve an even less systematic methodology than the standard model, and certainly do not represent any movement in the direction of the recommendations given below, they can be treated as additional reasons why those recommendations would be beneficial.

If one categorizes this process as “how a bill becomes a law,” the way Schoolhouse Rock does, then it seems to make sense. The proposal is introduced, the Members of Congress reach agreement on some version of it, and it then goes to the President for signature. But if one categorizes it as the way legislation, or more precisely public policy, is designed, it is hard to imagine anything that would diverge more widely from commonly accepted practice.¹⁵⁰ The components of an optimal public policymaking process are well known and generally agreed upon. First, the decision maker should define the problem to be solved. The next step is to generate a range of possible alternatives that might potentially resolve the problem. Each alternative is then assessed for its potential effectiveness on the basis of the available information. Then the decision maker chooses the most promising alternative; the more information and analysis that can be brought to bear on the decision, the more likely it will be that the most effective alternative will be selected.¹⁵¹ Once the choice is made, it must be implemented, typically by someone other than the policy maker.¹⁵² The policy maker’s post-implementation role is to evaluate the result, and if necessary, revise the policy or begin the design process anew.¹⁵³

There is, of course, an extensive literature about each step in the process, but at this level of generality, the main controversy is not about the components of optimal policy making but about whether that process exceeds the capacities of most real world decision makers. Perhaps the most famous critique is Charles Lindblom’s claim that policy makers have neither time nor

¹⁵⁰ See Linde, *supra* note [], at 227: “An obligation that lawmakers design and evaluate every law as a means to an end beyond itself would demand of policy-making the rational procedures of policy implementation.”

¹⁵¹ For general descriptions of the policy process, see Bardach, *supra* note [], at 1-57; Thomas A. Birkland, *An Introduction to the Policy Process: Theories, Concepts, and Models of Public Policy Making* 125-27, 157-80 (2005); John Friedman, *Planning in the Public Domain: From Knowledge to Action* 137-56 (1987); Stokey & Zeckhauser, *supra* note [], at 5-6; Deborah Stone, *Policy Paradox: The Art of Political Decision Making* 232-42 (rev. ed., 2002).

¹⁵² Eugene Bardach, *The Implementation Game: What Happens After a Bill Becomes a Law* (1977); Birkland, *supra* note [], at 181-97; Michael Hill & Peter Hupe, *Implementing Public Policy* (2nd ed. 2009); J. Pressman & Aaron Wildavsky, *Implementation: How Great Expectation in Washington Are Dashed in Oakland* (3rd ed., 1984); Stone, *supra* note [], at 265-375.

¹⁵³ See Sparrow, *supra* note [], at 281-314; Stokey & Zeckhauser, *supra* note [], at 134-58.

resources to carry out this process in most situations, and “muddle through” instead.¹⁵⁴ That is, they institute incremental changes to existing policy on the basis of a limited amount of information.¹⁵⁵ This critique is related to Herbert Simon’s notion of bounded rationality.¹⁵⁶ According to Simon, most decision makers lack the time, resources and analytic capacity to make a fully rational decision. Therefore, instead of maximizing, they “satisfice,” settling for a decision making process that is less than optimal but lies within their present capabilities.¹⁵⁷

In assessing the legislative design process in Congress, the caveats and cautions that Lindblom and Simon have advanced must be taken seriously. But there is certainly some value to considering the optimal process for public policy making in this context. The crucial point, as established in the preceding section, is that legislation is largely designed in the policy space. It follows that one way to make legislation more effective is to model this process on our idea of optimal public policy making.¹⁵⁸ Thus, Congress should define the problem, generate alternatives, evaluate at least the most promising alternatives, and reach a decision on the basis of that evaluation. From the existing accounts of the legislative process, we simply do not know whether this protocol has been followed because, as discussed above, accounts of legislation in

¹⁵⁴ Lindblom, *supra* note []; See Braybrooke & Lindblom, *supra* note []; Charles E. Lindblom, *The Intelligence of Democracy* (1965); Charles E. Lindblom, *Still Muddling, Not Yet Through*, 39 *Pub. Admin. Rev.* 517 (1979). Lindblom is essentially contrasting incremental decision making with synoptic decision making, which, he argues does not work because of its excessive information requirements. See Charles E. Lindblom, *Politics and Markets* (1977) (comparative analysis of market and centrally planned regimes). It is possible that his cautions are most directly relevant to the problem definition stage, rather than the alternative consideration stage, of the policy process, and that his basic argument is against over-ambitious efforts to transform society. His proposed solution, which is to divide the decision among smaller, autonomous decision makers, actually seems to fit the institutional structure of Congress fairly well, which divides general programs (e.g., the New Deal, the Great Society) into topic-specific bills considered by separate, specialized committees. But it also suggests variations on the standard policy making model within each committee, see note [], *infra*.

¹⁵⁵ See Kingdon, *supra* note [], at 77-83, which argues that American public policy making is characterized by this muddling, or non-rational approach, but that it is spasmodic, rather than incremental.

¹⁵⁶ Herbert Simon, *Administrative Behavior* 88, 118-22 (4th ed., 1997). Simon’s argument is that people intend to maximize their personal welfare, just as classical economic theory supposes, but that they lack the “global omniscience,” *id.* at 88, that would enable them to do so. According to Simon, this brings questions of psychology back into the study of organizations, that is, it precludes us from building an organizational theory on the basis of economic analysis. For an application of this concept to legal doctrine, see Melvin A. Eisenberg, *The Limits of Cognition and the Limits of Contract*, 47 *Stan. L. Rev.* 211 (1995).

¹⁵⁷ *Id.* at 119: “Whereas economic man supposedly maximizes – selects the best alternative from those available to him – his cousin, the administrator, satisfices – looks for the course of action that is satisfactory, or ‘good enough.’”

¹⁵⁸ For the jurisprudential implications of treating legislation as a policy making process, see Rubin, *supra* note [Camelot], at 191-226.

general, and of the history of particular laws, simply ignore the process by which the bill was originally written. More importantly, most of the legislators simply do not know whether the policy making protocol has been followed; at the start of the process, they are presented with a bill drafted in completed form. Perhaps the sponsors know, and perhaps they do not, depending on who actually wrote the bill.

C. Problems with the Existing Methodology from the Policy Making Perspective

Thus, the policy making process in Congress begins at the end of the decision making sequence that is widely recognized in our society as the most promising way to make public policy. This means that Congress has effectively opted out of this process and delegated the crucial decision making role to other parties of indeterminate identity.¹⁵⁹ Our elected representatives do not define the problem, they do not generate the alternatives, they do not evaluate the alternatives and they do not choose the most promising alternative. Rather, they begin their process of statutory design by considering the alternative that someone else has chosen.

To be sure, very few important bills go through Congress without major changes. As described above, there are at least three stages in the process where the language of the bill can

¹⁵⁹ The extent to which Congress delegates authority to administrative agencies has been a matter of concern to some observers. See, e.g., Theodore Lowi, *The End of Liberalism: The Second Republic of the United States* 92-126 (2nd ed., 1979); David Schoenbrod, *Power Without Responsibility: How Congress Abuses the People Through Delegation* (1995); Gary Lawson, *The Rise and Rise of the Administrative State*, 107 *Harv. L. Rev.* 1231 (1994). But with the possible exception of the National Industrial Recovery Act, which the Supreme Court struck down because it delegated too much authority to private parties, see *A.L.A. Schechter Poultry Corp. v. U.S.*, 295 U.S. 495 (1935), federal courts have never been persuaded by this argument. Its legal rationale is thin, and its extreme pragmatic difficulties suggest that it is simply an expression of distaste for modern administrative governance. See Mashaw, *supra* note [Prodelegation]; James Rossi & Mark Seidenfeld, *The False Promise of the "New" Non-Delegation Doctrine*, 75 *Notre Dame L. Rev.* 1 (2000). What is notable in the present context is that delegation of implementation authority to administrative agencies is much less serious, in terms of Congress' role and responsibility, than the delegation of drafting authority than the present methodology involves. When Congress delegates implementation authority, it is simply exercising the powers assigned to it, since it is supposed to rely on the executive for this purpose. See Edward Rubin, *Law and Legislation in the Administrative State*, 89 *Colum. L. Rev.* 369, 387-97 (1989). But when Congress delegates drafting authority to unidentified outsiders, it abandons its most essential function. Moreover, delegations of implementation authority emerge from Congress' affirmative decision to either give the agency authority or to proceed with a vaguely worded bill. But delegations of drafting authority seem to occur by inadvertence. Congress never asserts that it does not want to design its own bills; it simply adopts a legislative methodology ensuring that result.

be extensively revised. In chronological order, and probably descending order in terms of the number and extent of revisions, they are the markup sessions, the floor debate and the conference committee.¹⁶⁰ The problem is that, at each of these stages including the markup, the legislators and their staffs are working with an existing proposal that will largely define the scope of their deliberations. Their revisions are thus not statutory design but retro-design, attempts to modify or adjust a text that has already been drafted in final statutory form.

The disadvantages of limiting the design process in this manner are readily apparent. First, beginning with an existing bill obscures the nature of the problem.¹⁶¹ Instead of thinking about the way to address the problem that the Members, and the public, are genuinely concerned about, the legislators have placed themselves in the position of considering Senator X's bill. Even if they can separate their reactions to the bill from their personal relationship to Senator X, which will be difficult, and from their political relationship to Senator X's party or faction, which will be nearly impossible,¹⁶² they will have difficulty separating their grasp of the problem to be solved from the solution to the problem that the bill proposes. In other words, beginning with a definitive proposal conceals the underlying issue that the proposal addresses behind a screen of specificity. The true scope of the problem, its various ramifications, and its relationship to other problems will be difficult to consider and may be even difficult to discern.

¹⁶⁰ It is interesting to compare this list with the more familiar list of veto gates, or stages in the process where the bill can be defeated in its entirety. The main ones are the committee chair's decision whether to hold hearings, the committee vote on the marked up bill, the vote on the chamber floor and, of course, the President's signature. The reason why only one of the veto gates, the floor vote, overlaps with the revision periods, is that a veto is a categorical rejection, not a design process. If the bill fails, of course, we do not need to worry about whether it was well designed.

¹⁶¹ Linde, *supra* note [], at 230-34, makes essentially this point in arguing that statutes should state their purposes explicitly and clearly.

¹⁶² See Oleszek, *supra* note [], at 108-11, 122-23; Schneier & Gross, *supra* note [], at 148-51; John H. Aldrich & David W. Rhode, *Congressional Committees in a Continuing Partisan Era*, in Dodd & Oppenheimer, *supra* note [], at 217. The increasing polarization of Congress, see note [], *supra* (citing sources) naturally amplifies this effect.

Second, beginning with a fully drafted bill will almost inevitably limit the range of alternatives that Congress can consider in solving the problem.¹⁶³ The particular alternative that the drafter, whoever that may be, has selected will constitute the proposal, the essence of the bill. Reactions to the bill will naturally center on that proposal. This necessarily empowers the opponents, since every proposal will have weak points, and undermines those who agree with the need to solve the problem but might have preferred a different solution for one reason or another. More importantly, it increases the difficulty of conceiving and developing alternative solutions to the problem. In part, this is because suggested alternatives are likely to be seen by the sponsors as antagonistic to the sponsor's basic effort, rather than suggestions for achieving the same result by different means. Even more seriously, whatever undefined process resulted in choosing the alternative embodied in the bill cannot be duplicated in the process by which the bill is considered. Markup comes closest, but its very name, as well as its underlying concept, suggests revisions or adjustments of an existing bill, not consideration of distinctly different approaches.

Third, beginning with a completed bill restricts the range of empirical information that can be brought to bear on evaluating the solution it embodies. Members of Congress pay attention to such information,¹⁶⁴ but they are pragmatically oriented government officials, not theoretical researchers, and their use of information tends to be instrumental and pragmatic.¹⁶⁵

Confronted with a bill that specifies a particular solution, they will naturally seek information

¹⁶³ According to a leading study, economic elites exercise control over public policy by limiting the range of alternatives that are considered, rather than by dictating the result. Peter Bachrach & Morton S. Baratz, *Decisions and Nondecisions: An Analytic Framework*, 57 *Am. Pol. Sci. Rev.* 641 (1963). For a more general exploration, see Peter Bachrach & Morton S. Baratz, *Power and Poverty: Theory and Practice* (1970). The conclusion that can be drawn from Bachrach and Baratz's work is that allowing special interest groups to introduce legislation, via a single sympathetic legislator, that is in final statutory form and thus states only one possible alternative, is a recipe for public policy disaster.

¹⁶⁴ See Mucciaroni & Quirk, *supra* note [], at 161 ("Legislators rely most heavily on claims that have considerable empirical support. For claims at a given level of political force, they use the more sustainable, empirically supported claims more often."); Oleszek, *supra* note [], at 107 ("committee members and their staffs have a high degree of expertise on the subjects within their jurisdiction"); Tiefer, *supra* note [], at 156 (one reason "Congress attaches great importance to the testimony of executive branch witnesses" is that they "may have the most information")

¹⁶⁵ See Mucciaroni & Quirk, *supra* note [], at 156 (legislators prefer to rely on claims that reflect common understandings); Allen Schick, *Informed Legislation: Policy Research Versus Ordinary Knowledge*, in Robinson & Wellborn, *supra* note [], at 108-15 (members of Congress take policy research seriously, but will act on it only when it agrees with ordinary knowledge)

relevant to that solution and will tend to ignore or undervalue information that might lead to different, currently unidentified or undeveloped alternatives.¹⁶⁶ A hearing witness or other informant who attempted to introduce evidence indicating that another alternative was superior to the one embodied in the bill might well be ignored on grounds that the suggested evidence is not relevant.

Fourth, by casting the major opportunity to revise the bill as a markup of an existing draft in statutory language, the legislators and their staffs are likely to confuse details with basic substance. A poorly worded provision may attract as much criticism as a poorly designed one, or a minor provision that is clearly defective may draw more consideration than an enormously important one that suffers from more subtle flaws. More generally, revising a bill drafted in final statutory form demands that any change must be cast, almost from the outset, in final statutory form as well. The lapidary language that the revision demands inevitably becomes a major focus of the effort. Ideas, particularly ideas that are promising but still preliminary, are likely to be distorted or debilitated by linguistic necessity or rejected outright as insufficiently well formulated.

Beyond these specific and readily identified disadvantages of beginning the legislative design process with a drafted bill, there are several other more general, atmospheric ones that may be equally inimical to good public policy making. Even within the policy space, disagreements about the best way to design the bill in question are likely to be common; to the extent that political considerations penetrate the policy space, further disagreements will arise. If the process begins with a fully drafted bill, each disagreement needs to be resolved in final,

¹⁶⁶ See Mucciaroni & Quirk, *supra* note [], at 185. Sinclair reports that committee consideration in the House, where members once strived to be non-partisan, have become increasingly partisan in recent years, see Sinclair, *supra* note [], at 16-17. Under these circumstances, starting with a fully drafted bill will have a still more distorting effect on information gathering, since it will be apparent from the outset whether a given datum supports or undercuts the solution embodied in the bill.

statutory form before the process can proceed. The result is that the bill becomes encumbered with specific compromises that are strategically difficult to reconsider or undo. Once the Members and their staffs have hammered out a position that is acceptable to both sides, they are not likely to be amenable to someone, particularly a staff member, who comes along with a different approach. By being prematurely committed to final statutory form, the bill acquires a rigidity that precludes the open-minded evaluation and re-evaluation that is crucial to effective policy design. It is as if the bill is moving through a dense, resistant medium, and becomes increasingly indurated and encrusted in its effort to advance.

Even more generally, beginning with a drafted bill, and thereby delegating the crucial design questions to some external source, will subtly transform Congress from a policy maker to a debating society. In effect, the Members are surrendering to the excessively cynical, disparaging image of themselves that both scholars and the public have created. Alternatively, it might be said that Congress, the primary policy maker in a presidential democracy like our own, has relinquished its prerogatives and acquiesced to the subordinate position of legislatures in parliamentary democracies, whose role is often limited to debating and then enacting government bills.¹⁶⁷ Congress's leading position in the policy process, its authority to define the prevailing problems in our society and devise solutions to them, then declines into the more delimited power of revision. Of course, Congress also retains the power to reject. What it loses, for lack of an effective legislative methodology, is the creative role that it has been granted by the Constitution.

¹⁶⁷ See Jennings, *supra* note [], at 183-246; Strøm, Müller & Bergman, *supra* note []; Malcolmson & Myers, *supra* note [], at 116-29; Diana Woodhouse, *Ministers and Parliament: Accountability in Theory and Practice* 3-41 (1994); Philip Norton, *The House of Commons, 1911-1949*, in Clyve Jones, ed., *A Short History of Parliament: England, Great Britain, The United Kingdom, Ireland and Scotland* (2009); Paul Seaward, *The House of Commons Since 1949*, in Jones, *supra*.

Another serious defect in the prevailing methodology, when viewed as a policymaking process, is its unsystematic, un-analytic treatment of empirical evidence. Information does enter the process; in fact, it is fair to say that it floods in.¹⁶⁸ Contrary to the popular image, lobbyists rarely threaten legislators with the end of their political career if they does not vote the desired way; rather, they devote most of their efforts to providing information to the committee and the legislators generally.¹⁶⁹ Hearings often feature an impressive array of witness, with each witness free to append any information she deems relevant to her written statement or introduce such information in the course of her testimony.¹⁷⁰ Staff members spend a substantial amount of time gathering information as well, and the Members are free to introduce further information during the floor debate.

There at least two problems with this approach to information, both the result of Congress' failure to focus on the issue of legislative design and conceive it as a form of policy making. First, the information that inundates Congress for a given bill, a virtual tsunami if the bill is an important one, is not organized in any systematic way, but presents itself as a roiling, undifferentiated mass.¹⁷¹ The policy making process, in contrast, tends to bundle information into manageable batches. Certain types of information, such as surveys or theoretical analyses, are useful for defining the problem. Other types, often of a more speculative sort, will be relevant to generating alternative solutions. There will be a particular body of information

¹⁶⁸ See Schick, supra note [], at 103 (flow of information to Congress has “been spurred by the entrance of thousands of professional researchers into government agencies, think tanks, and many other organizations that produce policy research”); Schneier & Gross, supra note [], at 73-93

¹⁶⁹ Frank R. Baumgartner, Jeffrey M. Berry, Marie Hojnacki, David C. Kimball & Beth L. Leech, *Lobbying and Policy Change: Who Wins, Who Loses, and Why* (2009); Bertram J. Levine, *The Art of Lobbying: Building Trust and Selling Policy* (2008); Kingdon, supra note [], at 125-27; Schneier & Gross, supra note [], at 84-89; Kersch supra note [].

¹⁷⁰ Oleszek, supra note [], at 111-17; Schneier & Gross, supra note [], at 172-73; Tiefer, supra note [], at 155-56. Prior written testimony is required by the Legislative Reorganization Act of 1946, ch. 753, 60 Stat. 812. But see Roger Davidson, *The Legislative Reorganization Act of 1946*, 15 *Legis. Stud. Q.* 357 (1990) (effort to reform committee procedure undermined by the growth of subcommittees).

¹⁷¹ Kingdon, supra note [], at 90-105, 117-31. This is Kingdon's “garbage can,” see note [] supra. Kingdon presents the chaotic state of information acquisition in Congress as an inherent feature of the process. This is undoubtedly true to some extent, but he fails to demonstrate that the process cannot be improved, i.e., that information relevant to legislation cannot be gathered and organized in a more effective manner.

relevant to the evaluation of each solution, sometimes using empirical data, or at other times relying on models or projections.¹⁷² As the range of alternatives is narrowed down, the type of additional information that is most relevant will become apparent. Because Congress adopts a fairly passive role toward information, allowing anyone to introduce anything in its misguided effort to seem open-minded, it cannot benefit from any of these organizing strategies.

The second problem is that the information Congress receives tends to be assimilated to the debate or battle image that legislators have allowed to dominate their deliberations. It is treated as support for one side or the other, ways of buttressing or undermining a particular argument. By following this familiar, age-old strategy, Congress has denied itself the intellectual machinery of the twentieth century. There is no stage in the process when the scientific or social science techniques that represent the best means we have for grappling with the real world can be brought to bear on proposed legislation.¹⁷³ Hearings, for example, test the quality of the information being presented to Congress through the technique of cross-examination.¹⁷⁴ Obviously borrowed from judicial procedure, and heavily dependent on the argumentative skills of the questioner and witness, it is a singularly old-fashioned and inadequate means of evaluating proposed solutions to complex social problems. Floor debate trades

¹⁷² See Bardach, *supra* note [], at 65-93 (acquisition and use of knowledge, generally); Friedman, *supra* note [], at 40-44, 181-223 (problems of knowledge acquisition generally, and social learning as a specific planning strategy); Malcolm Sparrow, *Imposing Duties: Government's Changing Approach to Compliance* 101-30 (1994) (types of information support needed for various form of problem solving (1994); Sparrow, *supra* note [], at 255-78 (use of information in risk analysis); Stokey & Zeckhauser, *supra* note [], at 219-29 (use of information in decision analysis). Of course, this same pragmatic approach to data may result in its being manipulated, or interpreted in tendentious rather than productive ways, see Stone, *supra* note [], at 163-87. That occurs in the present-day legislative process as well, however; when the relevance and use of information is more highly specified, as it would be with a more policy-oriented approach, the way the data is being used becomes easier to understand and assess.

¹⁷³ On the methodology of social science generally, see John Gerring, *Social Science Methodology: A Unified Framework* (2nd ed., 2012); Gary Goertz, *Social Science Concepts: A User's Guide* (2006). For a more general discussion of the underlying epistemology, see Patrick Baert, *Philosophy of the Social Sciences: Toward Pragmatism* (2005)

¹⁷⁴ Rubin, *supra* note [Truth-in-Lending], at 274-77; Schneier & Gross, *supra* note [], at 83-84. The heavy reliance on hearings tends to validate anecdotal accounts and vivid examples, rather than general patterns. The style of the hearings places enormous weight on the comportment and forensic skill of the witness, see Tiefer, *supra* note [], at 149

judicial procedure for political oratory, which is equally defective as a means of evaluating the mass of information that has been presented.¹⁷⁵

IV. Recommendations for a New Legislative Methodology

A. Criteria for a New Methodology

Congress and other American legislatures can do better. As the primary policy makers for their jurisdictions, they need to develop and employ a methodology for designing legislation that will increase the likelihood that the legislation they produce will be effective, that it will achieve its stated purposes and benefit the people whom they serve. There is no reason why they should not be able to do so. Most of the process of legislative design occurs in the policy space that was described above. It is a space into which political concerns and the self-interest of the legislators in being re-elected only intermittently intrude. The fact this space is not inviolate, like the fact that executive policy makers are not always capable of following the optimal policy making procedure, is no reason not to use the best methodology that we can devise. That methodology will not always prevail, but all human aspirations sometimes founder on the complexities of circumstance. It would thus be a mistake to be overly optimistic, but it is a more serious mistake not to try at all.

¹⁷⁵ See Mucciaroni & Quirk, *supra* note []. The authors conclusion is that “[s]evere partisan and ideological conflict generally reduces information-value. Debate is more informative when there is a significant degree of bipartisan support for the proposal.” *Id.* at 187 (emphasis omitted). In general, the authors find that some useful information is conveyed in the debates, and some respectable analysis of the empirical information is carried out. Thus, as previously noted, their conclusion is not that Members of Congress reject the value of information, or are unwilling to engage in serious discussion about it. Rather, they find that in the setting that they studied, floor debates, the use of information often consists of “a stream of half-truths, exaggerations, selective use of fact and, in a few instances, outright falsehoods.” *Id.* at 200-01.

Of course, members of a legislature will disagree about what is good for the country. Legislatures are structured to debate those issues and then resolve them, not by reaching consensus, but by majority vote.¹⁷⁶ The minimum expectation for effective legislation, therefore, is that it will achieve the goals that the enacting majority of legislators have in mind when voting for the bill in question. It is possible, following a strictly pluralist theory of democracy, that there is no other definition of the public good.¹⁷⁷ In that case, we certainly want the legislation to achieve the goals of that the majority of its elected members favor at any given time.

It can also be argued, from a critical perspective, that there is an independent conception of the public good to which the majority does not necessarily adhere.¹⁷⁸ But that possibility does not counsel the critical observer to favor an ineffective legislative methodology. To do so would be to assume that the random consequences that an ineffective methodology produces are preferable to allowing one's opponents to achieve their goals. The first problem with this view is that it affects one's own side as well. Once the right people, from the critical observer's point of view, get into power, they will also be encumbered by the defective methodology that they inflicted on their opponents. The second problem in using ineffectiveness to frustrate one's

¹⁷⁶ Legislatures that decide by unanimity, rather than consensus, are based on the idea that this gap can always be resolved by argument. That is a politically immature position, a vain hope that real world policy disagreements can be resolved by reason. It generally leads to legislative impotence, as in the case of the Articles of Confederation Congress, see Merrill Jensen, *The New Nation: A History of the United States During the Confederation, 1781-1789* (1981); Fiona McGillivray, *Trading Free and Opening Markets*, in Fiona McGillivray et al. *International Trade and Political Institutions: Instituting Trade in the Long Nineteenth Century 80-95* (2001) (problems regarding trade relations); Jack Rakove, *Original Meanings: Politics and Ideas in the Making of the Constitution 46-48, 167-68* (1996) or the pre-Partition Polish Sejm, see Adam Zamoyski, *The Polish Way 206-21* (1997).

¹⁷⁷ This is at least arguably the position taken by Madison, and thus has a fair claim to be the theory behind our constitutional regime. *Federalist No. 10: The Same Subject Continued* (Madison), in James Madison, Alexander Hamilton & John Jay, *The Federalist Papers 122-28* (Isaac Kramnick, ed., 1987). See Robert Dahl, *A Preface to Democratic Theory 4-33* (1956). For related works, see Paul Sniderman, Joseph F. Fletcher, Peter H. Russell & Philip E. Tetlock, *The Clash of Rights: Liberty, Equality, and Legitimacy in Pluralist Democracy* (1996); David B. Truman, *The Governmental Process* (1951)

¹⁷⁸ For arguments that democracy can aspire to achieving a critically defined common good, rather than merely a resolution of disagreement, see Thomas Christiano, *The Constitution of Equality: Democratic Authority and its Limits* (2008); Kelman, *supra* note [], at 207-85; Alain Touraine, *What is Democracy* (David Macey, trans., 1997); Donald Wittman, *The Myth of Democratic Failure: Why Political Institutions are Efficient* (1995)

opponents is that it counsels a malicious attitude that can only undermine the stability of a democratic system. Such systems limit the damage that one's opponents can inflict by means of regular electoral procedures and independently enforced human rights that protect all members of the society,¹⁷⁹ not by means of a defective legislative methodology.

The third problem with using legislative ineffectiveness to hobble one's opponents is that it conflicts with the reality of a functioning democracy as well as democratic theory. In the real world, as Robert Dahl pointed out, a democratic government simply cannot exist without some area of consensus about the public good.¹⁸⁰ Most Americans, for example, want the economy to prosper and the environment to be healthy, even if they disagree about the relative importance of these goals and the best means for achieving them. This suggests that an effective legislative methodology is more likely to bring the legislation that the majority produces closer to the concept of the public good than randomly ineffective legislation. It allows, moreover, for policy-based compromises that would decrease the disadvantages of the opponent's legislation from the critical perspective, while still enabling them to achieve their goals.¹⁸¹ Thus, a non-partisan methodology that improved the ineffectiveness of legislation would be desirable, even if one does not adopt a pluralist conception of the public good.

B. A Proposed Methodology for Legislation

1. Begin with a Definition of the Problem

¹⁷⁹ Jürgen Habermas, *Between Facts and Norms: Contributions to a Discourse Theory of Law and Democracy* (William Rehg, trans., (1996) (procedures and rights enable members of a democratic society to resolve disagreements by communicative action – speech aimed at understand – rather than strategic behavior).

¹⁸⁰ Robert Dahl, *Dilemmas of Pluralist Democracy: Autonomy vs. Control* 138-65 (1982). See also Ernest Barker, *Reflections on Government* (1958) (focusing on British democracy); John Rawls, *Political Liberalism* (1993) (a stable society requires an overlapping consensus regarding its basic structures).

¹⁸¹ A society where people are primarily motivated by the desire to frustrate their opponents, rather than achieve their own goals, is one that has essentially ceased to function.

The considerations in the preceding section suggest some basic principles for a more effective legislative strategy. The first proposal is that the process of enacting legislation of any significance should never begin with a completed bill. Rather, it should begin with a statement of the problem to be solved.¹⁸² This statement should be written in expository language, not in statutory language, and should never be more than a few thousand words in length. The only operational provision it should include is the designation of the agency that is envisioned as implementing the bill once it is enacted.

Requiring that legislation be initiated by a problem statement still allows for a considerable amount of variability in the process of statutory design. Members of Congress can derive the problem statement from a wide variety of sources,¹⁸³ introduce broad statements or narrow ones, and act for either public oriented or strategic reasons.¹⁸⁴ Moreover, the way the problem is phrased might well exercise a significant effect on whatever legislation ultimately emerges from the process, as studies of agenda control suggest.¹⁸⁵ Thus, the requirement does not disable sponsoring legislators from exerting a considerable amount of influence over the

¹⁸² In noting that there are no constraints on the introduction of bills by members of Congress, Walter Oleszek adds: "Various assumptions are associated with the introduction of many bills, such as a problem exists and action is required by the national government to address it rather than leaving the matter to the states or the private sector to resolve." Oleszek, *supra* note [], at 93. The purpose of the proposal is to bring these rather important assumptions into the open so that the proposed legislation can be evaluated and revised in light of them.

¹⁸³ See Kingdon, *supra* note [], at 71-77, 90-103 (ideas for new policy come from a wide variety of sources, and no one person or institution plays a dominant role); Hugh Hechlo, *Issue Networks and the Executive Establishment*, in Anthony King, ed., *The New American Political System* 87 (1978) (ideas for new policy come from various sources, often without regard to their formal role in the governmental process).

¹⁸⁴ Oleszek, *supra* note [], at 93: "Woe to lawmakers who return to their district or state and cannot answer this question from the voters: 'So what have you done about energy costs?' A disarming response: 'I have introduced a bill on that very topic.'"

¹⁸⁵ Bachrach & Baratz, *supra* note []; Frank R. Baumgartner & Bryan D. Jones, *Agendas and Instability in American Politics* (2nd ed., 2009); Joseph E. Harrington, Jr., *The Power of the Proposal Maker in a Model of Endogenous Agenda Formation*, 64 *Public Choice* 1 (1990); Richard D. McKelvey, *A Theory of Optimal Agenda Design*, 27 *Management Sci.* 303 (1981); Richard D. McKelvey, *Intransitives in Multidimensional Voting Models and Some Indications for Agenda Control*, 12 *J. Econ. Theory* 472 (1976); Kenneth A. Shepsle, *Institutional Arrangements and Equilibrium in Multidimensional Voting Models*, 23 *Am. J. Pol. Sci.* 27 (1979); Barry R. Weingast & W.J. Marshall, *The Industrial Organization of Congress*, 96 *J. Pol. Econ.* 132 (1988). There are also a number of more descriptive studies of agenda setting that provide valuable insights but abjure normative discourse on the basis of the typical assumption that such discourse cannot be addressed to Congress. See Roger W. Cobb & Charles D. Elder, *Participation in American Politics: The Dynamics of Agenda Building* (2nd ed., 1983); Kingdon, *supra* note []; E.E. Schattschneider, *The Semisovereign People* (1975).

legislative process; its purpose, rather, is to prevent the excessive and potentially distorting influence that results from the practice of proposing legislation in the form of a final enactment.

Once the problem statement is introduced, the proposed legislation, which can still be called a bill, would follow the same institutional path as bills do at present. It would be assigned to a committee, on the same principle that is currently employed for doing so, and with the same exercise of rational decision making, political maneuvering and occasional skulduggery that currently prevails. This proposal is not an effort to transform real world legislators into Platonic Guardians, nor an abstract ideal designed to demonstrate the current legislature's moral turpitude. It is simply a different way of initiating a process that must begin one way or another.

2. Generate Alternative Solutions

The second proposal is that for a major bill, defined for now one that has introduced by means of a problem statement,¹⁸⁶ the Congressional committee to which the bill has been assigned should consider at least a few different alternatives for solving the stated problem. There are a number of ways by which this proposal could be implemented. One would be to provide that the committee chair, after receiving the bill, must estimate the total length of the hearings and markup sessions to be held on it and then schedule some minimum proportion of those hearings and sessions, a third let us say, to be held before any effort is made to develop statutory language. In other words, a prescribed proportion of the hearings would be held on the problem statement itself.¹⁸⁷ This first set of hearings would necessarily discuss alternative solutions to the problem since it would be the problem, and only the problem, that was before the

¹⁸⁶ The scope of the requirement is discussed below at pp. [] *infra*.

¹⁸⁷ Something of this sort is in fact the current practice in Canada. After the First Reading of a bill in Parliament, in essence a recitation of the bill's provisions, there is a Second Reading, after which the general purposes of the bill are discussed. See Malcolmson & Myers, *supra* note [], at 123. The bill is sent to committee for more detailed analysis only after the Second Reading. To be sure, Canada has a parliamentary system, where the legislature is not primarily responsible for the design of legislation. Nonetheless, the Second Reading demonstrates the practicality of having legislators debate the general features of a bill, rather than analyzing the bill clause-by-clause.

committee at that point. The first set of markup sessions would necessarily consider the alternatives presented at the hearings, since only the problem statement and the results of the first hearings would be in front of the legislators and staff when the markup began.

Of course, the committee chair could still kill the bill by not scheduling hearings under this proposal. If she did so, the amount of time required for the first round of hearings would be zero. Conversely, the sponsors of the legislation might have some particular solution in mind, and might have drafted the problem statement to signal that solution. The committee or subcommittee chair, generally the individual with the most influence over the bill's fate at this point, might also favor a particular solution, in some cases the same one as the sponsors. But because the bill being addressed consisted solely of a problem statement, opposing legislators, interest groups and others, in reacting to that statement, would be able to propose alternatives without needing to draft statutory language of their own or to fit their ideas into an existing statutory framework. One way of interpreting the result is that it would empower the opponents to suggest alternatives that differed from those of the bill's sponsors, a significant advantage for them if support for the bill is strong. Another interpretation is that it would enable the bill's sponsors to consider different alternatives from the one they originally had in mind, a significant advantage for them if support for the bill is weak. Hearings on the problem statement would not ensure that the legislation was designed in an optimal fashion of course, with every relevant alternative considered, nor would it ensure that the most effective alternative, from either the proponents' or a critical observer's perspective, was selected. They would simply make the initial stages of statutory design into something that was at least recognizable as public policy formation.

While the proposal requires that a markup session be held after this first set of hearings, it does not prescribe any rules for the markup session itself. The most likely scenario is that the legislators and staff members at the session would choose an alternative and then proceed to draft a preliminary version of the statutory language embodying that choice.¹⁸⁸ At this point, they might accept language from the bill's Congressional sponsor, from the administration, or from an outside group. The result of their deliberations would then be considered by the remaining hearings and the second set of markup sessions. It is possible, however, that once the markup session chose the alternative, nothing of any great significance would remain to be determined. In that case, the bill could be sent to legislative counsel, turned into statutory language as a pure staff function, and then voted on by the committee. That is why the proposal states the required portion of the hearing to be held on the problem statement as a minimum, rather than a fixed amount.

In the modern era, the President has played a crucial role in initiating major legislative efforts,¹⁸⁹ in some cases by delivering fully drafted bills to Congress,¹⁹⁰ but recognition of this role can be readily accommodated within the proposed methodology. Administration bills can be distinguished on their face from bills drafted by any other non-Congressional entity because they come from a coordinate branch of the same government as Congress, and can be given some sort special treatment on that basis. On the other hand, the President himself does not draft these bills, needless to say; they are drafted by members of his administration, administrative agents whose actions are always subject to Congressional supervision through the oversight

¹⁸⁸ It is conceivable that proponents intent on passing a particular bill might lie in wait until the first markup session, then present the session with a pre-drafted bill and insist on its passage. Such an effort to circumvent the policy making process that the proposal is designed to implement would probably not work however. At present, few outside groups can induce Congress to enact a bill without evaluating and revising it. The proposed requirement that alternatives must be considered would simply make it somewhat more difficult to do so.

¹⁸⁹ See Polsby, *supra* note [], at 5, 18-21, 139.

¹⁹⁰ These bills must still be introduced by a member of each chamber, of course, but this never presents a problem.

process. Thus, even if Congress is inclined to give deference to an administration bill – which, clearly, is not always the case¹⁹¹ – there is no reason for it to abandon its decision-making role, and it generally does not do so. The way these cross-cutting considerations can be accommodated, within the context of the proposed methodology, is to treat an administration bill as a fully developed alternative at the first markup session. At that point the committee, having considered the problem, and held its first round of hearings, can evaluate the administration bill as a potentially favored alternative. In doing so, it could either assess the substantive features of the bill or request reassurance that the administrative agents followed a policy making procedure that paralleled its own, that is, defined the problem, generated an array of alternatives, and chose the one that seemed most promising.

One feature of modern Congressional practice that alters the traditional, Schoolhouse Rock procedure for enacting legislation is the referral of introduced bills to multiple committees.¹⁹² This practice is predictably more common in the House, which is more specialized and more hierarchical, than in the Senate. According to Barbara Sinclair, about one fifth of all bills has been referred to multiple committees by the House in recent years, while less than six percent has been dealt with in this manner by the Senate.¹⁹³ A multiple referral complicates the process, of course, but does not alter the value of the proposed procedure. It means, in most cases, that the stated problem must be subdivided into subsidiary problems,

¹⁹¹ The general view is that the President's power is, as Richard Neustadt phrases it, the power to persuade, not the power to command. See Richard E. Neustadt, *Presidential Power and the Modern Presidents: The Politics of Leadership from Roosevelt to Reagan*, 29-49 (rev. ed., 1990); Stephen Skowronek, *The Politics Presidents Make: Leadership from John Adams to George Bush* 17-32 (1993).

¹⁹² Oleszek, *supra* note [], at 102-07; Sinclair, *supra* note [], at 116-18; Tiefer, *supra* note [], at 118-33.

¹⁹³ Sinclair, *supra* note [], at 117. See *id.* at 12-16, 44-45. The Senate has always been able to make multiple referrals by unanimous consent, but the practice was only authorized by the House in 1975, see Roger H. Davidson & Walter Oleszak, *From Monopoly to Management: Changing Patterns of Committee Deliberation*, in Roger H. Davidson, ed., *The Post-Reform Congress* (1992); Roger H. Davidson, *Multiple Referral of Legislation in the U.S. Senate*, 1989 *Legislative Stud. Q.* 385. By 1990, the percentage of multiple referrals in the House had risen to the current 20% figure, where it has remained fairly constantly. The Senate total for all legislation has never exceeded 5% and is commonly in the 1-2 % percent range. The rates Sinclair reports for major legislation, as she defines it, are somewhat higher, but only exceeded 6% in two Congresses, the 95th (7.3%) and the 103 (14.5%, an outlier). Sinclair, *supra* note [], at 117.

which demands more coordination but also encourage more precisely defined alternatives. If the House subdivides and the Senate does not, it may be possible to obtain the advantages of both broad and focused problem definition when one chamber accepts the other's bill in place of its own or when the two bills are reconciled in conference.

A second variation on the traditional procedure is to by-pass committee consideration entirely and take the bill directly to the floor.¹⁹⁴ This approach, which can be effectuated by a variety of techniques,¹⁹⁵ is used as a response to emergencies,¹⁹⁶ to move a widely supported bill out of a hostile committee,¹⁹⁷ or to accelerate consideration of a bill that is strongly supported by the House or Senate leadership.¹⁹⁸ Clearly, this variation largely precludes the use of the proposed methodology, since it is difficult to imagine anything other than a fully-drafted bill being considered on the floor of the House or Senate.¹⁹⁹ In other words, by-passing committee consideration would represent a decision to dispense with the proposed methodology, just as it represents a decision to dispense with the standard methodology that presently prevails, which requires committee consideration. The need to take specific action to dispense with the proposed methodology, unlike the need to take such action to by-pass committee consideration in

¹⁹⁴ Sinclair, *supra* note [], at 17-19, 47-49; Tiefer, *supra* note [], at 316-20, 584-601.

¹⁹⁵ Any Member of the House can file a discharge petition; if signed by a majority of the Members, the legislation in question is removed from the committee's jurisdiction. See Polsby, *supra* note [], at 142; Tiefer, *supra* note [], at 314-26. A discharge procedure is also permitted by the Senate rules, but unlike the House discharge procedure, it is rarely used. *Id.* at 598-99. Any Senator, however, can object to a committee referral under Senate Rule XIV(3), in which case the legislation, in theory, is placed directly on the Calendar; as a practical matter, this can only be done with the majority leader's approval. Tiefer, *supra* note [], at 593-98. In addition, Senators can bring a bill directly to the floor as a non-germane amendment to some bill that has already reached the floor, see Polsby, *supra* note [], at 142, Tiefer, *supra* note [], at 584-93..

¹⁹⁶ For example, the resolution to use force in response to the September 11, 2001 attack on the World Trade Center, P.L. 107-40, 115 Stat. 224 (2001), was enacted without committee consideration. However, the Bush Administration's draft of the legislation, which would have allowed the President to take military action against any terrorist anywhere in the world, whether connected with the World Trade Center attack or not, was amended by the Senate to grant the President only a more limited authority. See Richard F. Grimmett, *Authorization For Use Of Military Force in Response to the 9/11 Attacks* (P.L. 107-40): *Legislative History*, CRS Report for Congress, Order Code RS22357 (2007).

¹⁹⁷ Most famously, the Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 241, could only be enacted once the Senate Judiciary Committee, chaired by James Eastland of Mississippi, had been by-passed. See Lewis A. Froman, *The Congressional Process: Strategies, Rules and Procedures* 134-36 (1967); Whalen & Whalen, *supra* note [], at 132-36.

¹⁹⁸ See Sinclair, *supra* note [], at 19-20, 47-48.

¹⁹⁹ There is, however, one important exception. In some cases, the House or Senate leadership resolves the problem of a recalcitrant committee, or an overlap of committee jurisdiction, by organizing a task force of Members from different committees. See Groseclose & King, *supra* note [], at 145-49; Oleszek, *supra* note [], at 16-17; Sinclair, *supra* note [], at 188-95.

general, could be partially avoided by recognizing standardized exclusions from the proposed methodology, a matter that will be discussed below.²⁰⁰ More generally, Congress, as a constitutionally authorized entity with no direct superior,²⁰¹ generally has the ability to alter its procedures, assuming a sufficient number of the Members agree. The point of the proposed methodology is to establish a more effective standard practice, not to attempt the legally impossible task of imposing unalterable rules on Congress.

To some extent, the procedural variations just discussed reflect the underlying reality that Congress is a deeply divided institution these days, with relatively, and perhaps historically, high levels of partisanship.²⁰² The two proposals suggested here are essentially non-partisan, however. Both the Democrats and the Republicans introduce legislation, and both are presumably interested in increasing the chances that this legislation will serve the purposes for which it is intended. Each may accuse the other, from time to time, of using the legislative process for strategic purposes, such as embarrassing the other party,²⁰³ but neither is likely to concede that about itself and, more importantly, neither is more likely than the other to rely on this technique. There may be some vague sense that recognizing law as social policy making is more amenable to the Democrat's approach, but the effort to make sure that legislation serves its intended purposes, and does not regulate for the mere sake of regulating, aligns the proposal with Republican views.

²⁰⁰ See pp. [] *infra*.

²⁰¹ See Edward L. Rubin, *Hyperdepoliticization*, ____ *Wake Forest L. Rev.* ____ (forthcoming, 2012).

²⁰² See Hibbing & Theiss-Morse, *supra* note []; Mann & Ornstein, *supra* note []; Sinclair, *supra* note [], at 108-38. The point should not be exaggerated, however; present conflicts often loom larger than those of the past, which have a tendency to seem quaint. The current level of partisanship certainly pales in comparison with the decades prior to the Civil War, which featured a physical assault by a pro-slavery Representative on a leading Republican Senator. See David H. Donald, *Charles Sumner and the Coming of the Civil War* 241-49 (1960, 2009). On the pre-Civil War Congress generally, see *id.* at 173-260, Kenneth Stamp, *And the War Came: The North and the Secession Crisis, 1860-61*, at 63-69.

²⁰³ Perhaps the most famous example of this practice is Howard Smith's addition of the word "sex" to the employment discrimination provisions of the Civil Rights Bill, H.R. 7152, on the floor of the House of Representatives in February, 1964. Whalen & Whalen, *supra* note [], at 115-18. Smith, an implacable opponent of the Civil Rights Bill, thought that expanding its coverage in this manner would be fatal to its chances of enactment. He out-smarted himself, however, since the Bill was enacted into law with its expanded coverage.

3. Gather Evidence Regarding the Alternatives

The third proposal for improving legislative methodology is that available empirical evidence should be methodically collected and made available to the legislators at a juncture where it can influence the bill's design. This could also be implemented rather readily. One of the non-partisan Congressional agencies that all the Members currently rely on for information of various sorts is the Congressional Research Service (CRS).²⁰⁴ Part of the Library of Congress, CRS consists of a research staff that answers over half a million annual requests from the Members. The bulk of these requests involve information of one sort or another, often empirical in nature. CRS generally does not carry out its own studies, unlike the Congressional Budget Office (CBO) or the Government Accountability Office (GAO); its primary role is to collect existing information. To provide empirical information for each bill that is being seriously considered, CRS could be instructed to compile a literature review of existing research in a delimited period of time²⁰⁵ - 60 days for example – and then either locate or carry out a meta-analysis of that research, with a longer time allowed if no reputable meta-analysis was available.²⁰⁶

²⁰⁴ For general descriptions, see Bruce Bimber, *The Politics of Expertise in Congress: The Rise and Fall of the Office of Technology Assessment* 79-83 (1996); Congressional Research Service, *Annual Report of the Congressional Research Service for Fiscal Year 2011*, at 1-2 (2012); James A. Thurber, *Policy Analysis on Capital Hill: Issues Facing the Four Analytic Support Agencies of Congress*, 6 *Policy Sci. J.* 101 (1977).

²⁰⁵ There are of course, various forms of literature reviews. They can “focus on research outcomes, research methods, theories and/or applications. Literature reviews can attempt (a) to integrate what others have done and said, (b) to criticize previous scholarly works, (c) to build bridges between related topics, and/or (d) to identify the central issues in a field.” Harris M. Cooper, *Research Synthesis and Meta-Analysis: A Step-by-Step Approach* 4 (2009). For the purpose suggested here, the focus on research outcomes, integrating “what others have done and said,” seems most appropriate.

²⁰⁶ Meta-analysis can be defined as “the statistical analysis of a large collection of analysis results from individual studies for the purpose of integrating the findings.” Gene V. Glass, *Primary, Secondary and Meta-Analysis of Research*, 5 *Educ. Res.* 3, 3 (1976). The author adds that this technique “connotes a rigorous alternative to the casual, narrative discussions of research studies which typify our attempts to make sense of the rapidly expanding research literature.” Regarding meta-analysis, see Michael Borenstein, Larry V. Hedges, Julian P.T. Higgins & Hannah r. Rothstein, *Introduction to Meta-Analysis* (2009); Cooper, supra note [], at 145-96; Gene V. Glass, Barry McGaw & Mary Lee Smith, *Meta-Analysis in Social Research* (1981); John E. Hunter & Frank L. Schmidt, *Methods of Meta-Analysis: Correcting Error and Bias in Research Findings* (2004); Mark W. Lipsey & David B. Wilson, *Practical Meta-Analysis* (2000)

None of this would be original, or primary research.²⁰⁷ Rather it would identify and summarize existing research that is relevant to the problem on which the hearings were being held and organize this research in coherent form.²⁰⁸ In a literature review, for example, all the studies indicating that the stated problem was not particularly severe would be grouped together, all the critiques of those studies would follow, and all the defenses of the original studies would follow after that. A meta-analysis would involve the statistical analysis of comparable data from the studies that appeared in the review. Some increase in the CRS staff might be required to carry out this task, but the expense would be a modest one.²⁰⁹

It is possible that providing a comprehensive, organized account of existing research at an early point in the legislative process would encourage the Members to request new research that was designed to investigate the particular alternatives that they are considering. It is also possible that it might encourage the Members to adopt a research orientation of their own, and enact at least some provisions of the statute on an experimental basis.²¹⁰ Any such additional efforts would be beneficial. The various fields of empirical social science are now more than a century old and represent our society's best knowledge about the way various events and

²⁰⁷ Primary research involves the collection and analysis of data. It can be distinguished from secondary research, which involves the re-analysis of data that has already been gathered. A meta-analysis consists of the re-analysis of both primary and secondary research. See Glass, *supra* note [], at 3.

²⁰⁸ This is not to suggest that meta-analysis, or even a literature review, is intrinsically neutral or "objective." As Harris Cooper notes: "integrating separate research projects into a coherent whole involves inferences as central to the validity of knowledge as the inferences involved in drawing conclusions from primary data analysis." Cooper *supra* note [], at 3. See generally Berger & Luckmann, *supra* note []; Weber, *supra* note []. The sense of neutrality that is essential for this technique's acceptability must come from the institution performing the research, not from the nature of the research task. See pp. [] *infra*.

²⁰⁹ No state legislature has similar resources; California did at one time, see Muir, *supra* note [], but the currently parlous condition of state finances indicates that even large states are unlikely to possess this research capacity for the foreseeable future. Many states are much too small to ever be able to staff a research function for the legislation they enact. This problem is readily solved, however, because research, unlike decision-making, can be outsourced with no loss of state autonomy. A system could be set up where states buy research services from CRS, that is, provide funds to CRS to provide a certain amount of research service to the state legislature each year. A more likely, and probably preferable alternative, is that Congress would fund CRS to provide a certain amount of research service to each state. In terms of benefit to the state's citizens, and in terms of supporting state autonomy, these could well be the most effective dollars that the federal government gave to the states for any purpose.

²¹⁰ Regarding experimental legislation generally, see, e.g., Michael Dorf & Charles Sabel, *A Constitution of Democratic Experimentation*, 98 *Colum. L. Rev.* 267 (1998); Rob van Gestel & Gijs van Dijck, *Better Regulation through Experimental Legislation* 17 *Eur. Pub. L.* 539 (2011); Bradley Karkkainen, "New Governance" in *Legal Thought and in the World: Some Splitting as Antidote to Overzealous Lumping*, 89 *Minn. L. Rev.* 471 (2004); Eric Orts, *Reflexive Environmental Law*, 89 *Nw. U. L. Rev.*, 1127 (1995); Susan Sturm, *Second Generation Employment Discrimination: A Structural Approach*, 101 *Colum. L. Rev.* 458 (2001).

interventions impact the relevant parts of our society. These further efforts would involve significant expense, of course, but the cost is minor compared to the cost of an errant federal statute. For present purposes, however, the proposal is simply to make the existing empirical data available in systematic, readily usable form. The institution necessary to achieve this already exists and the cost would be minor.

Like the other two proposals, this proposal is non-partisan. The CRS already has a well-established reputation for non-partisanship, which is not only appropriate for its role but also essential to its continued survival.²¹¹ In fact, Congress has demonstrated a general ability to create acceptably non-partisan agencies that carry out research.²¹² The CBO and GAO, which might well be assigned to perform any new research that the Members wanted to commission, are also regarded as non-partisan.²¹³ One further Congressional agency, the Office of Technology Assessment (OTA), was accused by Republicans of favoring the Democrats when it was first created, and was ultimately abolished by the Contract with America Congress.²¹⁴ But as Bruce Bimber found, OTA quickly shifted to the non-partisan stance of the other Congressional agencies, and was generally regarded as performing a valuable function.²¹⁵ By the time it was abolished, no one was criticizing it for partisanship;²¹⁶ the reason for its termination was to demonstrate Congress was willing to cut its own budget as well as the

²¹¹ Mucciaroni & Quirk, *supra* note [], at 211; Bimber, *supra* note [], at 79-83.

²¹² Mucciaroni & Quirk, *supra* at 211. See note [], *supra*. The authors' doubts about the willingness or ability of Congress to create a new agency that would monitor its own activities, such as the caliber of its floor debates, is one reason why this proposal relies on an existing, well-accepted Congressional agency and limits that agency to a relatively modest and non-judgmental role.

²¹³ *Id.* at 83-92

²¹⁴ House Report 104-212, 104th Cong., 1st Sess., Conference Report to Accompany H.R. 1854, Appropriations for the Legislative Branch for the Fiscal Year Ending September 30, 1996, and for Other Purposes (July 28, 1995) (terms of OTA's termination); House Report 104-141, 104th Cong., 1st Sess., Legislative Branch Appropriations Bill, 1996 (June 15, 1995) (statement that no funds are being appropriated for OTA).

²¹⁵ Bimber, *supra* note [], at 67-68; R.M. Margolis, *Losing Ground: The Demise of the Office of Technology Assessment and the Role of Experts in Congressional Decision-Making*, International Symposium on Technology and Society: Technical Expertise and Public Decisions, Conference Proceedings 36 (June 21-22, 1996)

²¹⁶ Bimber, *supra* note [], at 50-68. Nonetheless, its abolition resulted in a loss of the expertise available to Congress, see Margolis, *supra* note [].

budgets of other federal institutions.²¹⁷ There is, moreover, one way to provide a convenient safety valve against charges of partisanship on specific issues; the rules could provide that any member of Congress who wanted to add to the list of relevant studies could do so, with CRS then providing the summary of the indicated study. Members who consistently demanded the addition of studies based on extremist politics or pseudo-science²¹⁸ would presumably be disciplined by their colleagues' scorn.

B. Implementing the Methodology

1. Limitations on the Scope of the Proposal

In the context of the U.S. Congress, these three proposals, and any other changes of this kind, could be adopted by simple resolution. As procedures internal to each chamber, they would not need the concurrence of the other chamber, nor would they need the President's signature.²¹⁹ Since they affect only procedures, they could be adopted on a trial basis, either for a limited period of time or for a limited category of legislation, without raising serious questions of inequality or unfairness. At the absolute minimum, therefore, the argument for adopting them is that every institution should reconsider its procedures from time to time. It seems unlikely that the optimal procedures are necessarily the ones that the institution is currently employing, particularly if those procedures have been in place for a long time – about 200 years in the case of Congress.

²¹⁷ Bimber, *supra* note [] at 69-77.

²¹⁸ See Wendy Wagner, *The Science Charade in Toxic Risk Regulation*, 95 *Colum. L. Rev.* 1613 (1995)

²¹⁹ See Schneier & Gross, *supra* note [], at 124-25; Louis Fischer, *The Legislative Veto: Invalidated, It Survives*, 56 *L. & Contemp. Probs.* 273 (1993); Robert Ginnane, *The Control of Federal Administration by Congressional Resolutions and Committees*, 66 *Harv. L. Rev.* 569 (1953). Alternatively, the same proposal could be adopted by both chambers as a concurrent resolution, again without Presidential signature.

Although the proposed methodology is broadly applicable, it is neither advantageous nor appropriate for some of the bills that Congress enacts. In order to make this determination, it is necessary to distinguish between different types of legislation. In a leading study, Walter Oleszek identifies three categories: bills lacking wide support, noncontroversial bills and major legislation.²²⁰ A purely political typology of this sort, reflecting the standard view of Congress as exclusively political, provides no basis for making policy-based distinctions. For present purposes, we might distinguish among appropriation bills, authorization bills, foreign affairs bills, honorific bills, and substantive domestic bills, with the last category further divided into major and minor. Appropriation bills deal with the funding of government operations and authorization bills deal with the authority or jurisdiction of government officials and institutions. Taken together, they can be regarded as belonging to H.L.A. Hart's jurisprudential category of secondary rules, that is, rules that "specify the ways in which the primary rules [rules regarding human conduct] may be conclusively ascertained, introduced, eliminated, varied, and the fact of their violation conclusively determined."²²¹ Foreign affairs bills are those that only have effects outside the nation's borders, but include the projection of military force. Honorific bills involve

²²⁰ Oleszek, *supra* note [], at 94-97. Oleszek defines the first category solely in terms of the bill's political support, and points out that introduction of such bills often has purely political motivations, e.g., "to satisfy individual constituents or interest groups from the member's district or state," or "to fend off criticism during political campaigns," *id.* at 95. The problem with using such a category is that there is no way to assign a bill to it on the basis of its text, and probably no way to reach a subjective determination without being unacceptably disparaging to the bill's sponsor. Oleszek defines noncontroversial legislation in a similar way, but gives examples ("bills that authorize construction of statutes of public figures," or "rename a national park" that suggest a substantive categorization") indicating that he is thinking about the types of bills that are described here as symbolic. *Id.* His categorization of major legislation is again based on political support, such as being "prepared and drafted by key committee leaders, the political parties, executive agencies or major pressure groups," or "supported by the majority party leadership." *Id.* Again, such a category cannot be determined from the bills text and necessarily involves invidious judgments ("sorry sir, you are simply not an influential member of the House").

²²¹ H.L.A. Hart, *The Concept of Law* 92 (1961). In my view, Hart's definition of primary rules as rules designed to tell people in the society how to behave, see *id.* at 40-41, 89, is hopelessly out of date for the simple reason that he seems unaware of the administrative state. Modern statutes that establish benefits (e.g., Medicare, social security disability, unemployment compensation) or create institutions (airports, hospitals, wilderness areas) do not tell people how to behave but rather attempt to alter the economic, social or physical conditions of citizens' lives. See Rubin, *supra* note [Camelot], at 199-201; E. L. Rubin, *Shocking News for Legislatures and Law Schools: Statutes are Law*, 27 *Vereniging voor Wetgeving en Wetgevingsbeleid* 1 (2001). Nonetheless, his distinction between primary and secondary rules applies in the modern context. It is not entirely accurate, but it is used here because of its familiarity.

nomenclature (National Brotherhood Week, the Ava Gardner Post Office Building²²²) or other standard forms of recognition (a statue, a fountain, a stamp).²²³ Substantive domestic bills are proposals to alter society in some fashion, with society being defined to include the physical environment within the society's borders, immigration and economic relations with foreign nations.

The policy-based methodology suggested here – a problem statement, consideration of alternative solutions, and the provision of empirical evidence – is primarily applicable to substantive legislation.²²⁴ It is designed to assess how some potential governmental action will interact with nature, that is, the physical, economic, and social circumstances of the jurisdiction that the legislature governs. The recommended procedure would be less effective, and sometimes unnecessarily elaborate, for secondary rules, such as an appropriations bill,²²⁵ a statute reorganizing an existing agency, or a statute granting an existing authority to a different agency. These provisions are internal to the government; they are intended to determine who is interacting with nature, but not the substance of the interaction. Emergency legislation can also be excluded from the recommended procedure, largely on the grounds that it is also a secondary rule. In effect, it authorizes the chief executive to act on his own, in a situation where he would otherwise need another body's approval, because time is of the essence and the chief executive is trusted to make the right decision in these circumstances.²²⁶ Foreign affairs bills cross the

²²² Sinclair's example, see Sinclair, *supra* note [], at 24.

²²³ Walter Oleszek estimates that about one third of the statutes enacted by the 110th Congress (2007-09) were of this nature. Oleszek, *supra* note [], at 94.

²²⁴ See John R. Johannes, Explaining Congressional Casework Styles, 27 *Am. J. Pol. Sci.* 530 (1983) (casework not designed to effect changes in policy).

²²⁵ For general discussions of appropriations bills, see D. Roderick Kiewiet & Matthew D. McCubbins, *The Logic of Delegation: Congressional Parties and the Appropriations Process* (1991); Aaron Wildavsky, *The Politics of the Budgetary Process* (4th ed., 1984); Polsby, *supra* note [], at 159-86; Tiefer, *supra* note [], at 849-1010

²²⁶ This concept of emergency is most closely associated with the legal philosopher Carl Schmitt, see Carl Schmitt, *Legality and Legitimacy* 67-83 (Jeffrey Seitzer, trans., 2004); Carl Schmitt, *Political Theology: Four Chapters on the Theory of Sovereignty* (George Schwab, trans., 2006). Schmitt is a somewhat malodorous reference, since he sided with the Nazi regime, but other political thinkers take a similar approach to the issue, see, e.g., Clinton Rossiter, *Constitutional Dictatorship: Crisis Government in the Modern Democracies* (1948). In fact, the transfer of authority to the executive is a principal way that emergency action has

boundary between primary and secondary rules. A treaty might shift decision-making authority from a domestic to an international body, but a foreign aid bill might attempt to affect nature by reducing poverty or increasing production in some area outside the legislature's jurisdiction. Because the two functions are often intertwined, and because executive authority is generally regarded as more extensive in this area,²²⁷ such bills might also be excluded from the proposed methodology. Honorific bills are similarly not intended to interact with nature in a significant way,²²⁸ and, in any case, are generally regarded as too minor to merit sustained consideration.²²⁹ The same is true for some substantive legislation, specifically accommodations to particular constituents that can be regarded as an alternative form of legislative casework, that is, constituent service.²³⁰

Most of these exclusions from the proposed procedure would be relatively easy to implement. At present, bills are referred to committees by the House or Senate parliamentarian,

been understood over the course of American history. See Edwin E. Moise, *The Tonkin Gulf Resolution and the Escalation of the Vietnam War* (1996); Mark E. Neely, Jr., *The Fate of Liberty: Abraham Lincoln and Civil Liberties* (1991). The chief executive can also declare an emergency on his own, see, e.g., Proclamation No. 7463, 66 Fed. Reg. 48,199 (Sept. 14, 2001) (President's declaration of a state of emergency following the World Trade Center attack), but such action is outside the scope of this article. For an illuminating discussion of Schmitt's theory, see Kim Lane Scheppele, *Law in a Time of Emergency: State of Exception and the Temptations of 9/11*, 6 U. Pa. J. Const. L. 1001, 1004-22 (2004).

²²⁷ *United States v. Curtis-Wright Corp.*, 299 U.S. 304 (1936). See Sarah H. Cleveland, *Powers Inherent in Sovereignty: Indians, Aliens, Territories, and the Nineteenth Century Origins of Plenary Power Over Foreign Affairs*, 81 *Tex. L. Rev.* 1 (2002); Harold Honju Koh, *Why the President (Almost) Always Wins in Foreign Affairs: Lessons of the Iran-Contra Affair*, 97 *Yale L.J.* 1255 (1988); Saikrishna B. Prakash & Michael D. Ramsey, *The Executive Power Over Foreign Affairs*, 111 *Yale L.J.* 231 (2001);

²²⁸ They are not, however, secondary legislation. In fact, they are another example of the inaccuracy of Hart's categories because they are also not intended to affect people's behavior and carry no particular sense of obligation that he regards as essential to the definition of primary rules. See Hart, *supra* note [], at 79-88. Even if Hart was determined to ignore the administrative state, he should have recognized that honorific legislation lies outside his categorization, since such legislation is as old as government itself.

²²⁹ Both chambers currently have established procedures for dealing with bills of this nature. In the House, a member may request that a bill be placed on the Consent Calendar or the Private Calendar, two groups of bills that are separate from the principal, or Union calendar. Three Members from each party review these bills to make sure that they are appropriate for such treatment. Tiefer, *supra* note [], at 326-32. The Senate uses a Clearance procedure, where staff members notify Senators of bills that seem appropriate for enactment without a roll call vote and record any exceptions. *Id.* at 569-73. Because of the Senate's small size, many bills are enacted by this mechanism, some of which would not qualify for exclusion from the recommended procedure on the basis of the exceptions noted in the text.

²³⁰ Regarding casework by legislators, see Richard F. Fenno, Jr., *Home Style: House Members in their Districts* (1978); Douglas Rivers & Morris P. Fiorina, *Constituency Service, Reputation, and the Incumbency Advantage*, in Morris P. Fiorina & David W. Rhode, *Home Style and Washington Work: Studies of Congressional Politics* 17 (1989); Fiorina, *supra* note [], at 93-101; Mayhew, *supra* note [], at 54-59, 108-110; Oleszek, *supra* note [], at 352; Johannes, *supra* note []; John R. Johannes, *The Distribution of Casework in the U.S. Congress: An Uneven Burden*, 5 *Leg. Stud. Q.* 517 (1980)

a non-partisan staff member, subject to review by the Speaker in the House, or as an advisor to the presiding officer in the Senate.²³¹ At the same time that this is done, the parliamentarian could also determine whether a fully drafted bill would be accepted or whether the bill must be initiated by a problem statement.²³² The determination that a bill was an appropriations measure, an authorization measure or a foreign affairs measure could be determined from the text of the bill. Emergency legislation would need to state its character as such explicitly, and other limitations are possible as well.²³³ Only the status of a bill as honorific or minor would create any difficult questions of judgment, and this problem could be resolved by using the same principle that the Office of Management and Budget (OMB) uses for cost benefit analysis, namely, that a proposal is subject to the stated requirements only if it has “an annual impact on the economy of \$100 million or more.”²³⁴ This is admittedly a bit under-inclusive, but has

²³¹ See Oleszek, supra note [], at 97-102; Sinclair, supra note [], at 11-12, 44. As Oleszek notes, “The vast majority of referrals are routine. . . .referrals generally are cut-and-dried decisions.” Oleszek, supra note [], at 98.

²³² The parliamentarians are sometimes pressured by Members, and even by lobbyists, to direct legislation to a particular committee. Oleszek, supra note [], at 101. This might also occur with respect to the exceptions to the proposed methodology.

²³³ Two possible limits are that the bill would need to be based on an explicit request by the chief executive, and that the emergency exclusion would expire if no bill was enacted during a specified period of time, such as 60 days. The subject is obviously a controversial one. A number of observers have criticized chief executives for using claims of emergency to effect inordinate expansion of their authority, see Sanford Levinson, *Constitutional Norms in a State of Permanent Emergency*, 40 Ga. L. Rev. 699 (2006); Scheppele, supra note []; Kim Lane Scheppele, *North American Emergencies: The Use of Emergency Powers in the United States and Canada*, 4 Int’l J. Const. L. 213 (2006). In addition, legislation enacted on the basis of emergency has persisted for inordinate lengths of time. For example, the Tonkin Gulf Resolution, hurriedly enacted by Congress in 1964 in response to a (false) report of attacks on U.S. naval vessels, remained a basis for the Vietnam War until 1971, see Moïse, supra note []. Canada’s War Measures Act, adopted in 1914 in response to the crisis of World War I, remained operative until 1970, see Patricia Peppin, *Emergency Legislation and Rights in Canada: The War Measures Act and Civil Liberties*, 18 Queen’s L.J. 129(1993). This article does not attempt to articulate any limits on the legislature’s authorization of emergency powers, with respect to either their scope or their duration. The suggested limits refer only to the legislature’s ability to act under the emergency exception to the requirement that the proposed methodology be followed.

²³⁴ Executive Order No. 12, 866, § 3(f)(1), 3 C.F.R. § 638 (1993), reprinted in 5 U.S.C. § 601. The OMB exclusions is more narrowly stated. In addition to the \$100 million impact test, regulations are subject to the Order’s requirements if they: adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or State, local, or tribal governments or communities; (2) Create a serious inconsistency or otherwise interfere with an action taken or planned by another agency; (3) Materially alter the budgetary impact of entitlements, grants, user fees, or loan programs or the rights and obligations of recipients thereof; or (4) Raise novel legal or policy issues arising out of legal mandates, the President’s priorities, or the principles set forth in this Executive order.

Id., § 3(f). Most of these criteria could be adapted to the legislative context; for example, clause 2 could be restated to replace the word “agency” with “statute.” Taken as a whole, the provision seems overly complex, but it has apparently proven manageable. For present purposes, the \$100 million impact exclusion has the virtue of simplicity and would provide reassurance that non-controversial measures, generally enacted as a courtesy to fellow Members, would not fall subject to the more systematic analysis that is recommended for major legislation.

proven to be relatively easy to implement, since the OMB exclusion is determined by fairly low-level executive employees and is binding on heads of executive departments.²³⁵

2. The (Relatively) Modest Character of the Proposal

Given these exclusions, the proposed methodology does not alter the existing legislative process in any dramatic or radical way. Major substantive legislation is already subject to sustained consideration by Congress before it can proceed. Moreover, once the problem has been debated, a markup held on the basis of that debate, and empirical data presented in a comprehensive, systematic form during those deliberations, the process would continue in its current form. The primary effect of these three proposals would be to bring the part of the statutory design process that currently precedes Congressional consideration under Congress' control. The importance of doing so is that this pre-Congressional part of the process is generally the place where crucial design decisions are made. Congress retains full power to vote bills up or down, and substantial power to revise and amend the bill, but it has ceded the basic power to conceptualize the bill --to think about and analyze alternative approaches -- to others. Very often, most of the Members do not even know who these others are, and they certainly do not know how they made their decisions. The proposed legislative methodology is thus a means for Congress to take control of its most essential and important task.

Would these proposals make legislation more difficult to enact? That is not necessarily a bad thing of course. While it is notoriously difficult to get a bill through Congress,²³⁶ there is no particular reason to avoid encumbering the enactment of ineffective or counter-productive legislation. Effective legislation might be somewhat more difficult to enact, but the

²³⁵ OMB's authority in this area is exercised by its sub-agency, the Office of Information and Regulatory Affairs (OIRA), see Executive Order No. 12,866, § 2 (b).

²³⁶ This consideration does not necessarily apply to state legislatures.

compensating factor would be that the additional procedures would ensure its effectiveness. There is also the possibility, however, that these proposals would make legislation easier to enact, as well as more effective, by facilitating the development of what is called, in common parlance, “win-win” alternatives.²³⁷ If we recognize that much of legislative design occurs in the policy space, then we can view a bill’s opponents as objecting to the inevitable costs that even effective legislation invariably imposes. As noted earlier, consideration of alternatives might reduce those losses without compromising the bill’s basic purpose or, more realistically, produce reductions in losses that are substantially larger than the decrease in benefits. A different means of protecting the environment might decrease the costs imposed on industry; a different restriction on tort actions might preserve the precautionary force of liability. Such beneficial trade-offs are central to existing legislative compromises, of course. But one of the main goals of the proposed changes in legislative methodology is to create a setting where such trade-offs can be more readily devised.

Conclusion

The preceding proposals should be regarded as exemplary. There may be pragmatic reasons why they would be difficult to institute, and there may be other changes that would produce better results. The principal point of this article is that such changes should be seriously discussed by academics, and seriously considered by Congress and every other American legislature. The prevailing belief that legislators are incapable of acting for the public good, that they are motivated exclusively by the desire to be re-elected, is empirically false. The further

²³⁷ For a discussion of win-win strategies in the policy context, see Nagel, *supra* note []. Nagel’s five basic steps for reaching a win-win solution are: 1) identify the major goals of the opposing parties; 2) identify the leading alternatives; 3) determine the relationship between the alternatives and the goals; 4) seek a new alternative that might achieve each side’s goal better than any existing alternative; 5) determine whether this alternative can overcome other hurdles to its adoption. *Id.* at 5. This procedure, which Nagel then expands upon, clearly tracks the standard policy making process. The point is that it depends upon, and can only be implemented in the context of, that process.

assumption that all decisions about legislation are controlled by this empirically false motivation does not even make sense. Legislators want to benefit the people they serve, even if they disagree about the way to do so, and most legislative design occurs in a policy space where they are free to decide on the basis of this motivation. It is therefore possible to envision changes in legislative methodology that would increase the likelihood that legislation would be more effective in either achieving its proponents' policy goals or benefitting society in general.

The final point, however, is that scholars and legislators should think seriously about legislative methodology even if they do not think that it can produce any results at all. Abandoning the effort to improve what is probably our most important governmental function is fatalism. It admits that we will never do better, that we can never govern more effectively than we do at present. No one who cares about the continued existence of democratic governance should surrender to that view without a fight.