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**The Political Economy of Law:  
Decision-Making by Judicial, Legislative, Executive and  
Administrative Agencies**

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**by McNollgast**

*Abstract*

In the 1980s scholars began applying Positive Political Theory (PPT) to study public law. This chapter summarizes that body of research and its relationship to other schools of legal thought. Like Law and Economics, PPT of Law uses sequential game theory to examine how rules and procedures shape policy and evaluates these outcomes from the perspective of economic efficiency. Like the Legal Process School in traditional legal scholarship, PPT of Law focuses on how the structure and process of legislative, bureaucratic and judicial decision-making influences the law and evaluates these procedures using the principle of democratic legitimacy; however, rather than using procedural norms derived from moral and political philosophy to evaluate procedures, PPT of Law conceptualizes the decision-making procedures of government as rationally designed by elected officials to shape the policies arising from decisions by executive agencies, the courts, and future elected officials. After summarizing this theory, the essay turns to applications of this approach in administrative law and statutory interpretation.

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**1.0 Introduction**

The political economy of law is a branch of Law and Economics that applies positive political theory (PPT) – optimizing models of individual behavior applied to political decision making – to study the development of law. PPT of Law is primarily a positive theory of rational strategic behavior in the presence of imperfect information that seeks to explain and predict the content of the law. These theoretical predictions are derived from information about the preferences of citizens, elected officials and government civil servants and the design of relevant political institutions, including electoral processes and the legislative, executive and judicial branches of the government. PPT of Law also includes a normative component that evaluates the effects of the structure and processes of governance in terms of economic efficiency, distributive justice and democratic legitimacy. PPT of Law also is relevant to other consequentialist normative theories of law because it provides a positive theory of the link between political institutions and policy outcomes.

This essay summarizes the assumptions, arguments and conclusions of PPT of Law. In legal scholarship, most studies of the law focus on the courts, judges, cases and judicial doctrine. While the judiciary is an important source of law, judicial doctrines and decisions do not constitute all of law. Most law is set forth in legislation, executive

decrees and bureaucratic decisions, yet these sources of law have not been as extensively studied as judicial law. As Staudt (2005,2) observes:

Although scholars have spent much time and energy debating questions such as how the judiciary should interpret statutes, how agencies should enforce statutes, or why, as a normative matter, Congress should write an altogether different statute, few have delved into the complex web of congressional players, rules, and practices that impact the initial decision to adopt the law and the decision to maintain it in the long-term.

The purpose of focusing on legislatures, the chief executive and the bureaucracy is threefold. First, we seek to understand the role and influence of the executive and legislative branches in creating law. Second, we seek to understand the interactions among these branches of government and the courts – how each branch constrains and influences the law-making activity of the others. Third, we seek to demonstrate that law is not primarily the domain of the judiciary. Because the other branches influence judicial decisions, even judge-made law cannot be understood by treating the courts in isolation.

To this end, PPT of Law examines each major political institution that is part of the law-making process. The analysis begins with elections, which induce preferences on elected officials and are the principal means by which citizens influence policy. Next, we examine decision-making by legislatures, the president, and the bureaucracy. We study these institutions separately for two reasons. First, as noted, each is an important source of law. Second, in order to evaluate these institutions as sources of law, we need to understand the extent to which they respond to citizen interests. The legitimacy of these sources of law depends on the extent to which they are responsive to citizens, as opposed to interest groups or the personal ideology of decision makers.

After reviewing the executive and legislative branches, we turn to the courts. PPT of Law provides insights about how judges make decisions and create judicial

doctrine, and hence about the content of law. Of particular interest is how the other branches influence judicial law-making by forcing the courts to act strategically in developing doctrine and deciding cases.

Before discussing each major institution that makes law, we first review the main schools of legal thought, explaining the differences in the structure of their arguments. The positive and normative approach of PPT is best understood when placed within the broader context of other important approaches to the study of law and policy.

## **2.0 Schools of Legal Thought**

Since the earliest days of English legal scholarship (Coke 1608 and Hobbes 1651, 1971) legal scholars have debated the question: “What is and/or ought to be the law?” During the last century, this debate was expanded to address the more vexing question: “Who has and/or should have the authority to make, interpret, and apply the law?” The schools of legal thought that contend to understand law and to shape its creation and use can be distinguished by how they answer these questions.

At any point in time, a society inherits a mutual understanding of what law is, say  $L_0$ . This understanding may be subject to uncertainty, so that each member of society,  $i$ , believes that the state of law is really  $L_0 + u_i$ , where  $u_i$  is a random variable. The institutions of society then determine who participates in interpreting (reducing the variance of  $u_i$ ) and changing (altering the value of  $L_0$ ) the law. The “what is” question addresses reducing  $u_i$  to explicate  $L_0$  more clearly, while the “what ought” question identifies the optimal law,  $L^*$ . The “who has authority” question seeks a cause-effect explanation for why the law is  $L_0$ , and the “who should have authority” question

identifies those who ought to make the law, presumably because they are most likely to move the law from  $L_0$  towards  $L^*$ .

Until the last third of the 20<sup>th</sup> Century, scholars made few attempts to ground the answers to these questions in coherent theories of the behavior of participants in the process of governance, whether voters, elected officials, civil servants or judges. For the most part, answers to these questions were based on either philosophical or religious arguments, or simple observation of who appeared to have the power to make law that had to be obeyed.

The “what is and/or ought to be the law” questions have three contending answers: law as nature, law as process, and law as policy. *Traditionalist* legal thought does not separate “is” from “ought to be.” Traditionalists regard law as exogenous to politics, society and individual mortals. To traditionalists, law emerges from a source outside of human manipulation, such as God’s will, nature or an abstract system of moral philosophy. Law is “good” if it is consistent with these external standards, regardless of its policy implications. Law that is not “good law” is not really law in that it need not be obeyed, and in some cases ought to be disobeyed out of duty to “good law.”

By contrast, *Realists* see law as constructed and manipulated by humans to serve earthly purposes. Most modern Realists are consequentialists in that they regard law as policy – a statement of the purposes and obligations of government to be evaluated on the basis of its effects. To these Realists, “good law” is law that produces normatively compelling policy outcomes. Economists will recognize Law and Economics as a form of Realism, wherein the normative objective is economic efficiency.

Another branch of Realism, the *Legal Process School*, is Kantian in that it focuses on law as a means to obtain social purposes, without specifying the social goal. The

Legal Process School focuses on the procedural architecture that defines the policy-making process. “Good law” is law that satisfies principles of good decision-making processes that are derived from normative democratic theory, such as assuring rights of participation and according respect to all individuals.

“Who makes the law” is a practical question about the distribution of authority in society. To Traditionalists, law is created outside the context of human institutions and decisions, perhaps by a divinity or simply inherited as part of the natural order, like the physical laws of nature. To Realists, people who have political power create the law. Political power is institutionalized by law that sets forth the rules and procedures of the political and legal system. This component of law also is created by those with power, usually to solidify their authority.

In democratic societies, many players have a role in making law as Realists define it. Voters elect legislators, and sometimes executive officials and judges, and in so doing influence the development of law through their choices among candidates for office. Sometimes voters even pass laws themselves (initiative, referendum). Legislators enact statutes. Where one is present, an independent chief executive vetoes legislation and issues decrees or executive orders. Elected legislatures and chief executives delegate law-making authority to bureaucrats, who then issue rules and regulations, decide how to enforce the law, make expenditure decisions, and produce public goods. Finally, the courts interpret law, resolve conflicts within the law, and make new law, typically when established law is vague, incomplete or contradictory. In some societies, the power given to all of these players depends on a form of higher law, or Constitution, that establishes rules and allocates authority for making law, including amending the Constitution.

“Who should make law?” is fundamentally a question about the legitimacy of the law, and therefore the circumstances under which law should be obeyed. This question also has three contending answers: popular sovereignty (supremacy in creating law should be given to citizens or their elected representatives), judicial sovereignty (supremacy in creating law should be given to the judiciary), and expert sovereignty (supremacy in creating law should reside in the hands of technically trained bureaucrats). The first answer views legitimacy as arising from popular consent, and so is related to the liberal theory of justice and normative democratic theory. In essence, popular sovereignty theories evaluate law on the basis of the extent to which it arises from the consent of the governed. The other two answers view legitimacy as arising from authorities who possess appropriate skills and/or values, such as religious leaders, judges, technicians or royalty, regardless of the popularity of their decisions among citizens. From combinations of these answers emerge eight major schools of legal thought.<sup>1</sup>

### ***2.1 Traditionalists***

The oldest school of legal thought is the *Traditionalist (or Classical) School*, and finds its most complete expression in Anglo-American law in Langdell (1871, 1880). Traditionalism is the pinnacle of formalism, focusing exclusively on the internal structure of law regardless of its consequences. This focus on internal structure implicitly assumes that law is separate from politics and other worldly pursuits.

Following Coke (1608) and Blackstone (1765-69), Traditionalists argue that law emerges from inherited cultural norms, such as Saxon traditions, God’s command, or nature. According to Traditionalists, humans do not make law; however, some humans

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<sup>1</sup> For surveys see Horwitz (1992); Posner (1990); Eskridge and Frickey (1994).



must interpret the inherited law and decide how it applies to daily life. In this sense, humans make law, and, according to Traditionalists, those who make law should be “oracles” who are trained in appropriate traditions and are independent of outside influences, including those arising from the political process. In some societies law is thought to emanate from deities, and legislators and judges must be selected from or approved by the clergy, as is the case in Islamic Law states such as Iran.

## **2.2 Realism**

Legal Realism is a broad category of schools of legal thought. All positive Realist legal theories regard law as made by humans to serve the objectives of those who make law, and all normative Realist theories evaluate law according to the extent to which it conforms to some version of a liberal theory of justice. But Realist schools differ in their assumptions, logic and conclusions in addressing the core positive and normative questions about the development of the law.

The first Realists, though not known by that name, were the *Sociological Jurisprudential School* (SJS), represented most clearly by Holmes (1881, 1897), Cardozo (1922), Pound (1931) and H. L. A. Hart (1961). SJS replaced Traditionalists in Anglo-American law. SJS argues that because law has social consequences, it ought to be regarded as an element of, or input to, policy. In this view, law should be evaluated on the basis of whether it improves society according to democratic principles, implying that law should serve the interests of most citizens while respecting individual rights. Although acknowledging the connection of law to the welfare of citizens, SJS, like Traditionalism, relies on philosophical reasoning or observations of cultural norms, not theory or facts about how citizens behave or perceive their interests, to evaluate policies.

Modern heirs of Holmes and Pound go one step farther, treating law as policy itself, i.e., an allocation of resources or a division of winners and losers by use of force (Llewellyn 1930, 1931, 1960; see also Landis and Posner 1975 and Posner 1990).<sup>2</sup>

Modern Realism includes five modern branches of legal scholarship: mainstream Political Science, Public Choice, Legal Process, and two overlapping offshoots of Legal Process, Law and Economics and PPT of Law.

### **2.2.1 Mainstream Political Science**

Mainstream Political Science (MPS) is a type of modern Realism, although political scientists do not always adopt the democratic normative standards of SJS and other Realist schools. That is, mainstream political scientists typically assume that law is policy made by humans according to their values and preferences. MPS is not the same as PPT for two reasons. First, MPS does not use the economic approach of goal-directed rational choice to examine political decisions. Second, MPS has no standards for evaluating policy outcomes other than counting support and opposition or applying moral and political philosophy to a particular policy issue. Thus, MPS measures expressions of preferences through votes and public opinion surveys, and seeks the roots of these expressions by correlating them with socioeconomic measures to ascertain how political values and preferences are created and transmitted.

Work in MPS deals with all the relevant political actors, including casting votes by citizens, enacting statutes (making policy) by legislators, implementing statutes by the executive and the bureaucracy, and deciding cases by judges. Because PPT research on

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<sup>2</sup> Progressives fit within the Realist School, but we will reserve our discussion of their contribution to later in this essay.

voters, legislators, and the executive branch builds on and has extensive overlap with MPS, we include the latter's contributions in these areas in subsequent sections that focus on PPT of law.

Research on the judiciary in MPS views judicial decisions as expressing the preferences of judges, and seeks to determine the sources of these preferences. One MPS group, Attitudinalists, searches for judicial preferences in the personal characteristics and values of judges. The pioneering studies by Pritchett (1948), Schubert (1959, 1965), Nagel (1961, 1969) and Spaeth (1963) developed many of the techniques used to study judges' attitudes.<sup>3</sup> Another MPS group work regards judicial preferences as derived from the political process in much the same way as politics influences the preferences of elected officials and bureaucrats. Other MPS scholars look for the source of judicial preferences in public opinion (Cook 1977; Kuklinski and Stanga 1979; Barnum 1985; Caldeira 1987, 1991; Marshall 1989). Still others look to interest groups (Galanter 1974; O'Connor 1980; O'Connor and Epstein 1983; Epstein 1985; Sunstein 1985; Macey 1986; Caldeira and Wright 1988; Kobylka 1991; Epstein and Kobylka 1992).

The MPS work that is closest to PPT is the self-designated "Neo-Institutionalist" School (see Epstein, Walker and Dixon 1989). Following Peltason (1955) and Dahl (1957), these scholars regard court decisions as derived from the individual policy preferences of judges, but these preferences are constrained and directed by the

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<sup>3</sup> More recent works in this paradigm include Tanenhaus et al. (1963), Giles and Walker (1975), Rohde and Spaeth (1976), Baum (1980, 1988), Carp and Rowland (1983), Segal (1984), Carter (1988), Songer and Reid (1989), Perry (1991), Segal and Spaeth (1993), Songer, Segal and Cameron (1994), Kobylka (1995) and Songer and Lindquist (1996).

institutional structure of the judiciary and its relation to the rest of the political process.<sup>4</sup> These scholars regard Supreme Court justices as mediating their own policy preferences according to the norms of jurisprudence and democratic legitimacy. They also regard justices as behaving strategically through their interactions with each other and with lower courts. While each judge seeks to achieve the best feasible outcome, the institutions of the court, such as procedures for assigning the task of writing opinions and the shared norm of precedent, affect both their goals and their strategies (Epstein and Knight 1998).

### **2.2.2 Public Choice**

Public Choice is a modern branch of Realism because it also assumes that law is policy that serves the interests of those in power (see Farber and Frickey 1991; “Symposium on Public Choice and Law,” 1988).<sup>5</sup> Public Choice also is another close relation to PPT because of its use of economic analysis to study politics; however, it has some unique elements that causes scholars in both camps to regard themselves as not part

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<sup>4</sup> Examples of New Institutionalism scholarship are Adamany (1973, 1980), Funston (1975), O’Brien (1986), Gates (1987, 1992), Marks (1988), Epstein, Walker and Dixon (1989), Gely and Spiller (1990, 1992), Rosenberg (1991), Eskridge and Ferejohn (1992), George and Epstein (1992), Schwartz (1992), Spiller (1992), Spiller and Spitzer (1992), Zuk et al. (1993), Cameron (1994), Schwartz et al. (1994), Epstein and Walker (1995), Epstein and Knight (1996), and Knight and Epstein (1996).

<sup>5</sup> We define the Public Choice School narrowly, as the term is used in economics, rather than broadly, as in much legal scholarship (e.g., Farber and Frickey 1991) that regards all work applying microeconomic reasoning to study law and politics as Public Choice.

of the other. The distinctive features of the Public Choice School are a strong form of the liberal theory of justice that comes very close to Libertarianism (in fact, some leaders of the Public Choice School are Libertarians), an equally strong suspicion of democratic processes for producing policies that respect this theory, and an absence of concern for distributive justice.

Public Choice scholars regard the normative purpose of government as maximizing a combination of freedom and wealth, which implies that the role of government is to ensure personal liberty, protect private property, and promote economic efficiency. The goal of economic efficiency is defined by the strong Pareto Principle: a hypothetical social state is superior to the status quo and ought to be adopted if it makes some better off while harming no one. Public Choice rejects the weak Pareto Principle, i.e. that a policy is preferred if the winners could compensate the losers and still experience a net gain from the change, on the grounds that it does not respect liberty or property. In Public Choice liberty and property rights always trump distributive justice.

Public Choice theory is highly skeptical about the efficacy of democracy for achieving economic efficiency, enhancing personal liberty and protecting private property. One Public Choice critique of democracy is that decisions are driven by rent-seeking elected officials and by special interest groups who essentially buy policy from politicians (Buchanan 1968; Buchanan, Tollison and Tullock 1980). Public Choice theory regards policy as purchased by the highest bidder, usually by sacrificing efficiency, liberty and property rights, and therefore as lacking a compelling normative defense.

Another Public Choice critique of democracy is that collective choice is a meaningless concept from both a positive and normative perspective. The basis for this

critique is one of the cornerstones of PPT, the Condorcet paradox and the Arrow Impossibility Theorem (Arrow 1951). Condorcet (1785, 1989) was the first to observe that majority-rule voting can lead to intransitive and unstable social decisions, even though each person votes non-strategically according to a stable, transitive preference ordering. Arrow's Impossibility Theorem, which we discuss more fully in the section on elections, states that if rational individuals have different values and objectives, all social decision process are normatively ambiguous (see also Chipman and Moore 1976) and, without arbitrary rules that restrict the decision-making process, unstable (McKelvey 1976 and 1979, Cohen and Matthews 1980). Public Choice scholars infer from these theoretical results that all collective decisions reflect either the imposition of agenda control by someone in power or the random result of an inherently chaotic process (Riker 1982).

Public Choice challenges the normative legitimacy of all forms of law, whether legislative, judicial or administrative (see Farber and Frickey 1991 and Eskridge 1994 for reviews). Some Public Choice scholars conclude that the only solution to these problems is to shrink the scope and power of government and to require unanimous consent to adopt coercive law.

### **2.2.3 The Legal Process School and Its Cousins**

Another branch of modern Realism is the Legal Process School. The origins of this school lie in a dissatisfaction with the form of Realism that was dominant in the 1950s and 1960s. This version of Realism thought of law solely as the expression of power, and had largely abandoned the normative component that was prevalent among Traditionalists and early Realists. To bring a normative grounding back to the law, the

founders of the Legal Process School, while agreeing that law is policy, proposed that law acquires legitimacy from the process by which it is made (Bickel 1962, Fuller 1964, Hart and Sacks 1958, 1994 and Wechsler 1959). “Neutral principles” inform the construction of the legal process to ensure that law-making, whether legislative, administrative or judicial, is reasonable and serves the common good. In *The Legal Process*, Hart and Sacks (1994) do not adopt either popular or judicial sovereignty, but rather see law as a holistic institutional system in which courts, legislatures, and administrative agencies interact to make policy. If the design of this system follows principles of representativeness and fairness, the process is legitimate and the policies it produces are in the interest of society. Indeed, the subtitle of Hart and Sacks’ famous 1958 manuscript was *An Introduction to Decision-Making By Judicial, Legislative, Executive and Administrative Agencies*.<sup>6</sup>

The Legal Process School is closely related to two other schools within Realism: Law and Economics and PPT of Law. Law and Economics does not have an articulated theory of political legitimacy, and so does not take a position on the issue of popular versus judicial sovereignty (see Posner 1986; Cooter and Ulen 1988; Polinsky 1989; Romano 1993, 1994a; Craswell and Schwartz 1994; Schuck 1994; and Shavell 1987). Nevertheless, Law and Economics research, following other Realists, typically assumes that the purpose of law is to promote collective welfare. In Law and Economics, the normative goal is to increase economic efficiency. But unlike Public Choice, Law and Economics generally uses the weak form of the Pareto Principle: policy change is desirable if the winners could fully compensate the losers and still be better off, regardless of whether compensation actually is paid. Thus, Law and Economics scholars

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<sup>6</sup> To honor this work, and to show our pedigree, we adopt their subtitle as our own.

are comfortable with policies that improve overall welfare by reducing transactions costs, the dead-weight loss of monopoly, or the incentive to engage in socially undesirable behavior, even if the losers (e.g., a monopoly that is divested or regulated, or a firm that is barred from producing an unsafe or polluting product) are not compensated.

Law and Economics employs positive microeconomic theory, which assumes rational, self-interested behavior, to predict the policy outcomes that will arise from a set of legal rules, and welfare economics to evaluate alternative approaches to the law for solving the same problem. The essential feature of work in Law and Economics, and arguably its most important contribution to legal scholarship, is the application of sequential game theory to explore the consequences of law, using a two-step analysis:

Stage I: society adopts law to constrain and to direct rational, self-interested behavior.

Stage II: members of society maximize their selfish interests, given the law that shapes their incentives.

Socially desirable rules parallel the accomplishment of perfectly competitive markets as perceived initially by Adam Smith: channel individual greed so that it leads to maximum social welfare. This dictum is almost identical to Madison's argument in Federalist 10 that in designing government institutions ambition must be made to counteract ambition. Hence, Law and Economics typically analyzes a legal rule (e.g., cost-plus regulation, formulas for compensating breach of contract, tort liability standards) to identify its incentives, to characterize the efficiency of the behavior arising from these incentives, and to propose an alternative that, if not perfectly efficient, at least is better.

PPT of Law is a close relative to Law and Economics. In fact, PPT of Law can be conceptualized as attacking a loose end in Law and Economics: why rational actors who greedily maximize their personal welfare in the second stage of the game altruistically



adopt legal rules in the first period that constrain their subsequent behavior in order to maximize social welfare. PPT of Law also extends Law and Economics into new areas by using its method to study a broader array of legal issues, such as administrative procedures, statutory interpretation and judicial doctrine.

Like Law and Economics, PPT of Law employs microeconomic theory to study the development of legal rules and institutions. The underlying assumptions are that political actors, like participants in private markets, are rational and goal-directed, and that government institutions, including the electoral process, shape their incentives.

As with Law and Economics, PPT of Law uses sequential game theory as its core analogy, but in PPT the process has four stages, not two.<sup>7</sup> In the first stage, citizens vote for candidates. In the second stage, elected officials (legislators and, where relevant, independent executives) produce law that empowers bureaucrats. In the third stage, a bureaucratic official makes decisions to elaborate and to enforce the law as authorized by statutes or decrees (e.g., Executive Orders). In the fourth stage judges make decisions on the basis of their own preferences, subject to the constraints and incentives that are established by pre-existing law (judicial precedent, statutes, the Constitution).<sup>8</sup> In each stage, decisions reflect “rational expectations” in that choices are based on expectations of the future behavior of decision-makers in subsequent stages. Because the four-stage

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<sup>7</sup> Of course, in some cases, a stage may be missed, such as when a Constitutional challenge is raised against a statute, or when voters create a statute through the initiative.

<sup>8</sup> Each of the four stages is further divisible into a sequence of substages. For example, in a hierarchical judiciary, decisions are made sequentially by courts at each level. This elaboration of PPT of Law is examined in subsequent sections.

game is repeated, in the fourth stage courts make decisions in expectation that all other actors will have a chance to respond to them.

The study of regulation has played a central role in the development of both Law and Economics and PPT, and both schools cite the early works on the economic theory of regulation as part of their canon (e.g., Stigler 1971, Posner 1974; for a survey of this work, see Noll 1989). The economic theory of regulation grew out of a desire to explain a key finding of early Law and Economics research, which is the divergence between normative Law and Economics (welfare maximization in the presence of market failures) and the actual effect of some regulation (cartelization and cross-subsidization). This research first focused on rules issued by the agency, then on legislation and oversight by the agency's principals, the legislators, and, finally, the decisions by the legislature to create the administrative procedures of agencies and the jurisdiction, powers and procedures of the courts as a means of influencing the actual policies that emerge from agencies and courts.

PPT of Law differs from the Legal Process School in two important ways. First, PPT, along with Law and Economics, argues that legal processes are designed to achieve policy objectives, not as ends in themselves to satisfy procedural norms. PPT and Law and Economics are consequentialist in that they evaluate processes on the basis of their outcomes. Second, PPT extends Law and Economics by providing an alternative answer to the question "Who makes law?" In particular, PPT accords more weight to the role of citizens and elected officials, and less weight to the role of bureaucrats and judges, than does the Legal Process School.

PPT argues that the choice of structure and process is directly related to the choice of substantive policy. Choice of legal process – that is, the design of institutions

that make and enforce policy – is a substantive political choice that is directly connected to policy objectives and outcomes (c.f. Noll 1976 and 1987, Shepsle and Weingast 1981, McCubbins, Noll and Weingast 1987), not some “neutral” choice that is independent of policy content and based on principles unrelated to policy objectives. According to PPT, elected officials design the structure and process of agency decision-making and judicial review to make bureaucratic and judicial decisions accountable to legislative and executive authority (Wilmerding 1943; Shapiro 1964; Fiorina 1977a,b, 1979; Fiorina and Noll 1978; Weingast 1984; McCubbins and Schwartz 1984; McCubbins 1985; McCubbins and Page 1987; Ferejohn 1987; McCubbins, Noll and Weingast 1987, 1989; Moe 1989; Kiewiet and McCubbins 1991; Eskridge and Ferejohn 1992; Ferejohn and Weingast 1992; Cohen and Spitzer 1994, 1996; Lupia and McCubbins 1998). In brief, delegation through administrative processes and judicial enforcement is not an abdication of policy-making authority by elected officials, but is a means for assuring that their policy objectives are carried out.

PPT of Law and the Legal Process School share a procedural norm, democratic legitimacy, which means that policy ought to be responsive to the preferences of citizens. If elected officials influence the decisions of unelected officials (bureaucrats and judges), then law that emanates from stages three and four of the law-making process has indirect democratic legitimacy (McCubbins, Noll and Weingast 1987; Kiewiet and McCubbins 1991; Lupia and McCubbins 1998). These later-stage decisions have direct legitimacy if first-stage decision makers (voters) influence second-stage decisions by elected officials. If statutes and decrees that are crafted by elected officials have democratic legitimacy, the ability of these officials to control third and fourth stage decisions confers democratic legitimacy on this part of law as well.

### ***2.3 The Foundations of PPT of Law***

PPT of Law draws its methods from positive political theory (c.f. Riker and Ordeshook 1973), an interdisciplinary field in economics and political science that seeks to model and explain political behavior. All PPT models are based on assumptions about how people respond to complexity and competition for resources (including ideas). PPT models share three foundational assumptions.

1. ***Rationality*** — PPT models assume rationality, at least in the weak sense. That is, individual behavior is purposive, and decisions are made to advance these purposes (c.f. Ferejohn and Satz 1994; Cox 1999; Lupia, McCubbins and Popkin 2000). While many theorists assume the self-interest principle (i.e., individuals selfishly maximize their own welfare), this assumption is not essential to rational actor theory (Noll and Weingast 1991). All that rational actor theory requires is that individuals can make comparisons between any two alternatives, can deem one better, worse or the same as the other, and make decisions based on such preferences that are weakly transitive (A preferred to B and B preferred to C implies C not preferred to A).
2. ***Strategic behavior*** — PPT assumes that individuals recognize that the consequences of their actions can depend on and affect the actions of others, and take this dependence into account when making decisions. PPT uses games as an analogy to specify how choices and consequences are jointly determined by multiple actors, and characterizes people's choices as strategies within a game.
3. ***Component analysis*** — while an individual simultaneously engages in many different interactions with many different people (i.e., people play many games at once), PPT assumes that studying the actions of individuals one interaction at a

time produces useful insights. This assumption parallels analysis in Law and Economics, and economics generally. Moreover, it closely corresponds to the concept of “factoring” in cognitive psychology, which refers to the observation that humans tackle complex problems by segmenting them into a sequence of simpler problems. PPT assumes that real social behavior can be explained and predicted on the basis of studying more simple interactions of individuals in a specific decision-making setting.

Each of these assumptions foments debate, particularly the rationality assumption. Assessing this debate is beyond the scope of this essay (c.f. Green and Shapiro 1994; *Critical Review* 1995; Lupia and McCubbins 1998).

### **3.0 Elections, Representation and Democratic Legitimacy**

The responsiveness of elected officials to the values and preferences of citizens is central to both democratic theory and the theory of law. The question of what sort of democracy we *should* have is informed by positive, analytical answers to the questions about what sort of democracy we *can* and *do* have, and how changes in the details of democratic institutions would influence the law that emanates from it. PPT of Law is about making policy in a democracy, and it inevitably must address whether the policies that emanate from democratic processes are normatively attractive. PPT provides two answers to those who challenge the normative significance of its results, given that individual goals may not deserve respect.

First, if institutions are evaluated on the basis of their policy outcomes, and if people usually do behave rationally as defined here, then PPT is normatively important because it links institutions to consequences, regardless of whether the goals of rational

actors are normatively attractive. A necessary preamble to “what ought to be” in institutional design is “what are the consequences” of specific forms of institutions. One need not believe that individual choice is normatively interesting to find useful a good positive theory of how individual behavior is shaped by institutions.

Second, normative democratic theory argues that the best method of governance bases policy decisions on individual expressions of political preferences through voting. The relevance of PPT to normative democratic theory is that it examines the extent to which a specific set of political institutions truly are democratic, i.e. that voting actually affects the content of the law so that one can say that policy has the consent of the governed. PPT of Law asks whether the policy emanating from the four-stage game has democratic legitimacy, which means that law can be said to reflect the preferences of citizens or, if not, whether it fails to do so only because of other conflicting values, such as protection of liberty and property. PPT provides an understanding of the extent to which the values and preferences of citizen/voters are transmitted to their elected representatives, and whether these preferences are then embodied in the law.

### ***3.1 Elections and Democratic Legitimacy***

PPT of Law begins with elections for two reasons. First, PPT of Law addresses the normative issue of democratic legitimacy by examining whether, as a matter of positive theory, electoral institutions enable citizens to influence policy. Second, PPT of Law must encompass elections to the extent that elections shape the preferences and behavior of elected officials, bureaucrats and judges. The development of normative and positive theories of the linkages between elections and law are not the only reasons to study voting behavior, so our review of this research is selective and incomplete.

If the preferences of all citizens influence policy, they do so through elections. Three necessary conditions for elections to influence policy are as follows. First, the electoral process must produce elected officials who broadly represent or respond to the preferences of citizens. Second, the legislative process must yield statutory law that broadly reflects the preferences of legislators that are, in turn, derived from or represent the preferences of voters. Third, the law-making actions of elected officials must be carried out by the players in subsequent stages of the game, bureaucrats and judges. This section addresses the first condition. Sections on the legislature, the chief executive, the bureaucracy and the courts discuss the second and third conditions.

Whether the first necessary condition is satisfied depends on the nature of elections. To ensure that elected officials are responsive to the preferences of all citizens, the power to influence elections and hence candidates must be distributed universally and equally. In addition, elections must be competitive in that entry to run for office must be sufficiently easy that incumbents who pursue unpopular policies will attract opposition candidates who will advocate and implement more popular policies.

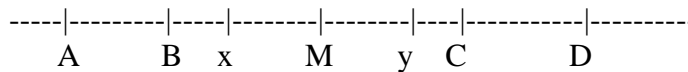
PPT of democratic elections argues that the presence of political competition leads to the election of candidates who are broadly responsive to citizen preferences. The simplest and most commonly used positive theory of elections is the one-dimensional spatial model of majority-rule decision-making, sometimes called the Black-Downs model after the pioneering work of Downs (1957) and Black (1958). This theory assumes that candidates and voters are arranged spatially on a one-dimensional continuum and that each voter has “single-peaked” preferences. A single-peaked preference refers to a preference ordering in which each voter has a “most preferred”

point on the policy continuum and the desirability of other policies to a voter is inversely proportional to their distances from the voter's most desired policy.

If elections are limited to a single candidate and citizens must either vote for that candidate or not vote at all, elections have no effect on policy because the sole candidate can take any position on the continuum, obtain some votes, and so win the election. But if elections are competitive, the one-dimensional spatial model produces two well-known results: the "median voter theorem" and the "positive responsiveness theorem."

The median voter theorem states that if two candidates run for office, can espouse any position on the continuum, and are motivated solely to win the election, and if citizens are uninformed about the policies that a candidate will adopt, then a candidate who takes the position that is most preferred by the median voter will defeat a candidate who takes any other position, so that the ideal point of the median voter will be the policy that is adopted by the winner. Although the logic of the median voter theorem is widely understood, it is useful to set forth the simple model here because we extend it to illustrate other issues about the politics of public law in other sections. Figure 3.1 depicts a configuration of ideal points, A, B, C, D and M, in one dimension for a polity of five voters. In this example M is the most preferred policy of the median voter because an equal number of voters have ideal points on either side of M. In addition, x and y are hypothetical policy positions of candidates.

**Figure 3.1:**  
**Majority-Rule Equilibrium in One Dimensional Policy Space**





If the distance from the ideal point is inversely proportional to the utility of a policy proposal to that voter, then the two voters having ideal points A and B prefer policies to the left of the median voter and would vote for a candidate who proposes  $x$  against a candidate who proposes  $M$ ; however, the other three would vote for  $M$ . Likewise, the voters with ideal points C and D would prefer policy to move to the left of  $M$ , and would vote for proposal  $y$ , but the other three would prefer  $M$ . If candidates themselves have no preferences over policies (they simply seek to win the election), each has an optimal strategy to propose  $M$ . If only one candidate proposes  $M$ , that candidate will obtain three votes regardless of the proposal by the other. If both candidates select  $M$ , each has a probability of  $\frac{1}{2}$  of being elected, but regardless of which candidate wins, the policy that is implemented will be  $M$ . Hence, the equilibrium outcome in majority-rule democracy is the most preferred policy of the median voter.

The positive responsiveness theorem states that a shift in the preference of a voter either will cause the majority-rule equilibrium to shift in the same direction or will have no effect on the equilibrium. Put another way, policy can not shift in the opposite direction of a change in the ideal point of a voter. This theorem arises from performing comparative statics analysis on the median voter equilibrium. If a shift in preferences causes a change in either the median voter's most preferred position or the identity of the median voter, then the winning policy position will move in the same direction as the shift in preferences. For example, in Figure 1, suppose the ideal point of the voter who formerly most preferred  $C$  to move to the point represented by  $x$ . This shift makes this person the new median voter and  $x$  the new median voter equilibrium. Likewise, if the preferred outcome for  $M$  switched to proposal  $x$ , then the identity of the median voter would not change but  $x$  would be the new equilibrium. But if the position of the person

who formerly most preferred C switched only to proposal y, the majority-rule equilibrium still would be M.

These two theorems provide a positive theoretical basis for democratic legitimacy. Together they imply that the preferences of citizens affect the policy preferences of elected officials if all citizens have equal opportunity to vote, if voters are informed, and if candidates adopt the policies that they espouse in a campaign. The theoretical basis for believing that candidates will do more or less what they say they will is that elections are repeated, so that if voters believe that candidates have not lived up to their promises, they will vote against incumbents who seek re-election. Thus, the key issues in whether the outcome of democratic elections confers legitimacy on the policies that are adopted by elected officials is whether all citizens have equal access to the polls and all voters are sufficiently informed to evaluate candidates reasonably accurately. If voter participation is biased – say, if citizens whose most preferred policies are A and B above are unable to vote – then the median voter will not represent the median of citizen preferences. If voter evaluation errors are small, policy outcomes will be responsive to voter preferences, but if these errors are large, policy outcomes will have no coherent relationship to the underlying preferences (utility) of citizens.

A more complex spatial theory, beginning with Davis, Hinich and Ordeshook (1970), relaxes the assumption that policy is a choice in a single dimension. This theory begins with two facts: governments adopt many policies (the textbook example is the choice between guns and butter), and citizens differ in their policy preferences, including the importance they assign to more policy output compared to more private consumption. To capture these facts in a model, the theory represents elections as a choice in a

multidimensional policy space, which presents the danger of instability and unpredictability due to the Condorcet paradox (majority-rule cycles).<sup>9</sup>

Although the multidimensional spatial model generally lacks an equilibrium outcome that corresponds to the median voter theorem, it does predict a centralizing tendency of winning policy positions. In the standard multidimensional model, the preferences of each citizen are characterized by an ideal point and a utility function in which utility is inversely proportional to distance from the ideal point. In this model, the Pareto Set is the smallest compact subset of points that contains the most-preferred outcome, or ideal point, of every citizen. The Pareto Set has the property that in an election involving a candidate who takes a position outside the Pareto Set, at least one position in the Pareto Set is unanimously preferred to that position. Majority-rule instability arises because each alternative in the Pareto Set can be defeated by some other alternative, although never unanimously. Thus, in competitive majority-rule elections in which candidates are motivated to win, the winning platform will be in the Pareto Set, but will not be stable over a sequence of elections.<sup>10</sup>

Elections in a multidimensional space also obey positive responsiveness, albeit in a weaker form than in the one-dimensional model. Because the composition of the Pareto Set is determined by the collection of the ideal points of citizens, the set of potentially winning platforms changes if citizen preferences change. If a change in

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<sup>9</sup> In the one-dimensional spatial model transitive individual preferences lead to transitive social preferences under majority rule if individual preferences are single-peaked.

<sup>10</sup> PPT has sought largely unsuccessfully to identify a smaller set that contains all feasible majority-rule outcomes. See Banks 1985, Epstein 1998 and Penn 2002.

preferences causes the Pareto Set to shift so that it no longer contains the status quo, then policy will move into the Pareto Set, thereby tracking the general shift in preferences.

The significance of voting theory is that it establishes a weak form of democratic legitimacy. Elections do respond to shifts in preferences, and the power of citizens whose preferences are most completely satisfied arise not from their identity or position, but from the fact that their preferences are in the middle of the distribution.

Nevertheless, the choices arising from majority rule clearly can not lay claim to social optimality, as many critics of democracy have shown. The next section addresses these critiques and assesses the extent to which they undermine the democratic legitimacy of elections.

### ***3.2 Critiques of Democratic Elections***

Realists in economics, law and political science have developed a long litany of criticisms of democracy as an effective method of making decisions. These criticisms all are related to the same fundamental theoretical result: the outcome under majority-rule democracy either is unstable (no equilibrium exists), or, even if the outcome is an equilibrium, it does not necessarily (or even probably) maximize social welfare. The following discussion pinpoints the causes of these problems, and how their significance depends on the design of political institutions.

#### **3.2.1 Tyranny of the Majority**

Perhaps the best-known critique of majority-rule is the possibility of a “tyranny of the majority,” which refers to a circumstance in which a majority extracts a small gain but in so doing imposes an enormous cost on a minority. This problem arises primarily because voting transmits little information about the intensity of preferences. If citizens vote for one alternative over another, all that one can infer is that the intensities of their

preferences are sufficient to offset the cost of voting. Thus, a majority with moderately intense preferences can impose its will on a minority with very intense preferences. In the absence of side payments (one side purchases the votes of its opponents), majority-rule is unlikely to pick policies that maximize social welfare because of the inherent difficulty in weighing the gains of the victors against the losses to the vanquished.

Despite this problem, democratic theory, in requiring a test of the consent of the governed to legitimate a policy, is not without a normative defense because of the absence of compelling alternatives. If the preference intensities of every individual are measurable and are described by convex functions over all feasible bundles of private goods and public policies, one can then identify an optimal social state. Unfortunately, the lesson of the Impossibility Theorem is that the only decision-making process that would select that state is a dictatorship run by a perfectly informed altruist. As long as those who make policy choices are not perfect altruists, no mechanism exists for selecting policies that achieve the social optimum – not the market mechanism because of its indifference to whether the initial allocation of endowments corresponds to differences among citizens in their abilities to derive welfare from income, and not the surrogate for a market mechanism in the public sector, benefit-cost analysis. Thus, the Arrow Impossibility Theorem is a counsel of despair for creating institutions that are capable of picking optimal policy.

Nevertheless, the failure of an institutional system to attain the optimal policy is not fatal to all normative inquiry about the performance of alternative decision-making processes if two conditions hold. First, normative analysis must be able to rule out some outcomes as worse than others, even though it can not produce a complete preference ordering over all possible outcomes. Second, positive analysis must be able to compare

alternative decision-making procedures in terms of their abilities to avoid bad outcomes and select acceptably good ones. The Arrow Impossibility Theorem does not say that one can never determine whether one social state is better than another, or that all institutions are equally inept at avoiding bad outcomes. Instead, it says that as a general proposition one can not always determine which of two social states is socially more desirable, and that no decision-making institution always implements the optimal social state. For example, the compensation test (the weak Pareto Principle) can be conclusive, but in some circumstances it is not. As shown by Besley and Coate (1997, 1998), the multidimensional spatial model does produce policy outcomes that are not strictly Pareto dominated by other alternatives with respect to their effects in the current election cycle, although they may not be efficient when one takes into account their effects across multiple election cycles.

The exploration of the meaning of Arrow's Impossibility Theorem adds context to both PPT and normative democratic theory. The consent of the governed as a criterion for the legitimacy of policy links to the spatial model in that it confers normative approval on a process in which the set of outcomes predicted by the theory excludes those that are unanimously regarded as inferior to others. Moreover, constitutional democracy, with its guarantees of certain individual rights combined with democratic decision making, can be interpreted as a system in which actions to provide valuable public goods are feasible, but are unlikely to impose enormous harm on anyone unless their preferences are widely at variance with the rest of society.

### **3.2.2 Imperfect Information**

A potential problem with democratic decision making arises from the unreality of the assumptions that voters know the positions of candidates, candidates know the

preferences of voters, and all voters participate equally and independently in the election. The transmission of citizen preferences to the preferences of elected officials is subject to distortions if these assumptions are relaxed. This section examines the distortions can arise from imperfect information, as examined initially by Downs (1957).

PPT provides a rich interpretation of the information problem in democratic elections as well as an understanding of how citizens deal with this problem. One important insight from Downs (1957) is that uninformed citizens (because a single vote is unlikely to be decisive in an election in which more than a few voters participate) are “rationally ignorant” – that is, they have no instrumental incentive to become informed, or even to vote if doing so is costly. Nevertheless, candidates and their intense supporters have an incentive to reduce the participation costs of voters who are likely to favor them, such as by supplying free information and providing transportation to the polls. Other inexpensive signals are available to voters, such as the party of the candidate, the candidate’s career record in and out of public office, and, for incumbents, the general state of the nation.

Fiorina (1981) explains that, in the absence of information about the likely policy preferences of candidates, the optimal voting strategy for a rational voter is “retrospective voting:” to keep a tally of positive and negative evaluations and, when an election occurs, to vote for the incumbent if the running score is positive. If citizens use a high discount rate, this strategy simplifies to observing the state of the nation at the time of the election and voting for incumbents if the voter is better off now than at the time of the last election but against them otherwise. Retrospective voting emphasizes the importance of repeated elections in forcing candidates to be responsive to citizens.

Political parties play an especially important role in overcoming information problems. Parties focus on increasing their overall power in the government, not on winning a particular seat, and as a result have an incentive to nationalize elections by appealing to a broad range of citizens. Parties perform this role by taking actions that connect imperfectly informed citizens to politicians, such as by developing a collective brand name, raising money collaboratively, and arranging for cooperation among members on policy goals (Petrocik 1981, Cox 1987).

If citizens rely on interested parties to provide information, one danger is that these groups will provide false or misleading information that will cause citizens to vote against their actual preferences. Cue theory analyzes how voters effectively can use the information that they acquire from easily accessible signals, such as parties, interest groups and other citizens, to inform their decisions while minimizing the danger of manipulation (Berelson 1954, Downs 1957, Schelling 1960, Popkin 1994, Lupia and McCubbins 1998). In cue theory political parties play an especially prominent role because parties are easily identified and have a strong incentive to secure their reputations among voters (c.f., Cox and McCubbins 1993, 2004).

### **3.2.3 Mobilization Bias**

Mobilization bias refers to systematic over-representation of some preferences relative to others in political decision-making, which includes voting, lobbying, litigating and participating in administrative processes. Mobilization bias arises because some preferences are more easily aggregated and represented by organizations that seek to influence policy through political participation. Mobilization bias is closely connected to the concept of “salience” in MPS, whereby citizens are said to consider only on a few issues in a campaign that, at the time, are most important (salient) to them. To focus



attention on a few issues is one response to the problem of incomplete information and rational ignorance, as analyzed in Downs (1957). If an issue is salient only to a small minority, a candidate can gain votes among them without sacrificing votes among the majority by advocating policies of importance to them. From the perspective of aggregate social welfare intense per capita preferences among a small group do not necessarily offset less intense per capita preferences among a large majority, so that a candidate's optimal strategy does not necessarily lead to policies that do more good than harm.

Olson (1965) takes this argument further to identify the types of policy preferences that are more likely to be effectively represented. Holding the aggregate intensity of preferences for alternative policies constant across groups, a group's preferences are more likely to be represented if the group is smaller (hence that group has a higher per capita stake), the group is already organized for another purpose (e.g., a firm, a trade association, a union, a church, or an outdoor club as in the case of the Sierra Club), and the preferences among group members are more homogeneous.

Mobilization bias does not necessarily distort policy. For example, Pluralists (c.f. Dahl 1967) observe that mobilization bias has the advantage of causing advocates of policies to generate information to inform both voters and decision makers. As long as groups representing a variety of policy positions are organized, then, in Madison's terminology, "ambition will counter ambition," leading to a negotiated policy decision that does not fully satisfy any of the organized groups.

In some obvious cases, conflicting preferences are not equally mobilized, in which case the preferences transmitted to candidates for election are distorted. For example, the preference of voters for federal construction projects in their home district,

so-called pork barrel expenditures, may only reflect the salience of the large local expenditure for their particular project and the lack of salience of the low individual tax price for projects in other communities. Hence, this form of mobilization bias can cause voters to respond positively to programs that do most of them more harm than good (c.f. Weingast 1979; Weingast, Shepsle and Johnson 1981).

The likely importance of mobilization bias depends on how the electoral system is designed. Democracies exhibit a variety of methods for dividing citizens into constituencies for choosing legislatures. Because representation systems aggregate citizen preferences in different ways, the preferences among legislators that are induced by citizen preferences through elections also differ according to the design of the system of representation. Consequently, the nature and extent of pathologies arising from mobilization bias differs according to how citizens are organized into constituencies for electing representatives.

As a general proposition, smaller constituencies (implying a larger number of elected representatives) are likely to be more homogeneous with respect to their economic interests and their non-economic values, and therefore more likely to produce elected representatives who differ from each other more widely in the policy preferences that they will bring to government policy-making. For more universal policies that are salient to many voters, narrow constituencies are not likely to bias the pattern of representation in the government; however, narrow constituencies also make it easier for a group with less access to information and lower turnout, or a group with atypically intense preferences in a particular policy domain, to influence an election. Hence, a larger number of smaller constituencies can increase the extent to which the induced preferences of legislatures emphasize narrow policies to benefit a small fraction of the

population. The legislators then have a further incentive to form a coalition that delivers targeted benefits to each of their small constituencies.

The pathology arising from this system of representation is the tendency to focus on policies such as pork barrel, where the benefits but not the costs of projects are salient in a majority of districts. But small districts have other consequences that may be more important. Small districts can give representation to small groups with atypical preferences that otherwise would not be represented in the legislature and so would stand no chance of being part of a controlling coalition. Moreover, in small districts citizens are more likely to be familiar with candidates, so that votes are more informed. Thus, the tendency to provide pork barrel projects is properly viewed as the price associated with having a legislature that is a more representative cross-section of the entire population.

In the U.S. House of Representatives and the dominant legislative branches in Canada, the United Kingdom and France, the nation is divided into a large number of distinct geographic districts, each of which is represented by a single legislator. But other nations use different methods of converting votes into legislators. Italy has geographic districts, but each elects several legislators, as did Japan before the reforms of the mid-1990s. In this system citizens cast a single vote, so that each elected legislator has a distinct, non-overlapping constituency in the same geographic area. Typically the most popular candidates receive a large number of “wasted votes” (votes in excess of the number needed to elect them), which enables other candidates to be elected with relatively few votes. For example, compare a district of  $2K$  voters electing two representatives with two separate districts, each containing  $K$  voters. In the latter case, candidates need to receive roughly  $K/2$  votes to win a two-candidate race in each district.

But in the former case, if one candidate receives  $K$  votes in a four-candidate race, the second winning candidate may receive as few as roughly  $K/3$  votes.

Holding constant the total number of legislative seats, the main difference between single-member and multi-member districts is that the latter eliminate the necessity for a small group with intense preferences to be geographically concentrated in order to be decisive in an election. Consequently, multi-member districts are even more likely than single-member districts to enable a group with distinct preferences to achieve representation and to create an induced demand for pork-barrel projects. This outcome is achieved at the cost of under-representing citizens who favor the most popular candidates.

Another method for assuring representation of small groups is to institutionalize their representation. Minority representation can be assured by reserving seats for them. In India, some legislative seats are reserved for women and for members of “scheduled castes and tribes.” This representation requirement has changed the bundle of policies that are adopted by local governments in favor of health and education (Besley and Burgess 2002; Besley, Pande, Rahman and Rao 2005).

Many Western Europe nations and Japan since reform use a proportional representation system, whereby citizens vote for parties, seats are allocated among parties in proportion to their votes, and parties decide who will fill the seats that they win. Proportional representation from large constituencies reduces the electoral payoff from policies that cater to narrow constituencies, and so reduces the influence of mobilization bias and the political attraction of pork barrel. Proportional representation also substantially increases the role of parties, which orients campaigning more towards national as opposed to local issues.

Whereas the U. S. House is designed to represent relatively small constituencies, the Senate is composed of representatives of states. In small states, Senate constituencies are equal to one or two House districts, so that representation is not likely to differ much between Senators and House members. But most states have several House districts, and a few have twenty or more. In these states, Senators represent a broader and typically more heterogeneous constituency, and hence are less likely to be able to generate majority support by adopting platforms that appeal to the small, mobilized groups that may be decisive in House elections.

Many democracies, including the U.S., elect an independent Chief Executive who also has law-making powers, and some, including many U.S. states, elect several independent executives, each with authority in specific areas of policy. The U.S. President and U.S. governors are elected from constituencies of the whole – all voters within the jurisdiction. As a result, votes for the President and governor, like votes for senators in larger states, are less likely to reflect the narrow, parochial interests of a group than can be influential in some House districts or in Senate elections in small, homogeneous states. These votes are more likely to be determined by issues that are salient to a large number of citizens, and so less likely to cause narrow, parochial interests to influence the policy preferences of an elected executive.

The U.S. national government grants law-making authority to officials that are elected from constituencies that represent different ways to aggregate the preferences of the same citizens. As explained by Madison, this system was deliberately designed to add stability to national policy and to provide checks and balances against the weaknesses and dangers in each form of constituent representation. Specifically, the House is generally more “representative” (in the sense of office holders with

heterogeneous preferences) than the Senate and the President, but the latter are generally more oriented towards national rather than local issues.

The effectiveness of this system of checks and balances hinges on how elected officials interact to produce law, for the process for enacting statutes determines the extent to which bargains among independently elected officials can be said genuinely to reflect the preferences of their constituents and, therefore, to have the consent of the governed. The next two sections analyze how the three forms of elected law-makers in the U.S. interact to produce law and the extent to which the law that they produce can be said to have democratic legitimacy.

#### **4.0 The Positive Theory of Legislative Politics**

Legislatures are central to democracy because they have the authority to make law. The theory of how democracy works, and therefore the theory of law, revolves around understanding the legislature. If legislatures are corrupt, so too is democracy; if legislatures are representative, then government by the consent of the governed is at least feasible. Thus, an understanding of legislatures drives a theory of law and informs us about how we should interpret statutes, organize government and construct constitutions.

The view of legislatures in most theories of law is not flattering. Nearly all 20<sup>th</sup> Century jurists agree that legislatures are suspect sources of law. For example, Posner (1990: 143) asks and answers the core question as follows:

*More fundamentally, how do we know that legislators really are better policy makers than judges? No doubt they could be—if only they could throw off the yoke of interest group pressures, reform the procedures of the legislature, and extend their own policy horizons beyond the next*

*election. If they cannot do these things, their comparative institutional advantages may be fantasy.*

Farber and Frickey (1991: 2) add:

*Sometimes the legislature is portrayed as the playground of special interests, sometimes as a passive mirror of self-interested voters, sometimes as a slot machine whose outcomes are entirely unpredictable. These images are hardly calculated to evoke respect for democracy.*

Finally, Eskridge and Frickey (1994: cxix-cxx), after reviewing the scholarly literature about the failure of legislative processes, ask:

*[W]hy should judges—or anyone else—defer to the legislature? It is easy to see ... that legal scholarship would start to favor judicial supremacy over legislative supremacy; civil, criminal, and voting rights, administrative, bankruptcy, and antitrust law would become increasingly independent of legislative desires.*

This section discusses the contributions of positive political theory to understanding the effect of political institutions and legislative organization on the content of the law. Legislative organization, as we will see, is understood to be analogous to, among other things, town meetings, firms and football teams. Each of these analogies provides insight into how legislatures make decisions and, more importantly, whose interests and welfare they try to serve.

#### ***4.1 Understanding Legislative Politics***

PPT seeks to explain whose preferences are reflected in statutes. As such, the theory of the legislature is an essential ingredient to addressing questions such as the

legislative intent of a statute and the democratic legitimacy of the policies that it creates. In principle, legislatures are democratic bodies in which members have preferences over alternative laws (policies), so that a theory of legislatures rests on a conceptualization of how the heterogeneous preferences of a decisive group of legislators (usually a majority) becomes aggregated into law. To the extent that legislatures really are democratic, the median voter and positive responsiveness theorems ought to apply. And, since the preferences of legislators are induced by elections, then the democratic legitimacy of majority-rule elections confers democratic legitimacy on legislatures. But are legislatures really miniature democracies that represent citizens?

In practice, the view that statutes arise from a democratic interaction among legislators is not the basis of most theories of a legislature. Instead, most theories hold that legislative authority is controlled (some say ‘seized’) by some group of political actors. The theories differ according to who seizes power. Non-partisan theories point to congressional committees, interest groups, and/or the executive branch, while partisan theories point to political parties and their leaders. By contrast, PPT views legislatures as democracies, and their structure and process as selected by majority rule to serve the goals of its members. Thus, what others interpret as seizing power PPT sees as a delegation of limited and reversible authority to serve the majority’s common end. The key questions addressed by this debate are whether responsible democratic governance is possible and how legislative outcomes should be interpreted and understood.

A key institutional feature of most legislatures is that the task of crafting legislation typically is delegated to a subset of the members. In most legislatures, and especially legislatures with an independently elected executive, the task of proposing legislation is assigned to committees. Some parliamentary systems do not have



committees. In these cases the responsibility for proposing legislation usually is delegated to ministries, which in turn are managed by one or more members of the legislature (a minister and perhaps one or more deputy ministers). Conceptually this system can be viewed as one with very small committees.

Among the powers given to committees is agenda control. One form of agenda control is the *ex ante veto*, or the power to prevent proposals from being considered by the entire legislature (Shepsle 1979, Shepsle and Weingast 1987, Weingast and Marshall 1988). Thus, in both houses of the U.S. Congress, all bills are referred to a committee, and rarely are they considered by the parent body unless the committee formally approves the bill, perhaps after extensive amendment in committee. Another form of agenda control is the *ex post veto*, whereby the committee has the authority to block enactment of the bill as amended and approved by the parent body (Shepsle and Weingast 1987). For example, the U.S. House and Senate frequently pass different versions of the same bill, and then appoint a joint conference committee to iron out the differences. A legislative body can grant an *ex post veto* to a committee by allowing the committee to act as its representatives on the conference committee.

Although some models of the legislature are based on the assumption that agenda-setting power is delegated to committees by the chamber as a whole (Weingast and Marshall 1988, Gilligan and Krehbiel 1990, Krehbiel 1991), others argue that in some cases committees have usurped their agenda-setting powers (Mayhew 1974a, Fiorina 1977a, Smith and Deering 1984, Shepsle and Weingast 1987). These two types of models have profoundly different implications with respect to the democratic legitimacy of legislative outcomes.

#### **4.1.1 Non-Partisan Theories**

Non-partisan theories of legislatures do not necessarily ignore political parties, but instead see them as unimportant manifestations of a more fundamental division of the legislature according to the policy preferences of its members. The fundamental building block of non-partisan theories is that legislators have heterogeneous preferences, which presumably reflects heterogeneity of preferences among citizens. Parties are simply groups of legislators that exhibit much less within-group heterogeneity than the legislature as a whole.

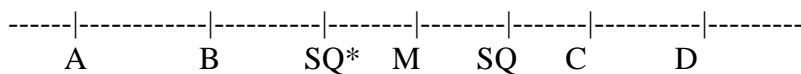
The baseline that we employ for analyzing more complex positive theories of legislatures is the simplest non-partisan theory in PPT, which ignores not only parties but also all other organizational features of a legislature. In this theory, a legislature is a group of equal legislators in which none has greater resources or agenda-setting power than any other. This idealized legislature is organized as if it were a town meeting or a social group, without order or rules, except those that define voting rights. The simplest non-partisan theory is the application of the one-dimensional spatial model of majority-rule decision-making to legislatures, as depicted in Figure 3.1, in which legislative outcomes are the ideal point of the median legislator. This model is the most widely used theory for understanding policy choice in legislatures, and is represented by the work of Riker (1962), Smith (1989) and Krehbiel (1998).

This simple theory has been extended to incorporate and explain the committee organization of legislatures (Krehbiel 1991). According to this theory, the policy preferences of legislators (and constituents) are uncertain because of imperfect information about the consequences of changes in the law. Committees are a mechanism for legislators to divide labor, develop expertise, and collect relevant information. Each legislator bears the cost of becoming informed on only a relatively small part of policy.

With special knowledge may come the ability to mislead less knowledgeable legislators into enacting laws that, with full information, a majority would oppose; however, this adverse consequence of legislative specialization can be overcome if the committee is broadly representative of the membership of the legislature. If the median voter on a committee has approximately the same ideal point as the median voter in the entire legislature, then the legislative outcome of the committee will be the majority-rule equilibrium in the legislature. The fact that committees include members of minority parties is regarded as evidence that committees are selected to be broadly representative in order to protect against strategic information manipulation by a committee.

The significance of the degree to which committees are representative of the legislature is apparent from considering various committee structures in the model depicted in Figure 3.1, and reproduced here is Figure 4.1. The entire legislature consists of five members, whose ideal points are A, B, C, D and M, three of whom form a majority-rule committee to propose legislation to the parent body. The status quo is SQ, and SQ\* is the policy that the median voter regards as equally attractive as the status quo. If the committee is the median voter plus one member from both the right and the left of M, say the members with ideal points A and C, then the committee will propose M, its majority-

**Figure 4.1:  
Committees as Legislative Agenda Setters**



rule equilibrium, which also is the majority-rule equilibrium of the entire legislature. But if the committee contains two members from either the right or the left, then their

proposed bill will not be M. For example, a committee of the members preferring A, C and D, respectively, will propose its majority-rule equilibrium, C, which could be enacted if the members with ideal points B and M are uninformed and if both of these voters are unconvinced by the protests of A.

Alternatively, if the committee anticipates that the median voter might catch on to the ruse and propose to amend C to M, the committee may exercise its *ex ante* veto and propose nothing. The majority of the committee prefers SQ to M, so that by exercising an *ex ante* veto, the committee achieves a preferred result. Or the committee may try to succeed by proposing C, but then exercise an *ex post* veto if things turn out badly. If the median voter does not figure out what the committee has done, the committee will obtain C; however, if the median voter proposes M, the committee can prevent a vote on the final bill and preserve SQ. Of course, the committee veto can be overridden; however, doing so is costly, because it eliminates the incentive for the committee to put forth the effort to become informed about this dimension of policy.

The preceding assumes that the committee's proposal can be amended by the whole legislature, which implies an "open rule" – that is, a legislative rule that members are permitted to propose any amendment during the course of floor debate. Most bills in the U.S. Senate are considered according to an open rule. An alternative is a "closed rule," under which either amendments are not permitted or a committee decides in advance which amendments will be considered. In the U.S. House of Representatives, bills usually are considered under a closed rule in which the House Rules Committee decides which amendments will be considered and the sequence of votes. In this case, even if other members are informed, the composition of the committee determines the final outcome. In Figure 4.1, any outcome in the interval  $[SQ^*, SQ]$  is preferred by a

majority to SQ. A committee that includes the members whose ideal points are A and B, plus any other member, can propose a policy slightly to the right of SQ\* and receive majority support. A balanced committee, such as one containing the members with ideal points A, M and D, will propose M, which also will pass. Finally, a committee comprised of the members with ideal points at C and D plus any other member will propose nothing because it can not obtain majority support for any bill to the right of SQ. Note that if the median voter on the committee has an ideal point anywhere between SQ\* and SQ, the committee will propose that member's ideal point, which will then pass.

The multidimensional spatial model also has been applied to study legislatures. These models view the organizational structure of legislatures – especially committees – as a means to overcome the instability of majority-rule outcomes, creating a “structure-induced equilibrium” where equilibrium would not exist otherwise.

One version of multi-dimensional theory interprets committees as a means of breaking down the dimensions of policy into a series of single dimensions, one for each committee, which then yields a unique median-voter equilibrium in each dimension. The stability of these equilibria are protected by “germaneness” requirements on proposed amendments, which are interpreted as preventing a legislator from creating instability by offering an amendment that introduces a second dimension into a proposed bill.

A related multi-dimensional non-partisan theory argues that the committee system is a means to facilitate vote trades and bargains among legislators (Mayhew 1974a, Fiorina 1977a, Weingast 1979, Shepsle and Weingast 1981, Weingast and Marshall 1988). Vote-trading is a mechanism for taking into account intensities of preferences. Suppose that a legislature is considering two issues (separate dimensions), each of which has the same preference configuration as shown in Figure 4.1. Suppose that on one issue

legislators with ideal points C and D have intensely held preferences while the others do not feel strongly, while on another issue the legislator with ideal point B has intensely held preferences. If the legislature as a whole picks committees, a majority consisting of the legislators with most preferred points B, C and D would assign the members with ideal points M, C and D to the first committee, which would then propose C, and the members with ideal points A, B and M to the second, which would then propose B. The members with ideal points at B, C and D could “trade votes” – the member with ideal B agrees to vote for outcome C from the first committee if the members with ideals C and D agree to vote for outcome B from the second committee. Because each makes a small sacrifice for a large gain, all are better off from trading.

The normative implications of these theories are disputed. On the plus side, a committee system with vote-trading is a means for producing stable outcomes that take into account preference intensities when the alternative could be some combination of chaos and tyranny of the majority. If policy choices are multi-dimensional and, therefore, legislative outcomes are unstable due to preference heterogeneity, some mechanism for achieving stable legislative bargains is necessary for society as a whole to acquire valuable public goods and other desirable policy outcomes. The fact that many bargains may emerge from this process, some of which may be preferred to the actual outcome, is a normative quibble if the actual outcome is substantially better for society than doing nothing or having policy instability. Thus, a committee system that facilitates bargains and enforces vote trades can improve policy outcomes for most or all legislators.

On the negative side, a particular vote-trading agreement is typically one among many that could emerge. All agreements by a majority of legislators that produce policies within the Pareto Set are feasible coalitions, so that the particular agreement that

emerges is not obviously superior to others that might have emerged but did not. Moreover, vote-trading coalitions can lead to policy excesses in all dimensions. If outcomes in each policy dimension are driven by legislators with atypically intense preferences, policy outcomes will not reflect the preferences of the median or pivotal legislator as predicted by the Black-Downs model (this view dates to Wilson 1885). An example of policy excess that is widely attributed to the committee structure of Congress is “pork barrel” bills, which overspend on public works because spending is distributively attractive to legislators and constituents (Ferejohn 1974). In practice, the incentive to avoid exclusion from the list of approved projects can and often does cause legislators to agree to a coalition of the whole, in which each legislator who votes for the bill receives a project (Weingast 1979) even when no project generates more benefits than costs.

Some scholars who emphasize the cost of the committee system see committees as groups of individuals who *seize* legislative power. In this view, the distribution of power in the legislature is as if it were an assortment of monopolies that use their market power to expropriate maximum profits. That is, each committee holds a monopoly over changes in policy on each dimension of the policy space (Shepsle 1979, Shepsle and Weingast 1987). Thus, policy is stable, bargains are enforceable and stable (Shepsle and Weingast 1981; Laver and Shepsle 1996), but policy outcomes hardly can be said to represent the majority will unless all committees are representative of the distribution of preferences in the legislature.

The process by which legislators build support constituencies among voters has led to the theory that committees are influenced or controlled by interest groups. One such theory is Pluralism (Bentley 1949, Truman 1951, Dahl 1967), which takes a

sanguine view of the process because it views policy as the outcome of bargains among many interest groups with conflicting interests. Another is the “political marketplace” in Public Choice, in which committees auction public policy ‘rents’ to the highest-bidding interest groups (Becker 1983, Buchanan 1968, Peltzman 1976, Posner 1974, Stigler 1971). Some scholars with the latter view argue that interest groups form “iron triangles” or “unholy trinitities” with the committees and executive agencies that control the legislative agenda, or that interest groups “capture” congressional committees and executive agencies (Schnattschneider 1960, Lowi 1969).<sup>11</sup>

Whether the sanguine view of the Pluralists or the darker view of Public Choice is more accurate depends in part on the process by which interest groups form and influence legislators. If interest groups from the spectrum of support and opposition to a policy are represented on a committee and participate in crafting its legislation, then committee bargains are likely to embody a balancing of interests, lending support to the view that committee bargains improve welfare. But if interest representation is biased on one side of an issue, the legislative bargain may harm the majority in service of a minority. Of course, even this outcome is normatively ambiguous, for a policy that is intensely desired by a few but mildly opposed by a majority can still increase social welfare.

The theory of the legislature includes a role for the Chief Executive. Much as when Julius Caesar seized control of the government from the disorderly Senate, modern scholars sometimes see the “imperial” President as seizing control of government from legislatures. Adherents of this view assume that the legislature lacks the ability or the will to set its own agenda, and so cedes that power to the executive (Fiorina 1974,

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<sup>11</sup> Nonetheless, as Ramseyer and Rasmusen (1994) observe, bribes in most modern democracies are not prevelant and tend to be small relative to the stakes.



Edwards 1980, Sundquist 1981). For example, some argue that the President or bureaucracy is able to influence legislative outcomes through “overtowering” knowledge (Weber 1968), control over spending powers (Fisher 1975) or the appropriations process (Niskanen 1977), or the issuance of executive orders (Moe and Howell 1999a, b). The executive-as-agenda-setter model is not applied to the U.S. as often as to European, Asian and Latin American legislatures, especially in countries in which the Chief Executive has the power to issue unilateral decrees.

The core analogy in these models is that the President or an agency is able to make take-it-or-leave-it proposals to the legislature (Niskanen 1971).<sup>12</sup> Examples of legislatures that operate in this fashion are the French and European parliaments. A variant of Figure 4.1 that closely parallels the analysis of the role of committees under a closed rule illustrates the effect on legislative outcomes of granting such authority to the Chief Executive. In Figure 4.2, let SQ be the status quo, M be the most preferred position of the median voter in the legislature, and I be a position that the median voter finds equally attractive as SQ. Notice that the median legislator will prefer any proposal between SQ and I to SQ. If the ideal point of the Chief Executive lies anywhere in

**Figure 4.2:  
Legislative Outcomes with Executive Agenda Setters**



<sup>12</sup> Romer and Rosenthal (1978) developed the first formal model of an agency agenda setter in analyzing the use of referenda to approve bond measures for school districts.

this range, the Chief Executive can implement it. If the Executive's most preferred outcome is E, which is to the right of I, the Chief Executive successfully can move policy just short of I. In all cases, the median legislator is not made worse off by the Chief Executive's proposal power, although most of the benefit of policy change is captured by the Chief Executive.

#### **4.1.2 Partisan Theories**

Another strand of legislative research places parties at the center of analysis, arguing that parties control the legislative agenda. The electoral incentives of party members and the majority's ability to control outcomes lead the majority party to enact generally good public policy that represents the interests of voters. A political party or a coalition of parties that controls a majority of votes can seize the legislative agenda by cartelizing legislative procedure, keeping measures unfavorable to it off the agenda (Cox and McCubbins 1993, 2002, 2004) and pushing their platform onto the agenda (Rohde 1991, Aldrich 1995, Aldrich and Rohde 1998, 2001).

A system of single-member legislative districts with plurality voting, such as the United States, tends to have two effective parties (Duverger 1954, Cox 1997, Taagepera and Shugart 1989). In this case, legislative authority is seized by the majority party, and understanding legislative organization and operation involves understanding *party* organization and operation. It is to a discussion of these theories we now turn.

A simple theory of partisan organization conceives of parties as fraternal gatherings of like-minded individuals (Young 1966, Krehbiel 2000). For example, some argue that parliamentary coalitions (Laver and Shepsle 1996), committee decision-making in the German Bundestag (Saalfeld 1997), and the boardinghouse origins of American political parties (Young 1966) resemble a structureless social gathering. The

implication for legislative organization and policy outcomes is that a majority party or coalition controls the legislature simply because its members are like-minded and can implement their harmonious goals by majority rule.

Another theory of partisan organization emphasizes preference heterogeneity within the party and the role of party leadership. One version of this theory draws an analogy between parties and armies, with generals (party leaders) in charge of the direction, promotion, and placement of the rank-and-file (backbenchers) (Gosnell 1937, American Political Science Association 1950, Cohen and Taylor 2000). In these models, party leaders determine the organization and agenda of the legislature, and their preferences determine policy outcomes, so that party governance is a form of dictatorship. Some European parties and American party machines at the turn of the 20<sup>th</sup> century resemble the parties-as-armies model (Gosnell 1937, Cohen and Taylor 2000).

Recent approaches to understanding party organization see party leaders not as the principals of party members (as in the army model), but as the agents of party members in charge of solving collective-action problems within the party. Analogous to the theory of the firm in industrial organization, this approach argues that party members, recognizing their incentives to “free ride,” empower a boss (party leader) to manage and discipline them such that they all can achieve the benefits of cooperation (Cooper and Brady 1981, Sinclair 1983, Cox 1987, Stewart 1989, Rohde 1991, Maltzman and Smith 1994, Binder 1997). Rohde (1991) and Aldrich and Rohde (2001) argue that the amount of authority that backbenchers delegate to the party leaders waxes and wanes in accordance to the internal homogeneity (like-mindedness) of the party members’ preferences and the heterogeneity between the majority party or coalition and the other (minority) parties in the legislature. According to this view, the importance of the party

for legislative organization and output is conditional on the amount of authority given to party leaders by party backbenchers; legislative governance is thus “conditional party government.”

Building on the “parties as firms” approach, another partisan theory conceptualizes party leadership as a team (Kiewiet and McCubbins 1991, and Cox and McCubbins 1993, 1994, 2002, 2004). In this approach, legislative leadership is collegial because it is distributed among the majority party leadership – the Speaker, the majority leader, and so on – as well as among the chairs of the standing committees, especially control committees such as Rules, Appropriations, Budget, and Ways and Means.

Partisan models of legislatures are analogous to vote-trading models in non-partisan theories. A problem with vote-trading models is that, in a large legislature, coalitions emerge from bargaining among legislators and, as a result, many vote-trading coalitions are feasible. In partisan models, if a single party is in the majority, the membership of the vote-trading coalition is largely determined by party affiliation. And, in legislatures in which no party has a majority, the set of feasible coalitions is vastly reduced to the combinations of a few parties that could form a majority.

#### ***4.2 Delegation, Monitoring and Legislation***

One major contribution of PPT is a better understanding of the legislative process. This process has three basic elements. First, because each legislature must allocate scarce plenary time, a substantial fraction of the rules, procedures, and structure of a legislature is devoted to defining how the legislature's agenda will be determined (Oleszek 2004, Cox and McCubbins 1993, 2004). Second, the rules must also proscribe what happens if no new law is passed, which scholars call the "reversionary policy." Usually, but not always, the reversionary point is the status quo; however, for bills

authorizing expenditures and appropriating funds, the reversionary point normally is zero spending. Third, once plenary time is allocated and the reversionary policy is set, the legislature must have rules and procedures that dictate how a collective decision on policy change will be reached (Oleszek 2004). These rules and procedures include the duties and powers of committees and the process for assigning members and jurisdiction to them.

Research to explain the structure and process of legislators focuses on two questions. The first is the extent to which legislatures actually delegate power, and the second is the mechanisms for controlling agents once authority has been delegated.

On the first question, Aldrich and Rohde (2001) suggest that the majority party will delegate more as the preferences of its members become more homogeneous. The logic behind this argument is that if all members of the majority party have very similar policy preferences, the policy that any one would adopt is “close enough” to the optimal policy of other party members that party members do not fear any significant cost to delegating authority; however, if party members have widely differing preferences, each member risks losing a great deal if authority is delegated to someone with very different policy objectives.

Laver and Shepsle (1996) examine a condition in which preferences do differ substantially by studying multi-party coalitions in European nations. They conclude that coalitions will determine which policy dimension matters most to each member of the coalition, and then will delegate control over each dimension to a party that values it highly by letting that party appoint the minister. Thus work highlights an important role of delegation: keeping the majority together, whether it is a single majority party or a coalition of parties. To keep a majority together requires making certain that each

partner has more to gain from remaining in the majority than by defecting to the minority.

Regarding the second question, much of the legislative process involves attempts to mitigate the problems that result from delegation inside the legislature, principally to committees and party leaders (Kiewiet and McCubbins 1991, Cox and McCubbins 1993, 2004). The purpose of these mechanisms is to capture the benefits of delegation without giving so much power to agents that agents become dictators. These mechanisms for controlling the behavior of agents have important effects on the flow of legislation.

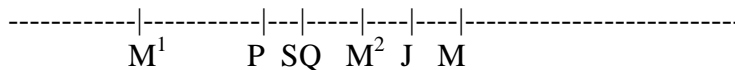
Research on delegation deals with the ways in which majorities can exercise influence over the discretion of the agents to whom agenda authority is delegated. Controlling the legislative agenda involves creating and delimiting two powers. One power is the authority to put proposed policy changes on the legislative agenda, or *positive agenda power* (c.f. Shepsle and Weingast 1981, 1987). The other power is the authority to keep proposed policy changes off the legislative agenda, and thereby to protect the status quo—or reversionary policy—from change, or *negative agenda power* (c.f. Cox and McCubbins 2000, 2002, 2004). Negative agenda power is similar to an *ex ante* veto. Committees with positive agenda power have an *ex ante* veto because they can decide not to let a proposed bill within their jurisdiction reach the floor of the legislature; however, others can be given the power to block proposals independently of the power to make them. For example, the chair of a committee can refuse to allow a committee vote on the final version of a bill, and the Rules Committee can refuse to allocate floor time to a bill that passes out of committee.

There is, of course, an inherent tradeoff between the use of positive and negative agenda power. The more that the majority party distributes veto rights (at the expense of

proposal rights), the harder it is to pass legislation. The more it distributes proposal rights (at the expense of veto rights), the greater the risk that some proposals will impose external costs on other members of the majority party—even to the point of adopting proposals that make a majority of the members of the majority party worse off. Thus, the majority party always faces the question of the optimal mix of veto and proposal powers (Cox and McCubbins 2005 and Aldrich et al. forthcoming).

A simple model illustrates these issues. Suppose that the ideal point of the median voter of the party is  $P$  and for the entire legislature is  $M$ , and that, like the Senate, bills are considered under an open rule so that if a bill is proposed, regardless of its initial content, it will be amended to be  $M$  and then passed. Note that by definition both  $P$  and  $M$  are members of the majority party. Assuming that the majority party is democratic, its

**Figure 4.3:  
Agenda Power and Party Control of Legislatures**



policy position will be  $P$ ; however, if it enacts  $P$ , it may cause the median voter (and other party members whose ideal points are to the right of  $M$ ) either to be defeated or to defect. If membership in the majority party is valuable, the median voter in the legislature need not be fully satisfied with the policy outcome for the majority party to retain control. For example, if policy can be as far away from  $M$  as  $M^1$  without causing the loss of the legislative median, then status quo policy  $SQ$  can be retained; however, if the median voter in the legislature can tolerate no deviation from  $M$  beyond  $M^2$ , then an attempt by the majority party to preserve  $SQ$  will cause the party to lose power. The delegation problem for the party is to design a system in which self-interested agents will

be willing to propose to amend SQ in the second case (making most party members worse off by moving policy away from the party median) but to retain SQ in the latter case.

The creation of two agents solves this problem. First, proposal power can be given to M, who will make a legislative proposal if SQ deviates from M in any direction. Second, veto power can be given to a member whose ideal point is represented by J, who is indifferent between M and  $M^2$ . This member will veto any proposal if the status quo is between M and  $M^2$ , but will accept any proposal for any other position of the status quo that must be changed to preserve the majority.

Related to our discussion of agenda control are the many ways that bills can be placed on the agenda. While the United States Constitution grants the President the right to submit proposals to Congress, Article I, Section 1, of the Constitution states that “*all* legislative powers ... shall be vested in a Congress.” Thus, only the House of Representatives and Senate possess the power to determine whether proposals are considered in their own chambers.<sup>13</sup> Within the House, committees with a particular jurisdiction and specialized task forces have the power to initiate policy change in their policy area. But simply proposing legislation hardly implies that it will be considered by the full legislative body.

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<sup>13</sup> In the past, Congress delegated the ability to place items on its agenda to executive branch agencies through the one-house legislative veto, by which decisions by an agency could be overturned by a majority in either the House or Senate. In *Immigration and Nationalization Service v. Chadha*, 462 U.S. 919 (1983), the Supreme Court ruled that the Constitution prohibits Congress from writing laws containing a legislative veto provision on the grounds that Article I, Section 1, requires that all legislation must be written by Congress.



Mirroring the fractionalization of power in the Constitution and the divisions in American politics, something of a dual system of agenda power has developed in the House and Senate, in which the legislature divides power among individual committees and the leaders of the majority parties (on the mirroring principle, see Ferejohn 1987, McCubbins, Noll, and Weingast 1987, 1989). With the exception of some “privileged” bills,<sup>14</sup> most scheduling in the House is controlled by the Rules Committee (Lapham 1954, Jones 1968, Fox and Clapp 1970, Oppenheimer 1977, Dion and Huber 1996, Sinclair 2002, Oleszek 2004, Cox and McCubbins 2004), which in turn is controlled by the Speaker, who is elected by the majority party. Party leaders also determine the membership of other committees.

Committees act as filters, shaping nearly all proposals in their particular policy jurisdiction. They exercise positive agenda control in the sense that they write the bills that are submitted to the Rules Committee to be placed on the agenda of the legislature. They also have negative agenda (or gatekeeping) power in that they can decide simply not to pass legislative proposals on to the Rules Committee. This power is limited in that the floor can pass a “discharge petition” that forces the committee to report a bill, but such a petition is costly to undertake and so is rarely undertaken.

The delegation of the legislature’s agenda-setting authority to party leaders and committees creates the potential for mischief, i.e., agency loss, and is the reason why the discretion of each agent of the majority party is limited. At issue is how members assure that the people to whom the agenda-setting authority has been delegated do not take advantage of this authority to use it for personal gain. Legislatures use both checks and

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<sup>14</sup> The US House Standing Rules grants the privilege to five committees to have direct access to the floor on select legislation.

balances to accomplish these tasks. These checks and balances provide others with a veto over the actions of agenda setters.

The agenda power of the majority leadership provides an incentive for the majority party's representatives on a committee to take actions that are responsive to the interests of the whole party (Cox and McCubbins 1993, Kiewiet and McCubbins 1991). To the extent that the party exercises control over committee assignments and that some assignments are more valued by members than others, committee members have an incentive to be responsive to the party's collective interests (Cox and McCubbins 1993) in order to be rewarded with subjectively desirable assignments. The shortage of plenary time on the floor of the legislature creates another incentive for substantive committees to compete against each other, in something of a tournament, where the reward for satisfying the party's interest is time for floor consideration of their bills (c.f. Cox and McCubbins 1993, 2004).

A similar relationship holds between the party and its leadership with regard to the leadership's scheduling activities. The leadership of the majority party has an incentive to pursue the majority party's collective interests to the extent that the party can discipline its leaders (Cox and McCubbins 1993, 2004). Party leaders are selected by a majority vote of party members. Moreover, disaffected members of the majority party can vote against the wishes of party leaders on the floor or even defect to a minority party if they are dissatisfied with the leadership's exercise of agenda control. The constraints on party leaders imply that party leaders act on behalf of the collective interest of the party, not just themselves.

An important element of agenda control is veto power. Any person or group with the power to block or significantly to delay policy is referred to as a veto gate or a

gatekeeper. Nations differ substantially in the number of veto gates that inhabit the legislative process. The United States, for example, represents the end of the spectrum with a large number of veto gates because it has a bicameral legislature that is decentralized into numerous committees plus a President with veto power. In the House of Representatives alone, the substantive committees and their subcommittees, the Rules Committee, the Speaker, and the Committee of the Whole each constitute veto gates through which legislation normally must pass, and the Senate has even more veto gates due to their lax restrictions on debate. The United Kingdom occupies the other end of the spectrum with parliamentary government and a relatively weak upper legislative chamber.

Whenever legislators consider a bill, they must consider its effect relative to what would occur if no law were passed. In virtually every legislature the final vote pits the final bill against the reversionary policy. The reversionary policy is not necessarily the extant policy. For example, some laws contain 'sunset provisions,' which mandate that a program be dissolved or an appropriation be terminated by some specified date. A law being considered for renewal under a sunset provision faces a reversionary policy of no law even though the status quo is that the law is in effect.

To understand law-making, it can be important to know whether the reversionary policy can be manipulated, and if so, who possesses the power to do so (c.f. Romer and Rosenthal 1978). This requires understanding the relationships between the reversion policy, the proposed policy and the preferences of policy makers. Reversionary policies can be defined formally by the Constitution and/or statutes, or through informal solutions to immediate problems. The U.S. Constitution defines the reversion point for some

budgetary items (a zero budget), but statutes typically define the reversionary policy for entitlements, such as Social Security, as adjusted annually to account for inflation.

The effectiveness of agenda control is contingent on the reversionary outcome. Whether those who possess positive agenda control will be able to make "take-it-or-leave-it" offers (also known as ultimatum bargaining) to the legislature depends largely on the attractiveness of the reversionary outcome. Positive agenda control confers much greater power if the reversionary policy is no policy at all, as with budgets and sunset provisions, than if the reversionary policy is a continuation of the status quo, as with entitlements and laws without sunset provisions.

Most legislatures possess rules that structure the handling of proposed legislation. Rules define voting procedures, what amendments (if any) that will be considered, the procedures under which amendments will be considered, provisions for debate, the public's access to the proceedings, and so forth. Because of the instability of majority rule voting as exemplified by the Condorcet paradox, the sequence in which amendments are considered determines the composition of the final bill.

As a proposal approaches the floor, the party's influence grows. The majority party's members delegate to their leadership the authority to represent their interests on a broad variety of matters. In the U.S. House of Representatives, the Rules Committee, the Speaker and (if expenditure of funds are required) the appropriations and budget committees all hold power that checks the ability of substantive committees to exploit their agenda control. If a committee's proposal conflicts with the party's collective interest and if the issue is important to the party, either the Speaker or the Rules Committee can kill or amend the proposal, or the budget committees can refuse to supply the necessary funds to implement it. This system of multiple veto points, each controlled

by a partially non-overlapping subset of the members of the majority party, constitutes a system of checks and balances to constrain the ability of a substantive committee or the party leaders to pursue policies that are not in the interests of other members of the majority party. Legal scholars have long recognized that the legislative process has implications for policy (cf. Farber and Frickey 1991) and for statutory interpretation (cf. Eskridge 1994). PPT gives a new understanding of how the elements of these key processes fit together.

#### ***4.3 Policy Consequences of Legislative Structure***

The American system of government is defined by deliberate separation of powers, which creates an institutional structure rife with veto players. As the number of effective veto players increases, the government's ability to be resolute (to commit to policy) increases while its ability to be responsive (to change policy) decreases (Cox and McCubbins, 2001). While numerous veto points reduce policy instability, the cost is that government action tends to be more responsive to particularistic interests rather than to broad policy goals than would be the case if the Constitution made a different tradeoff between resoluteness and responsiveness. This Constitutional structure does not imply an absence of collective goods or public-regarding legislation. Rather, the tradeoff created by the Constitution shapes the terrain of policy tendencies that pervade law-making.

Both political parties in the U.S. have created relatively stable reputations for the type of policies they support. Since the Civil War both parties have shown consistent differences on tax and monetary policy (Studenski and Krooss 1963, Berglof and Rosenthal 2004). The parties also express consistent differences over agricultural policy, domestic and foreign spending, energy policy, education and health policy (Sullivan and

O'Connor 1972, Bresnick 1979, CQ Farm Policy 1984, Browning 1986, Kiewiet and McCubbins 1991, Peterson 1994, Den Hartog and Monroe 2004, Monroe 2004). In sum, the obstacles to policy-making in the U.S. legislature have not prevented political parties from presenting differentiated but consistent visions of the role of government.

The Constitutional separation of powers in the U.S. encourages some forms of privatization of public policy, although less than would arise if the only policy-making entity was the House, with its fragmented constituencies. Because the President and to a lesser extent Senators from large states are held accountable for the broad performance of government, while House members and other Senators primarily are held responsible for the effect of policy on relatively small constituencies, policy outcomes represent a compromise of the preferences that representatives derive from different systems of representation. In order to overcome indecisiveness and to forge coalitions among legislators with heterogeneous preferences, private goods are sometimes used as the basis for legislative bargaining, with the consequence that broad public policy goals are packaged with distributive politics that are dominated by special interests, characterized by fiscal pork and rent-seeking, and morselized—all of which contribute to inefficiency.

Perhaps the most widely discussed form of policy inefficiency is *fiscal pork*, which refers to geographically targeted public expenditures for which the incidence and location of projects follow a political rather than an economic logic (Ferejohn 1974; Weingast, Shepsle, and Johnson 1981; Cox and McCubbins 2001). This form of policy includes classic pork-barrel projects such as dams and levies as well as projects involving water quality (Pisani 2002), transportation (Baron 1990, Hamman 1993), technology (Cohen and Noll 1991), energy (Stewart 1975, Davis 1982, Vietor 1984, Arnold 1990, chapter 9), and defense (Fox 1971, Kanter 1972).

The institutional features of the Senate exacerbate the problems associated with fiscal pork. Because senators' districts are geographically defined (as opposed to the population-based boundaries of members of the House), Senate policy-making tends to favor rural interests (Lee 1998), especially agriculture (McConnell 1966, Congressional Quarterly 1984) and other resource-based industries (e.g., coal – Ackerman and Hassler 1981).<sup>15</sup> Furthermore, because the Senate is less majoritarian than the House (due to the filibuster and the need to rely on unanimous consent agreements—see Krehbiel 1986 and Binder & Smith 1997), the distribution of pork by the Senate tends towards universalism (Weingast 1979; Bickers and Stein 1994a, 1994b, 1996; Weingast 1994), whereas the House is more partisan (Cox and McCubbins 2004).

Another source of inefficiency is *rent-seeking* – a term that refers to an array of subsidies, tax provisions, and regulatory exceptions that special interests extract from government (cf. Tullock 1967, Krueger 1974, Buchanan et al. 1980). Many scholars lament the ways in which rent-seeking pervert democratic accountability and distort economic incentives (Buchanan and Tullock 1962, Stigler 1971), while others focus on the related, yet distinct, problem of how the representation of special interests within the legislature causes fragmented, incoherent policy (Shepsle and Weingast 1987, Weingast and Marshall 1988). In the extreme, this “balkanization” of politics can lead to the dominance of sub-governments (such as subcommittees) that agree to let each control a particular area of policy for their private benefit (Dahl 1956, Schattschneider 1960, McConnell 1966, Lowi 1969, Shepsle and Weingast 1987).

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<sup>15</sup> To a large extent, this was also true of the House prior to redistricting. See McCubbins and Schwartz (1988) for further discussion.

An example of the ways in which special interests cause inefficient policy outcomes is provided by Banks' (1991) discussion of the roots of the *Challenger* disaster. As Banks documents, once the research and development for the shuttle was underway, the program "picked up political steam" as core political constituencies – shuttle contractors and manned space-flight advocates in NASA – grew in number as expenditures on the project increased. This example shows how programs create support constituencies as they are implemented (Noll and Owen 1981). Indeed, political support for the project became powerful enough to overcome growing evidence of the severe economic and technical shortcomings of the project.

The core political constituencies for the shuttle program placed great emphasis on the timing of the first launch, leading Congress to push NASA for a quick launch despite misgivings about the operational readiness of the technology among those responsible for implementing the program. Thus, distributive politics conflicted with and overcame the economically efficient courses of action, which, in this case would have been to extend the R&D period and to emphasize capability and safety over timing. But extending R&D would have entailed delaying the transition to the more expensive – and hence politically more beneficial – operational phase, which was opposed by contractors and advocates of manned space flight. Thus, distributive politics led to declaring operational a vehicle that was regarded as unsafe and economically unsound by the managers of the program.

Distributive politics also causes policy in the U.S. to be *morselized* – that is, divided into subcomponents (morsels). Morselization allows elements of a program to be dispersed among politicians as 'goodies' for constituents. For example, the broad policy goal of reducing water pollution is divided into many grants to cities for sewage treatment plants (Arnold 1979, Weingast 1994), for which members of Congress then can



claim credit. While such morsels still aggregate to a public good, the morselization process is inefficient in that the means of production are politically determined, and so do not constitute the least costly means of providing the public good to society.

The separation of powers makes other branches of government more distant from distributive politics. The sources of resistance to excessive responsiveness to special interests that are favored by the legislature are the President, the civil service bureaucracy and the judiciary. The following sections discuss the role of each in making law and policy, and the extent to which they can constrain the tendency of the legislature to favor inefficient policies.

## **5.0 The President**

In the U.S. and most European democracies, the legislature is the dominant institution for making law. Nevertheless, despite the unequivocal wording of Article I, Section 1, the U.S. Constitution grants some law-making authority to the President. And, in many democracies throughout the world, the Chief Executive possesses the power to issue decrees that have statutory status. Thus, in the U.S. and many other democracies, the Chief Executive plays a significant role in forging legislative bargains that yield new laws, and so the content of law in part reflects the Chief Executive's policy preferences. As with the legislature, if the President's decisions are corrupt, then so, too, is the law that emanates from the President's participation in the law-making process.

In the analysis of citizen voting we noted that the President and the legislature face distinctly different political incentives in making policy because they are elected from different constituencies. Another important factor influencing presidential behavior is the career time-horizon inherent in the office. Unlike other Constitutional positions in

the government, the President is limited to two terms. This provision not only shortens the time horizon of the President, but also attenuates the responsiveness of the President to citizen preferences, especially in the second term. In addition, because of the importance, visibility, historical significance and clear accountability of the office, the President's personal reputation hinges much more on the broad performance of the government than is the case for legislators. To the extent that the desire for respect and status motivate human behavior, the President's behavior is likely to be influenced more by these concerns than is the behavior of a legislator. All of these factors together imply that the decisions of the President are likely to be more responsive to the overall efficiency and effectiveness of government than are the decisions of the legislature.

Of course, for these differences in incentives and policy orientation to influence the law, the President must have the power to affect the law, which is the issue to which we now turn.

### ***5.1 Presidential Law-making Powers***

The Constitution grants the President two types of powers: 1) legislative as defined in Article I, Section 7 (veto power), Article II, Section 2 (treaties), and Article II, Section 3 (statutory proposals and the power to convene special sessions of Congress); and 2) executive, as described elsewhere in Article II. In addition, nothing in the Constitution prevents the President from using the visibility of the office and the information that the executive branch collects to organize public support for policies.

#### **5.1.1 Veto Power**

The ability to veto legislation is the most powerful presidential legislative tool, especially when the President faces a Congress that is controlled by the opposition. The veto power confers more wide-reading influence than simply the authority to prevent the

enactment of legislation that is not overwhelmingly popular in both branches of the legislature. Both actual vetoes (Cameron 2000) and veto threats, either implicit (see Matthews 1989, Cameron and Elmes 1995, McCarty 1997) or explicit (Ingberman and Yao 1991a, 1991b), provide the President with significant leverage in shaping the final contours of legislation. This leverage is particularly useful in constraining and influencing congressional policy initiatives during periods when the President is not a member of the party that controls Congress (Kiewiet and McCubbins 1988, Kernell 1991). Even during periods of unified partisan control, the veto stabilizes policy (Hammond and Miller 1987, Brady and Volden 1998, Krehbiel 1998). If the President prefers policies that are closer to the status quo (or reversion) than Congress, the veto is a very powerful tool.

Nevertheless, the efficacy of the Presidential veto is limited. Although the veto enables the President to limit the departure of new laws from the reversion point, it does not give the President leverage to pull policy further from the reversion point than Congress prefers. Kiewiet and McCubbins (1988) demonstrate the limits of this “asymmetric” veto power on appropriations decisions. They show that the President, while able to use the veto to limit congressional appropriations, cannot use the veto to extract appropriations that exceed the amount preferred by Congress. Furthermore, the President’s ability to use the veto successfully is tied to the President’s “resources” (presidential popularity and the seat share of the President’s party in Congress) and the “political environment” (when a bill is enacted in relation to the election cycle) (Rohde and Simon 1985, Wooley 1991).

The President’s veto power is also limited because the President may face electoral punishment for vetoing legislation. Groseclose and McCarty (2001) show that,

on average, presidential approval drops significantly following vetoes, particularly during periods of divided government. This argument implies that Congress may be able to use the veto power against the President by passing legislation that harms a key constituency of the President's party, thereby forcing the President to lose support regardless of whether the bill is signed or vetoed (Gilmour 1995, ch. 4, 1999).

### **5.1.2 Treaty Power**

Article II, Section 2, of the Constitution grants the power to negotiate treaties to the President, but it also states that two thirds of the Senate must concur for a treaty to be enforceable. The Senate has, on occasion, rejected treaties that the President negotiated (see Helbich 1967). In other cases, the Senate has adopted only part of a treaty or ratified only an amended version. Thus, the constitutional requirement of Senate approval limits the President's authority in foreign affairs (Glennon 1983).

Congress sometimes passes so-called "fast-track" legislation that commits it to vote on the treaty as proposed by the President without amendment or condition, but this legislation, because it requires passage in both the House and Senate, requires that the House as well as the Senate be given the opportunity to ratify the treaty. Thus, the power granted by fast track is, to some degree, offset by making the House a second veto player. Furthermore, some treaties require further legislation and appropriations to be effectively implemented, and Congress can effectively veto a treaty by failing to pass these bills.

Finally, presidents have increasingly used executive agreements with other countries as a means of skirting the treaty process entirely (Moe and Howell 1999a). We discuss this topic below in section 5.2.2.

### **5.1.3 Legislative Proposal Power**

Though not a member of the legislature, the President frequently drafts legislation and proposes it to Congress.<sup>16</sup> In doing so, and most notably in formulating yearly budget proposals, the President can make use of many bureaucratic resources (the OMB, for example; see Hecl 1975, 1977). Yet, this proposal power is weak.

The proposal power of the President is conditional upon congressional consent. Some of the most important proposal powers of the President, such as budget and tax proposals, are requested by statutes that specify the matters to be addressed in the proposals. Moreover, all executive legislative proposals must pass through the standard gauntlet of congressional veto gates, starting with substantive committees. These proposals always receive extensive scrutiny and revision by Congress (Kiewiet and McCubbins 1991).

Presidential proposal power depends on the partisan composition of the legislature and the presidency. In the post-war era, the raw number of “important” laws does not vary significantly between Democratic and Republican presidential administrations (Mayhew 1991), yet Democratic Presidents have proposed considerably more legislation than Republican Presidents. Moreover, Presidents of both parties have proposed more legislation under unified government (Browning 1986, p. 80). The willingness to propose legislation apparently is influenced by its anticipated success, and scholars have long noted that Presidents are much more successful in the legislature if their party controls Congress (Edwards 1980, 1989; Bond and Fleisher 1990; Peterson

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<sup>16</sup> Though Presidents cannot formally introduce a bill in Congress, they routinely introduce legislation by way of a member of Congress of the President’s party, who is the official sponsor of the legislation.

1990).<sup>17</sup> Ronald Reagan, for example, faced a Democratic House during his terms as President. While Reagan was successful in proposing increases in defense programs, he failed to reduce spending on domestic social programs. Reagan's differential success in domestic and defense spending contributed to the rapidly increasing budget deficits of the 1980s (McCubbins 1991).<sup>18</sup>

#### **5.1.4 Coalition Building Power**

Beyond vetoes and treaties, the President's most effective law-making tools are the informal resources that aid him in building coalitions. In the modern age of media, the President's visibility enables the President to pressure members of Congress to support administration proposals by "going public" (Kernell 1986, Edwards 1983, Canes-Wrone 2001). That is, the President can appeal to the public, playing on the electoral concerns of members of Congress, to force legislative action on a bill.

Certainly, there are instances where public appeals are effective, notably during the budget battles of the 1980's and 1990's; however, public appeals also have limits. First, the President's position must enjoy sufficient popular support to cause Congress to be concerned. Second, even with public support, the President can only go public so many times before the public stops paying attention (Popkin 1991). Finally, the President is not the only player who can go public. The President must also consider the electoral consequences of a dispute with Congress, and if congressional leaders can

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<sup>17</sup> For rejoinders to Mayhew (1991), which point to the difference in the content of legislation between periods of unified and divided government, see Sundquist (1992), Lohmann and O'Halloran (1994), Epstein and O'Halloran (1996, 1999), Edwards et al. (1997), Binder (1999), and Cameron (2000).

capture the media's attention, Congress can parry the president's moves by also going public (Groseclose and McCarty 2001).

The President also can build coalitions by doling out Presidential patronage, in the form of fundraising assistance and campaign support (Cohen, Krassa, and Hamman 1991, Davidson and Oleszek 2000), well-publicized visits to the White House (Neustadt 1960, Covington 1987), rides on Air Force One (Walsh 2003), placement of federal construction projects, and the geographic distribution of other federal programs (Edwards 1980). Similarly, the President is able to facilitate log rolls across bills, promising not to veto (or to offer support for) one bill for support on another (Cameron 2000).

The President's coalition building power is limited by its partisan element. That is, much like proposal powers, the President's ability to build successful coalitions depends on which party controls each branch of Congress. Presidential support scores tend to be very strong among members of Congress from the Presidents' party, and very weak among members of the opposite party (Kiewiet and McCubbins 1991). Further, what is sometimes mistaken for Presidential patronage – such as the change to Rural Free Delivery in the late 19<sup>th</sup> century – is actually partisan pork distributed by Congress to its members (Kernell and McDonald 1999).

## ***5.2 Executive Powers***

As chief executive, the President's authority over executive branch agencies confers indirect law-making power. Statutory law requires implementation and enforcement by agencies, which inevitably implies some power to make law.

### **5.2.1. Executive Orders**

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<sup>18</sup> On this point, see also Cox and McCubbins (1991) on tax policy since the New Deal.

In some cases the President can bypass the coalition building process and make policy directly. In many nations, the chief executive has the constitutional power to issue decrees, which usually cannot directly and permanently override a statute but otherwise has the same legal standing as a statute. For example, the agencies that regulate telecommunications in India and Mexico initially were established by decrees, not statutes. The U.S. Constitution does not grant the President the power to issue decrees, but it does give the President the authority to implement policy and to manage the executive branch. To exercise this power, the President issues Executive Orders. Like decrees, they can not explicitly contradict statutes or create authority where none has been granted by Congress or the Constitution, but otherwise these orders can influence law by setting forth procedures and standards for decision-making by agencies.

In response to the common notion that the President lacks the ability to act unilaterally in making law (e.g., Peterson 1990), some have argued that the power to issue executive orders confers the ability under some circumstances to end-run a hostile Congress and unilaterally to make policy (Moe and Howell 1999a, 1999b, Mayer 1999, 2001, Deering and Maltzman 1999, Howell 2003). An impressive list of government actions have occurred through executive order (the Emancipation Proclamation and the creation of several important agencies, including the Environmental Protection Agency, the Food and Drug Administration, and the Office of Management and Budget). Evidence regarding the frequency of and success against court challenges to executive orders indicates that they almost always remain in force.

Nevertheless, Executive Orders as a source of law have important limitations. Most executive orders have little importance, so that their overall success rate is not a particularly revealing statistic. Moreover, the President is constrained by the *Youngstown*



*Steel* decision, which, among other things, states that Presidential actions that directly violate the will of Congress are illegal. Furthermore, in issuing executive orders the President is subject to limitations in dealing with the bureaucracy in the form of legislated administrative structures and procedures, which are designed to protect the influence of Congress over agency decision-making (McCubbins, Noll, and Weingast 1987, 1989).

Some executive orders arise from statutory authority that has been delegated by Congress. In these cases, executive orders either fulfill a statutory obligation or implement a statutory authority, and so are simply the result of effective policy-making delegations by Congress, rather than the President's means of end-running the opposition.

Once a President issues an executive order, in most cases expenditures are likely to be necessary to carry it out. Congress can undermine the order by simply writing into the relevant appropriations bill that funds cannot be spent for the purpose of carrying out the order. The President can veto the appropriations bill, but the President's veto threat is usually not an effective means for increasing appropriations. Furthermore, a President who uses delegated authority to issue executive orders that a majority of Congress finds repugnant risks being denied such delegated authority in the future. Hence, to maximize influence over many issues, a President will think carefully about departing from the range of acceptable outcomes according to the preferences of congressional majorities.

From the preceding discussion, the value of executive orders as a source of presidential policy control can be summarized. First, executive orders can be an important source of presidential policy authority in areas where Congress itself is unable to act either initially to produce a statute or reactively to prohibit implementation. These

cases enable the President to take advantage of a circumstance in which the diversity of preferences in Congress causes policy gridlock. Second, for a variety of reasons Congress may prefer to let the President control the details of policy implementation. In areas where the outcome of policy actions is uncertain, Congress may regard the executive as being more flexible to respond to new information (Bawn 1995), and if the policy is highly controversial, Congress may use delegation to increase the political accountability of the President (and lessen the accountability of Congress) for the ultimate policy outcome (Fiorina 1982). In these cases Congress regards delegation of authority to be in its collective interest, and can subsequently use the appropriations process to overturn presidential decisions that are unacceptable to a majority of legislators.

### **5.2.2 Executive Agreements**

In order to overcome the constraints that the Senate imposes on treaty ratification, Presidents often opt to negotiate executive agreements instead. Executive agreements allow Presidents to enter into arrangements with other countries without Senate approval, thereby enabling Presidents to sidestep treaty rejections. As Cronin (1980) emphasizes in discussing the “imperial presidency,” Presidents used executive agreements throughout the 1960’s and 1970’s to arrange important mutual-aid and military-base agreements with other countries. As O’Halloran (1994) points out, executive agreements often require implementing legislation and so constitute a form of legislative delegation. Accordingly, executive agreements are therefore subject to amendment and authorization by both the House and the Senate. In essence, to obtain an executive agreement, the President trades a 2/3 voting requirement in the Senate for a simple majority in both chambers. As a

result, during periods of divided control, Congress places tighter reins on the President's authority to negotiate executive agreements (Lohmann and O'Halloran 1994).<sup>19</sup>

### **5.2.3 Executive Oversight**

As the Chief Executive Officer, the President controls hundreds of agencies and seemingly unlimited resources. Among the executive powers granted to the President in Article II of the Constitution are the position of commander in chief of the army and the authority to require written reports from heads of executive agencies. Furthermore, as a practical matter, almost all appointment powers are also vested in the President.

As Chief Executive, the President seems to have a powerful advantage in policy-making. In reality, the President's control over agencies is far less extensive than a CEO's control of a corporation. Because Congress controls the budget, the President lacks funds to pay for programs and authority to sanction agencies by withholding appropriations; legislation controls expenditures. Furthermore, legislation determines administrative structure and process (McCubbins, Noll, and Weingast 1987, 1989). Bureaucratic structure and process is created with the aim of making bureaucratic agencies responsive to the will of the legislature, not just the President (Weingast and Moran 1983, McCubbins and Schwartz 1984, McCubbins 1985, McCubbins and Page 1987, Calvert, Moran, and Weingast 1987, Epstein and O'Halloran 1999).

The disparity between Congress and the President is exemplified by comparing the Office of Management and Budget (OMB) in the Executive Office of the President (Pfiffner 1979, Moe 1985) and the General Accounting Office (GAO) and Congressional Budget Office (CBO), which work directly for Congress. GAO investigates federal

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<sup>19</sup> See Cronin (1980) on Congress limiting the President's use of executive agreements.

programs and audits expenditures, while the CBO estimates the budgetary impact of proposed legislation and provides economic expertise about anticipated revenues and expenditures of cyclically sensitive policies. Both CBO and GAO also provide economic evaluations of specific policies. OMB performs the same functions and prepares the President's annual budget, but despite its formal location in the Executive Office of the President, it exists at the pleasure of Congress and is much smaller than the GAO. As much as anything else, OMB aids Congress in formulating the budget – if it did not serve this purpose, it would not exist (Heclo 1984, Kiewiet and McCubbins 1991).

#### **5.2.4 Appointments**

The President controls the top administrators in the executive branch. Senate confirmation is required of nominees for most top posts. Because Senate approval is virtually always granted, even in times of partisan division between the President and the Senate, many conclude that the President determines the policy preferences of political appointees (Moe 1985), but others conclude that the Senate has considerable influence (Snyder and Weingast 1999). The fact that Presidential nominees are rarely rejected does not necessarily mean that the Senate does not influence appointments. In some cases, at least, rejection of an appointment is costly to the President. For example, the process of rejecting a nominee gives the President's opponents a very public forum for criticizing the policies and judgment of the President. Moreover, a rejected nominee's embarrassment makes potential nominees more reluctant to let their names be sent

forward. Hence presidents usually succeed in appointments, but the reason may be that they allow the Senate to have influence.<sup>20</sup>

The President can fire most high-level officials, the exceptions being political appointees to independent agencies and positions that are reserved for the civil service. The President can influence the civil servants who can not be fired by controlling the allocation of bonuses among the Senior Executive Service and their promotion to the Senior Executive Service, which are the jobs with the greatest prestige and highest pay.

The President's authority to make appointments is an important source of policy influence, but is nevertheless subject to the same limitations that apply to executive orders and agreements. While a President can pick executives who prefer particular policies and fire those who do not, the decisions of Presidential appointees are constrained by statutory mandates, the appropriations process and administrative procedures. Here the power of the President is more negative than positive: an agency can slow down implementation of a program or fail to spend all of its appropriations, but it is unlikely to succeed in carrying out policies that are not supported by its statutory mandate or the requirements of its statutory decision-making procedures.

### ***5.3 Assessing of the Role of the President***

PPT of the role of the President provides good news and bad news. The good news is that the Constitutional separation of powers achieves two useful ends: the system

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<sup>20</sup> As McCarty (2004) shows, the willingness of Congress to delegate authority to an agency depends on the harmony of preferences between the agency and Congress. If an appointee reflects only the President's interest, Congress will delegate less authority to the agency. In some cases the President can gain greater authority by appointing someone who is more compatible with congressional interests.

of checks and balances grants considerable power to influence the law, and the incentives created by the method of electing the President counteract the excessive responsiveness to particularistic interests in the legislature. The bad news, of course, is that the law-making powers of the President are not as strong as those of the legislature. In essence, the President has the authority to use the office to influence Congress and even to make policy within a range of discretion that Congress will tolerate, but, in the end, the role of Congress in making law is dominant. Presidents can constrain pork, rent-seeking and morselization, and within limits can push policy in the direction of economic efficiency and universalistic goals, but they cannot prevent these inefficient activities.

An important issue with respect to the power of the President is the degree to which the President controls the bureaucracy. Because legislation frequently contains broad delegations of authority to agencies, the ability of the President to impose more universalistic objectives in policy implementation turns the responsiveness of the bureaucracy to presidential policy preferences. To this issue we now turn.

## **6.0 The Bureaucracy**

During the 20<sup>th</sup> Century, the debate over the nature of the bureaucracy pitted Weberians (Weber 1946) and Progressives (see Landis 1938, Mashaw 1985, 1994, 1997, Moe 1987, 1989), who favored giving substantial law-making power to elite civil servants, against Democrats (not the party, but a school of thought about the democratic legitimacy of delegation to the bureaucracy), who favor popular and legislative sovereignty (Shapiro 1964, and Woll 1977). The issue animating the original debate between Progressives and Democrats was whether professional experts without the encumbrances of political pressure should undertake administration, or whether elected

officials should take as much control as possible of the details of policy, only reluctantly delegating authority to bureaucrats and then only with detailed instructions and safeguards to prevent the bureaucracy from seizing control of policy.

Shapiro (1964: 45) summarizes the point of contention between Progressives and Democrats: "Somewhere in the examination of every agency of American government, we may wish to ask to what extent the structure and function of this agency accords with whatever theory of democracy we have." Woll (1977) offers the typical worry about the expanded role of the bureaucracy advocated by the Progressives. "In this respect the development of a bureaucracy that is not elected and that exercises broad political functions has apparently resulted in the breakdown of a primary constitutional check on arbitrary governmental power" (p. 29).

The debate between Progressives and Democrats, though framed in normative terms, is rooted in a disagreement about the positive theory of relationships among citizens, elected officials and bureaucrats. Whether elected officials *should* delegate authority to an expert bureaucracy hinges on another question. As a matter of positive analysis, *can* elected officials control the bureaucracy in the sense that the policy preferences of the bureaucracy reflect the policy agreement among legislators that gave rise to the statutory law that empowered the agency? If the answer to this question is yes, then elected officials can enlist the technical expertise of civil servants without ceding to them control of policy.

Whether the control of the bureaucracy by elected officials is desirable in turn hinges on two questions addressed in preceding sections. First, as a matter of positive analysis, do elections and the legislative process cause statutes to reflect the preferences of citizens? If the answer to this question is yes, then the decisions of bureaucrats are

responsive to citizens. Second, as a matter of normative analysis, are the preferences of citizens as reflected in elections normatively compelling? If the answer to this question is yes, then bureaucratic delegation is normatively compelling as well since the chain of arguments implies that delegation marshals the skills of analysts to advance the normatively attractive goals of citizens.

The schools of thought about bureaucracy differ according to how they answer each of these questions. Explicating these differences and the insights that PPT brings to this debate are the subjects of this section.

### ***6.1 Schools of Thought on Bureaucratic Autonomy***

There are five distinct modern schools of thought with respect to the debate about the desirability of delegating policy-making (hence law-making) authority to a bureaucracy. These five schools are linked to the eight general schools of legal thought discussed in Section 2.0. Progressives and their New Deal successors argued that the bureaucracy is the only forum in which technocratic, scientific, apolitical policy-making is feasible. Landis (1938), a leading Realist, argued: "The administrative process is, in essence, our generation's answer to the inadequacy of the judicial and the legislative processes." This school favors broad, vague delegations to a bureaucracy populated by civil servants who are hired and promoted on the basis of merit.

In the early 1950s, Pluralists, exemplified by Truman (1951) and building on the work of Bentley (1908), replaced Progressives as the dominant school of thought about the role of bureaucracy. The premises of Pluralism are similar to the Sociological Jurisprudential School and Realists in that they believe that law is policy and that making policy is necessarily political. Pluralists also believe that bureaucrats (and the courts) are competent to make political decisions that serve a general public interest. To Pluralists,



the bureaucracy is just another arena where groups compete and communicate their interests so that bureaucracy is a mechanism for forging deals among competing social interests. Pluralists view this competition as taking place in a political environment in which power is distributed among antagonistic interests, so that the outcome is likely to be a compromise of interests that serves the social good.

Four newer schools of thought have responded to different components of the optimistic picture painted by the Progressives and Pluralists. These are Public Choice, Civic Republicans, New Progressives and Neodemocrats.

The view of Public Choice about bureaucracy is derived from their skeptical view about democracy. Public Choice scholars argue that special interests, not public interests, capture the benefits of government intervention (Buchanan and Tullock 1962; Kolko 1965; MacAvoy 1965; McConnell 1966; Lowi 1969; Stigler 1971). These scholars extend this argument to bureaucrats by regarding them as another device for creating and allocating rents, either for their own benefit (Niskanen 1971) or for the benefit of elected officials (Stigler 1971) to the detriment of economic efficiency and society as a whole. Mashaw (1997: 4) has characterized this view of American politics “somewhat hyperbolically, as a world of greed and chaos, of private self-interest and public incoherence. It is this vision that provides the primary challenge for today’s designers of public institutions; for it is a vision that makes all public action deeply suspect.”

Public Choice scholars level two main criticisms against bureaucracy. First, bureaucrats, in maximizing their personal welfare, have bargaining power over elected officials and use this power to extract budgets that are in excess of the amounts necessary to provide services (Niskanen 1971). Second, special interests dominate agencies, either

because the bureaucrats or their elected over-seers sell policy to the highest bidder. The inevitability of bureaucratic implementation costs leads these scholars to advocate strict limits to the size and scope of government and “undelegation” of legislative authority to avoid selfish misuse of discretion (Lowi 1969).

While Public Choice is by no means the dominant school of thought about either bureaucracy or democracy, its critiques have been taken seriously by scholars of other schools. The other responses to Progressives and Pluralists actually accept some aspect of the Public Choice critique, but place it in a broader context that soften or even reverse its harsh conclusions about the efficacy of democratic government.

Two new forms of Progressivism resurrect the social desirability of bureaucracy while incorporating at least the possibility of democratic pathologies as put for by Public choice scholars. The first is called Civic Republicanism and the second is the New Progressivism.

In a twist on Jacksonian Republicanism, Sunstein (1990) and Seidenfeld (1992) argue that the bureaucracy can lead citizens in policy deliberation and, moreover, in doing so can instill "civic republicanism." Civic Republicans see democracy as coming in two flavors. Day-to-day politics is not carefully followed by most citizens, and as a result is capable of the pathologies noted by the critics of democracy, whether Public Choice or the others that were summarized in Section 3.0. But “deliberative democracy” arises when citizens think seriously about policy and engage in public investigation and discussion about the consequences of alternative policy actions. Civic Republicans argue that in deliberative processes, citizens are not as likely simply to pursue narrow, short-sighted personal interests, and more likely to take into account the general welfare of

society. Thus, one task of society is to maximize the extent to which policy is the outcome of deliberation.

Civic Republicans view delegation to properly designed agencies as a mechanism for creating deliberative democracy. Specifically, Seidenfeld argues that "given the current ethic that approves of the private pursuit of self-interest as a means of making social policy, reliance on a more politically isolated administrative state may be necessary to implement something approaching the civic republican ideal."

Two positive theoretical hypotheses underpin the normative prescription of Civic Republicans. First, elections and the process of law-making by elected officials do a poor job of transmitting citizen preferences into statutes. In this regard Civic Republicans resemble Public Choice in rejecting the optimism of Pluralists. Second, a largely independent bureaucracy that must satisfy procedural requirements to interact with citizens produces decisions that are more responsive to citizen preferences. In this case, Civic Republicans reject Public Choice and resemble Pluralists in that they emphasize the representation of citizen interests within the bureaucratic process rather than the technical expertise of a well-selected civil service.

New Progressivism, most completely explicated by Mashaw (1985a, b, 1994, 1997), also rejects pessimism about bureaucracy as a necessary feature of delegation. Mashaw (1997: 206) argues that agencies can be constructed to be competent and responsive to public desires, but not because the process is deliberative. A distinctive feature of New Progressivism is that it recognizes that not all bureaucratic delegations do lead to policy implementation that serves a plausible definition of the public interest. But New Progressives tend to see these examples as exceptions that can be avoided.

One cause of bureaucratic failure is simply mistakes – errors by elected officials in setting up the procedures and powers of agencies (Breyer 1982 and 1993, Mashaw 1983). Here the solution is not unlike the prescription advocated by Civic Republicans: elected officials should take greater care (engage in more deliberation) in designing policies. The other source of bureaucratic failure is invisible day-to-day involvement of elected officials in the affairs of agencies, typically in responding to a demand for service from an unhappy supporter (Mayhew 1974a, Mashaw 1994). This problem can be mitigated by ensuring the oversight is rare and politically visible, such as by enacting sunset provisions and making multi-year appropriations and authorizations. Thus, New Progressives propose that agencies should have broad and vague mandates and that Congress should exercise more care in designing policies and methods for oversight.

Neodemocrats (not the contemporary branch of the party, but a reference to the Democrat School) agree with Pluralists and Democrats that the bureaucracy is political.<sup>21</sup> Unlike Progressives and Pluralists, Neodemocrats agree that excessive or uncontrolled delegation undermines democratic legitimacy (Shapiro 1964, Melnick 1983). But unlike Democrats and like Progressives and Pluralists, Neodemocrats see delegation as a potentially valuable way to negotiate political compromises and to bring technical expertise to making law, and therefore as a necessary part of modern government. In

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<sup>21</sup> The term “Neodemocrat” emphasizes that this group favors popular control of administration. These scholars adopt the Progressives’ premise that political problems can be mitigated through the design of political institutions, so they could be called Neoprogessives. We eschew the latter to avoid confusion with the self-proclaimed New Progressive School, discussed below.

short, Neodemocrats see delegation as having costs (as emphasized by Democrats and Public Choice) and benefits (as emphasized by Progressives and Pluralists).

The distinctive feature of Neodemocrats is that they also argue that elected officials can and do control the policies that are pursued by agencies (early examples are Wilmerding 1943 and Fenno 1973). These scholars focus their attention on studying how democratic, principally legislative, control of the bureaucracy comes about. The recent work uses PPT to analyze the structure and process of legislative delegation (see, for example, Fiorina 1977a; Cohen 1979; Wilson 1980; Fisher 1981; Weingast and Moran 1983; McCubbins and Schwartz 1984; Weingast 1984; McCubbins 1985; McCubbins and Page 1987; Moe 1987; Noll 1983; McCubbins, Noll, and Weingast 1987, 1989; Kiewiet and McCubbins 1991; Bawn 1995, 1996; Epstein and O'Halloran 1996).

The debate amongst scholars of delegation and the bureaucracy revolves around the efficacy of democratic institutions. Progressives and their recent offshoots see elections and elected officials as at best capable of providing only general directions about policies, but unable to do well in specifying the details (c.f. Abramson 1994 and Posner 1995). Citizens and elected officials lack the information available to administrative agencies. Elected officials, once they get past the general goals of policy, are susceptible to capture by a special interest when they tackle the largely invisible tasks of designing policy details and engaging in day-to-day oversight of agencies. Due to these limitations of the democratic system, old and new Progressives argue that the details of policy implementation should be delegated to apolitical bureaucratic experts.

This conclusion is directly at odds with that of Public Choice, which sees bureaucracy as a seeker of rents and server of special interests. This conclusion also is at odds with the analysis of Neodemocrats, who agree that broad bureaucratic discretion

represents an abdication of a legislative responsibility and allows the usurpation of popular sovereignty. But Neodemocrats also argue that elected officials design agencies so that generally their objectives are served. Whether this political control of bureaucratic decisions works for good or ill depends on whether the goals that the legislature pursues and embeds in agencies are responsive to citizens.

The normative and positive debates regarding the role of the bureaucracy in policy-making closely parallel each other. Weber and the Progressives argue that policy-making is best left to apolitical, appointed administrators, because politicians lack the expertise, patience and public spirit necessary to make good public policy. In line with this normative argument is positive analysis claiming that much of the modern American bureaucracy is independent of legislative and executive oversight and control. Much of Public Choice scholarship accepts the positive argument that bureaucrats have great autonomy, but then claims that bureaucrats use their unbridled leeway in policy-making to allow themselves to be captured by special interests, to shirk their duties, and to engage in corruption (Tullock 1965, Niskanen 1971).

PPT seeks to develop a theory of bureaucratic behavior that takes into account both the objectives of elected officials in delegating policy-making authority and the instruments available to elected officials to solve the agency problem that accompanies delegation. In this sense, PPT is most closely aligned with the view of delegation put forth by Neodemocrats. The resulting theory describes how the Congress and the President influence bureaucratic law-making, which has led to a new view of administrative law. We now turn to a review of this work.

## ***6.2 PPT of Administrative Law***

Why would elected representatives allow bureaucrats to act autonomously, especially if they implement policy in a corrupt manner? Or, for that matter, why would legislators, who want to deliver particularistic benefits to selected constituents, delegate power to a scientific bureaucracy that will ignore these preferences in pursuit of economic efficiency and distributive justice?

Many scholars argue that Congress and the President are either incapable or unwilling to oversee and control bureaucratic policy-making (Ogul 1976, Fiorina 1977a, Dodd and Schott 1979). Congressional incentives and capabilities are poorly matched, such that the management resources available to the elected branches of government are woefully inadequate relative to the size of the task of overseeing the bureaucracy (Aberbach 1990). Fiorina (1979) provides a valuable insight about this perspective. He argues that Congress is clearly capable of controlling the bureaucracy, but that it may have no incentive to do so. Indeed, Fiorina emphasizes that for some policies the reelection goals of legislators give them no incentive to work for coordinated control of the bureaucracy. Why should Congress take political chances by setting detailed regulations that are sure to antagonize some political actor or constituent? When it comes to controlling the bureaucracy, electoral incentives lead representatives to “let the agency take the blame and the Congressmen the credit” (Fiorina 1979; p. 136).

Democrats favor representative policy-making. Because they believe that the bureaucracy cannot be bridled, they also believe that legislative delegation should be avoided (Lowi 1969; Stewart 1975; Aranson et al. 1982). Neodemocrats model bureaucratic policy-making as part of a game between Congress, the President, the courts, the bureaucracy, and the public. In this policy game, the bureaucracy’s discretion is *conditional* (Fiorina 1981, Weingast and Moran 1983, Calvert, Moran and Weingast

1987, Moe 1987). Under some conditions bureaucratic decisions will align closely with Congress' or the President's wishes (or both), while under other conditions they will not, depending on the incentives of legislators.

Delegation of legislative authority to the executive thus presents something of a dilemma. To capture the benefits of specialization and the division of labor as explained by Weberians and the benefits of bargains among interests as discussed by Pluralists, members of Congress delegate, therefore sacrificing some control. In so doing, they may in turn sacrifice the public interest as the agency empowered through delegation may be both unaccountable to elected officials and either captured by special interests or its own selfish objectives, as argued by the more pessimistic Realists. Alternatively, as New Progressives see it, a corrupt Congress sacrifices the opportunity to sell policy to special interests by delegating to scientific elites in pursuit of the public interest. In either case, the goals of the legislature are sacrificed through delegation. Yet despite the potential problems, elected officials have opted to delegate on a massive scale.

### **6.2.1 Why Elected Officials Delegate**

The basic question that PPT seeks to answer is why elected officials choose to engage in extensive delegation. In a sense, the answer is obvious: *elected officials are not as afraid of the potential gap between the goals of elected officials and the outcome of bureaucratic decisions as the scholars who emphasize the depth of the agency problems arising from delegation.* Subsidiary questions that PPT has recognized as important to understanding why elected officials delegate are when (i.e., under what conditions) do bureaucrats enjoy some degree of discretion in policy-making, how much leeway are they be able to exercise, when and how does Congress, the President, or the courts, singly or jointly, influence the decision-making of bureaucrats, and how do the



delegation strategies of Congress, the President, and the courts change under conditions of divided government, unified government, and partisan realignment?

In answering these questions, research has looked beyond the overt methods of managing bureaucratic behavior, such as appointments, salaries and oversight, which many would agree are not sufficient by themselves to control delegations to the bureaucracy. Instead, scholars have emphasized budgetary control (Wildavsky 1964, Kiewiet and McCubbins 1991), appropriations riders (Kirst 1969), Presidential and OMB leadership and oversight (Moe 1987, Sundquist 1988, Moe and Wilson 1994, Wood and Waterman 1994), judicial review and deck-stacking procedures (Noll 1971, 1985; McCubbins 1985; McCubbins and Page 1987; McCubbins, Noll and Weingast 1987, 1989), and even external pressures, such as competition from other agencies. These devices include *ex post* reward-and-sanction mechanisms, which operate through what Weingast (1984) calls “the law of anticipated reactions,” as well as *ex ante* institutional mechanisms that change the costs and benefits of taking various actions, thereby channeling agency decision-making (McCubbins, Noll, and Weingast 1987).

### **6.2.1 Delegation and Agency Theory**

PPT introduced the analogy of agency theory to thinking about legislative delegation to bureaucrats (e.g. Weingast 1984). Abstractly, delegation is a "principal-agent problem." The principal is the person who requires a task to be performed, and the agent is the person to whom the principal delegates authority to complete that task. In all delegations, a necessary condition is that the principal must gain some advantage from delegating, such as involving more people in executing a demanding task or taking advantage of an agent's specialization or expertise. Delegation always brings disadvantages in the form of agency losses and agency costs. Agency losses are the

principal's welfare losses when the agent's choices are sub-optimal from the principal's perspective. Agency costs are the costs of managing and overseeing agents' actions (including the agent's salary, and so on).

Three conditions give rise to agency losses, and thus the delegation dilemma. The first condition is that the agent must have *agenda control*. That is, the principal delegates to the agent the authority to take action without requiring the principal's informed consent *in advance*.<sup>22</sup> This puts the principal in the position of having to respond to the action *ex post* after its consequences are observed, rather than being able to veto it *ex ante* on the basis of accurate expectations about its likely effects. The second condition is a *conflict of interest* between the principal and the agent. If the two have the same interests, or if they share common goals, then the agent will likely choose an outcome that the principal finds satisfactory. The third condition is that the principal *lacks a fully effective means of correction*, in the sense that the principal cannot overturn the decision after the agent makes it without incurring cost. Conventionally, the lack of an effective means of reversing the agent's decisions frequently is said to be due to the agent's expertise – the agent is chosen because of expertise, so the principal must acquire expertise or hire another expert to evaluate and then alter the agent's choice.

Members of Congress may lack an effective check over agency decisions because of the separation of legislative powers (held jointly by Congress and President) and executive power (held by the President, but supervised by the Congress). This sets up the so-called “multiple principal” problem. The legislative process in the United States

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<sup>22</sup> Informed consent means that the principle possesses at least as much information as the agent about the consequences of the action.

ensures that the consent of at least majority coalitions in the House and Senate, plus either the President or additional members of both chambers, is given before a proposal becomes law. Because these principals must all agree to legislation – even legislation to check an agency's actions – the agency may be unconstrained within some sphere of activity. Broad agency discretion may exist even if all principals match the agency's expertise. The breadth of agency discretion depends on the extent of conflicting interests among the many principals. An agency needs only to make a single “veto player” (someone who can block legislation) sufficiently happy to sustain the agency's policy against an override or other form of punishment (McCubbins, Noll and Weingast 1989, Ferejohn and Shipan 1990, Gely and Spiller 1990, 1992, Ferejohn and Spiller 1992).<sup>23</sup>

Agencies take many types of actions, such as proposing rules and adjudicating cases. Often these actions are taken without the appearance of congressional oversight, and therefore many deem these bureaucrats as unaccountable. Of course, when agencies make decisions, their actions are not necessarily final. Congress can overturn their decision by passing new legislation, which can be as simple as a brief rider on an appropriations bill that orders the agency not to spend any funds enforcing a particular rule. Even though Congress does not frequently override agencies, the possibility that they can do so creates an incentive for the agency to take the preferences of members of Congress into account. In a similar fashion, the threat of rewarding or sanctioning an agency for its actions may also create incentives for the agent to respect the wishes of members of Congress. These factors constitute an *ex post* form of control, by which is

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<sup>23</sup> Of course, the President, courts and often individual House and Senate committees have the ability to unilaterally reject a proposal or punish an agent.

meant possible actions that can be taken after the agency has made a decision. The next section explores how *ex post* controls resolve some aspects of the delegation dilemma.

### **6.2.3 Solving the Agency Problem: Ex Post Corrections and Sanctions**

The first major source of the delegation problem is the fact that agencies often possess an "institutional" advantage, in that the agencies collectively make voluminous decisions, and Congress must pay potentially large costs to respond legislatively. The agency's "first-mover" advantage potentially puts Congress in the position of facing a *fait accompli* from an agency. One important countermeasure by the legislature to mitigate bureaucratic agenda control is institutional checks. Operationally, institutional checks require that when authority has been delegated to the bureaucracy, at least one other actor has the authority to veto or block the actions of the bureaucracy. Before *Chadha* undid the process, Congress used the *ex post* legislative veto to check agency discretion. The legislative veto allowed the House and Senate, and in some instances either one alone, to veto bureaucratic policy proposals before they were implemented (Fisher 1981).

Other *ex post* mechanisms add up to what has been referred to as "the big club behind the door" (Weingast 1984). In addition to the threat to eliminate an agency altogether, Congress can make use of numerous checks on agency implementation. Congress can also make life miserable for an agency by endless hearings and questionnaires. For political appointees with short time horizons, this harassment can defeat their purpose for coming to Washington. In sum, *ex post* sanctions provide *ex ante* incentives for bureaucrats to avoid those actions that trigger them; and the best way to avoid them is to further congressional interests. Congress can also reduce the agency's budget or prohibit the use of funds for particular purposes or policies.

Similarly, enabling legislation (describing the nature of the delegation to the agency) can establish Presidential vetoes over proposed rules, or can grant only the authority to propose legislation to Congress. Another form of veto threat is an appropriations rider that prevents implementation of the agency's decision, whereby Congress can undermine a decision without rejecting it outright (Kirst 1969).

In making proposals and engaging in rule-making, bureaucratic agents must anticipate the reaction of political leaders and accommodate their demands and interests. In discussing Congress, Weingast (1984: 156) notes: "Ex post sanctions ... create ex ante incentives for bureaucrats to serve congressmen." That is, Congress's big club engenders the well-known *law of anticipated reactions*, whereby bureaucrats are aware of the limits to acceptable behavior and know that they run the risk of having their agency's programs curtailed or careers ended if they push those limits too far.

Bureaucratic expertise relative to Congress often cited as the reason that delegation leads to loss of political control and accountability. But the problem is not that legislators lack information or that bureaucrats monopolize it. Legislators have access to sources of information and expertise on technical subjects from sources outside of the bureaucracy, such as legislative staff, constituents, interest groups, and private citizens, as well as from their own expert agencies, CBO and GAO. Rather, the problem is that gathering and evaluating information is costly, and the presence of costs to discover non-complying behavior inevitably causes Congress to regard some potential non-complying behavior to be not worth the cost of detecting and correcting. The proper response to this problem by Congress is to find cost-minimizing methods to monitor agencies, to which we now turn.

#### **6.2.4 Solving the Agency Problem: Oversight**

The information requirement for evaluating policy implementation is sometimes interpreted to mean that in order to ascertain whether an agency is doing its job, political leaders must engage in proactive oversight: they must gather enough information to assess whether an agency is producing good solutions to the problems that it confronts. This idea is false, however. Legislators do *not* need to master the technical details of policies in order to oversee effectively an agency's actions. Legislators need only to be capable of collecting and using enough information to reach reasonable conclusions about whether an agency is serving their interests. Moreover, if legislators *can* engage in effective oversight, they need not always *actually* engage in oversight to cause agencies to take their preferences into account in making decisions. The probability of detecting noncompliance with legislative purpose need not be 100 percent to cause agencies to ponder the risk of noncompliance.

Congressional oversight takes two forms: “police patrol” and “fire alarm” (McCubbins and Schwartz 1984). In the former, members of Congress actively seek evidence of misbehavior by agencies, looking for trouble much like a prowling police car. In the latter, members wait for signs that agencies are improperly executing policy: members use complaints to trigger concern that an agency is misbehaving, just as a fire department waits for citizens to pull a fire alarm before looking for a fire.<sup>24</sup> Conventional wisdom nearly exclusively assumes that oversight is of the police patrol form.

Fire-alarm oversight has several characteristics that are valuable to political leaders. To begin, leaders do not have to spend a great deal of time looking for trouble.

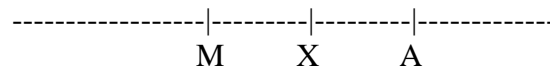
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<sup>24</sup> The intuition behind fire alarm oversight has also been formally modeled in the context of the judiciary’s appeals process (Shavell 2004).

Waiting for trouble to be brought to their attention ensures that if it exists, it is important enough to cause complaints. In addition, responding to the complaints of constituents allows political leaders to advertise their problem-solving role and to claim credit for fixing problems (Fiorina and Noll 1978). In contrast, trouble discovered by patrolling might not concern any constituents and thus would yield no electoral benefit. Thus, political leaders are likely to prefer the low-risk, high-reward strategy of fire-alarm oversight to the more risky and costly police-patrol system.

The logic of fire-alarm oversight can be incorporated into the one-dimensional model of policy choice, and shown in Figure 6.1. Let M represent the policy goal of

**Figure 6.1:  
Controlling Agencies with Fire Alarms**



the legislation that gives an agency its mandate, and A represent the preferred policy of the agency. Also assume that the enabling legislation grants standing in the process of the agency to a group that has a most-preferred policy of M. Thus group, at some cost K, can report the agency's policy deviation for the purpose of having it restored to M. Let X be defined so that the difference to this group in the value of a deviation from M to X equals K. Thus, if the agency attempts to adopt its preferred position, the group has more to gain by challenging the decision than the cost of doing so, and so will pull the fire alarm. If the agency adopts any policy between M and X, the group will not find a challenge worthwhile. Hence, the agency can move policy to X, but not all the way to A. Whether fire-alarm oversight is preferred by political actors to police patrol oversight depends on the relative magnitude of the cost saving from the former compared to the

loss of ability to detect the smaller deviations that the watchdog group does not regard as significant enough to be worth challenging.

This theoretical model has two implications. First, the oversight process induces decision-makers to make decisions that are close to the democratically legitimate outcome  $M$  (at least within the range governed by the cost of an appeal). Second, unless an agency makes a serious error in estimating the stakes of the group that can pull the fire alarm, inducing compliance is costless because the fire alarm does not actually need to be pulled. If the agency accurately anticipates the response of the fire-alarm group, it will pick an outcome that does not generate an incentive to mount a challenge.

### **6.2.5 Solving the Agency Problem: Administrative Procedures**

The mechanics of fire-alarm oversight are embedded in the administrative procedures of agencies that are within the jurisdiction of the Administrative Procedure Act (APA) of 1946 (McCubbins, Noll, and Weingast, 1987, 1989), as amended by further legislation and as extended and interpreted by the courts. First, an agency cannot announce a new policy without warning, but must instead give "notice" that it will consider an issue, and do so without prejudice or bias in favor of any particular action. Second, agencies must solicit "comments" and allow all interested parties to communicate their views. Third, agencies must allow "participation" in the decision-making process, the extent of which is often mandated by the statute creating the program. When investigative proceedings are held, parties can bring forth testimony and evidence and often may cross-examine other witnesses. Fourth, agencies must deal explicitly with the evidence presented to them and provide a 'rationalizable' link between the evidence and their decisions. Fifth, agencies must make available a record of the



final vote of each member in every proceeding. Failure to follow any of these procedures creates a cause of action to appeal the agency's decision to the courts.

As legal scholars have long observed, these requirements have obvious rationales in procedural due process, but beyond rights of due process, they also have profound political implications (McNollgast 2000). These requirements force agencies to collect information to guide its decisions, but this goal could be achieved in much less elaborate ways – including judicial review on the basis of the balance of evidence supporting the agency's position. The important additional insight about these procedures is that they facilitate the political control of agencies in five ways.

- (1) Procedures ensure that agencies cannot secretly conspire against elected officials to present them with a *fait accompli*, that is, a new policy with already mobilized supporters. Rather, the agency must announce its intentions to consider an issue well in advance of any decision.
- (2) Agencies must solicit valuable political information. The notice and comment provisions assure that the agency learns which relevant political interests are affected by its proposed decision and something about the political costs and benefits associated with various actions. That participation is not universal (and may even be stacked) does not entail political costs to members of Congress. Diffuse groups that do not participate, even when their interests are at stake, are much less likely to become an electoral force in comparison with those that do participate.
- (3) The proceeding is public, thereby enabling political principals to identify not just the potential winners and losers of the policy but their views. Rules

against *ex parte* contact protect against secret deals between the agency and some constituency it might seek to mobilize against Congress or the President.

- (4) The sequence of decision-making – notice, comment, deliberation, collection of evidence, and construction of a record to support an action – creates opportunities for political leaders to respond when an agency seeks to move in a direction that officials do not like. By delaying the process, Congress has time to decide whether to intervene before a decision becomes a *fait accompli*.
- (5) Because participation in the administrative process is expensive, it serves to indicate the stakes of a group in an administrative proceeding. These stakes are indicators of the resources the group can bring to bear in taking out political reprisals against congressional principals whom they hold accountable for policy outcomes.

These features of the APA reduce an agency's information advantage and facilitate fire alarm oversight. By granting rights of participation and information to interest groups, administrative procedures reduce an agency's information advantage. Congress uses the APA to delegate some monitoring responsibility to those who have standing before an agency and who have a sufficient stake in its decisions to participate in its decision-making process, and, when necessary, to trigger oversight by pulling the fire alarm. In addition, administrative procedures create a basis for judicial review that can restore the status quo without requiring legislative correction. As a result, administrative procedures cope with the first-mover advantage of agencies.

#### **6.2.6 Solving the Agency Problem: Ex Ante Controls**

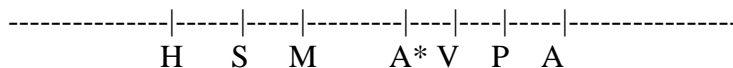
While *ex post* methods of controlling agencies are always present, utilizing them to respond to an agency decision requires legislative action. Some legislative action,

such as oversight hearings (including those designed to harass administrators) can be done unilaterally. So too can single-chamber legislative vetoes, but unfortunately this approach has been severely curtailed by the Supreme Court in *Chada*. Fast-track treaties are now the only important sources of policy change which makes use of the one-house veto by either chamber.

When legislation is required to correct an agency, action must be taken by both chambers of Congress (and their committees) and the legislation must survive the possibility of a Presidential veto. Because multiple actors must assent in order to undertake successful legislative action, the agency will face looser constraints on its actions if the principals—i.e., majorities in the House and the Senate, and President—disagree among themselves. The agency needs only to make a majority in a single chamber happy with a policy choice to protect against a legislative *ex post* reversal.

The problem of the absence of the ability to engage in effective *ex post* correction of an agency decisions is shown in Figure 6.2. Here H, P and S represent the policy ideal points of the House, President and Senate, respectively, where H and S are the positions of the median voters in those bodies. Let SQ represent the status quo policy as contained in statutes, and let A represent the ideal point of an agency that is charged with implementing policy. The issue to be examined is the discretion available to the agency if it can adopt a policy without being detected by any of its political principals.

**Figure 6.2:**  
**Agency Power without Ex Ante Oversight**



If the agency adopts policy A, the Congress and the President agree that policy should be changed; however, the old outcome is not likely to be restored. Let A\* be the

policy that the President regards as equally valuable as A. If Congress adopts any policy to the left of A\*, the President will veto the bill. If Congress can not muster a 2/3 majority in both legislative branches to override the veto, then A will stand. Hence, the best that Congress can do in response to the non-complying adoption of A is to propose legislation at A\*.

If the agency rationally anticipates the response of Congress, it can do better than the ultimate result A\*. If the agency adopts the President's ideal point, P, the President will veto any attempt at correction, and P will then stand as the policy unless Congress overrides the President's veto of correcting legislation. Suppose Congress can override the President's veto for any bill that is to the right of V. In that case, the agency can guarantee V by either adopting it or adopting some policy to the right of V and letting Congress pass a veto-proof correction.

A variant of all of these results holds regardless of the relative positions of the four major players. All that is required for *ex post* correction to be inadequate is that the status quo legislative bargain differs from the preferred policy of the agency and that the three branches have different ideal points. The agency always has some discretionary power to move policy within the range of outcomes between the two extreme ideal points without fear of legislative correction or punishment.

This analysis explains why most administrative procedures that have been adopted are for the purpose of preventing non-complying behavior before it happens or through the courts, rather than correcting it after it occurs through legislation.

In creating and funding bureaucratic agencies, the legislature anticipates the problems just discussed. When delegating, legislators decide consciously whether to take steps to mitigate these problems. This section examines ways that members of Congress

and the President can structure an agency's decision-making process so that it is more responsive to their preferences.

One important countermeasure that Congress and the President may take to mitigate the power of bureaucratic agenda control is the aforementioned strategy of employing institutional checks. Checks on agency agenda power can also be created so that they affect the agency's choice *ex ante*, that is, before it makes a proposal. In our earlier work (McCubbins, Noll, and Weingast 1987, 1989) we argued that tools available to political actors for controlling administrative outcomes through process, rather than substantive guidance in legislation, are the procedural details, the relationship of the staff resources of an agency to its domain of authority, the amount of subsidy available to finance participation by underrepresented interests, and resources devoted to participation by one agency in the processes of another.

By structuring who gets to make what decisions when, as well as by establishing the process by which those decisions are made, the details of enabling legislation can stack the deck in an agency's decision-making. In effect, this is the same problem that we discussed earlier in terms of a legislative majority delegating to its agents the discretion to determine a policy agenda. We have argued that the winning coalition in Congress will use its ability to establish the structure and process of agency decision-making to fix the range of feasible policies. This, in turn, implies a definition for the agency's range of policy discretion'

For example, elaborate procedures, with high evidentiary burdens for decisions and numerous opportunities for seeking judicial review before the final policy decision is made, benefit groups having considerable resources for representation. When combined with the absence of a budget for subsidizing other representation or a professional staff

for undertaking independent analysis in the agency, cumbersome procedure works to *stack the deck* in favor of well-organized, well-financed interests (Noll 1983).

Congress and the President can use procedural deck-stacking for many purposes. A prominent example of how procedures were used to create a “captured” agency was the original method for regulation of consumer product hazards by the U.S. Consumer Product Safety Commission (CPSC). Although the CPSC was responsible for both identifying problems and proposing regulations, it was required to use an "offeror" process, whereby the actual rule writing was contracted out. Usually the budget available to the CPSC for creating a regulation was substantially less than the cost of preparing it. Consequently, only groups willing to bear the cost of writing regulations became offerors, and these were the groups most interested in consumer safety: testing organizations sponsored by manufacturers or consumer organizations. Thus, this process effectively removed agenda control from the CPSC and gave considerable power to the entities most affected by its regulations (Cornell, Noll and Weingast 1976).

In 1981, Congress amended this process by requiring that trade associations be given the opportunity to develop voluntary standards in response to all identified problems, assuring that agenda control was never granted to consumer testing organizations. The 1981 legislation illustrates how procedures can make policy more responsive to a politically relevant constituency by enhancing that special interest’s role in agency procedures.

The U.S. National Environmental Policy Act (NEPA) of 1969 provides another example of how this works. In the 1960s, environmental and conservation groups in the United States became substantially better organized and more relevant politically. By enacting NEPA, Congress imposed procedures that required all agencies to file

environmental impact statements on proposed projects. This requirement forced agencies to assess the environmental costs of their proposed activities. NEPA gave environmental actors a new, effective avenue of participation in agency decisions and enabled participation at a much earlier junction than previously had been possible.

An example of the policy consequences of NEPA is its effects on decisions by the Nuclear Regulatory Commission (NRC) in licensing nuclear power plants (Cohen 1979, McNollgast 1990). NEPA gave environmentalists an entry point into the proceedings before the NRC for approving new projects. Initially the Atomic Energy Commission (the predecessor to NRC) asserted that it was exempt from NEPA, but the 1971 decision in *Calvert Cliffs* required the agency to follow NEPA's requirements, and thereafter environmental impact reports were a necessary part of the approval process.

Environmentalists used this entering wedge to raise numerous technical issues about the risks of components of nuclear reactors, thereby dramatically slowing down the licensing process. Although the interveners rarely won their contentions, their interventions succeeded in raising the costs of nuclear power plants so dramatically that no new plants were actually built. Between 1978 and 1995, no new nuclear plants were ordered, and moreover, every single project planned after 1974 was cancelled (as were a third of those ordered before 1974).

The 1972 California Coastal Zone Conservation Act required similar institutional checks. The statute's objectives were to protect scenic and environmental resources along California's coastline and to preserve public access to the beach. In this case, the key procedure was to grant numerous bodies a veto over proposed changes in land use in the coastal zone. Local governments were the first in line to approve or deny any proposed project, then one of the six regional coastal commissions, and then the

statewide coastal commission reviewed all permits passed by the local governments. The commissioners were also given the power to levy substantial monetary fines against violators, which helped induce compliance.

The creation of a permit review procedure with diffused power automatically biased the regulatory process against approving new coastal projects. By carefully choosing the *procedure* of the California coastal initiative, the state legislature was able to achieve its statutory goals to curtail further development even though the statute contained a broadly-stated, seemingly balanced substantive mandate.

Perhaps the most important tool that legislatures use to stack the deck in bureaucratic decision-making is the establishment of the burden of proof. In all agency decisions, proof must be offered to support a proposal. The burden of proof affects agency decisions most apparently when the problem that is before the agency is fraught with uncertainty. In such a circumstance, proving anything – either that a regulation is needed to solve a problem, or that it is unnecessary – is difficult, if not impossible. Hence, assigning either advocates or opponents of regulation a rigorous burden of proof essentially guarantees that they cannot obtain their preferred policy outcome.

For example, the U.S. Federal Food, Drug, and Cosmetics Act of 1938, as amended, requires that before a pharmaceutical company can market a new drug, it must first prove that the drug is both safe and efficacious. By contrast, in the Toxic Substances Control Act of 1976, Congress required that the Environmental Protection Agency (EPA), before regulating a new chemical, must prove that the chemical is hazardous to human health or the environment. The reversionary outcome is that companies may market new chemicals, but not new drugs. The results of the differences in these two burdens of proof are stark: very few new drugs are brought to market in the United



States each year (relative to the rates in other countries), while the EPA, by contrast, has managed to regulate none of the 50,000 chemicals in commerce under these provisions in the Toxic Substances Control Act.

Congress has successfully used modifications in the burden of proof to change the outcome of regulation. By requiring a certain actor to prove some fact in order to take a regulatory action, Congress can stack the deck against that particular actor's most preferred outcome.

The Airline Deregulation Act of 1978, amending the Civil Aeronautics Act from the 1930s, provides one example. Under the original act, in order to enter a new market by offering flights between a pair of cities, the prospective entrant bore the burden of proof to demonstrate to the Civil Aeronautics Board (CAB) that without entry, service would be inadequate. Thus, a potential entrant in a market that already was being served had the virtually impossible task of showing that someone who wanted service was being denied. In the Kennedy Amendments, Congress changed the procedure used by the CAB, shifting the burden of proof to the existing carriers to show that new entry would lead to less service. This modification now biased the process in favor of allowing entry, and against the old protections that had profited carriers for so long. As a result, the airline entry was essentially deregulated.

More recently, when stories of abuses of power by the Internal Revenue Service came to national attention, Congress again responded by shifting the burden of proof. In this case the burden shifted from taxpayers, who had been required to prove that they had not violated tax law, to the IRS, which now must prove that a taxpayer has violated a tax law. The shift in the burden of proof raises the cost of tax enforcement, and therefore reduces the number of tax claims that the IRS can file. The effect is to benefit taxpayers

by forcing the IRS to abandon some enforcement actions that it would have filed under the old system. Again, this change in the administrative process stacks the deck in favor of one group of actors' preferred outcome.

Using administrative procedures as instruments to control the bureaucracy is part of a broader concept called *the mirroring principle* (McCubbins, Noll, and Weingast, 1987: 262). Political officials can use deck-stacking to create a decision-making environment in an agency in which the distribution of influence among constituencies reflects the political forces that gave rise to the agency's legislative mandate. As argued above, the enacting coalition faces large impediments to reforming and passing corrective legislation when an agency deviates from their intended policy. This coalition therefore has an incentive to use structure and process to enfranchise in the agency's procedures the constituencies it originally sought to benefit. This environment endures long after the coalition behind the legislation has disbanded. As a result, policy is more durable – therefore raising the credit due to legislators for enacting a statute that is more valuable to its proponents. Without policy durability, legislative victories would not be long lasting, and constituents would not be willing to reward legislators for policy change.

The point of mirroring and deck-stacking is not to pre-select policy, but to cope with uncertainty about the most desirable policy action in the future. Procedures seek to ensure that the winners in the political battle over legislation will also be the winners in the process of implementing the program. By enfranchising interests that are represented in the legislative majority, a legislature need not closely supervise the agency to insure that it serves its interests, but can allow an agency to operate on "autopilot" (McCubbins, Noll, and Weingast, 1987: 271). Policy then can evolve without requiring new legislation to reflect future changes in the preferences of the enacting coalition's

constituents, and political principals can be more secure in using fire-alarm oversight of the agency.

Legislatures can further limit the potential mischief of agency agenda control by carefully setting the reversionary policy in the enabling statute that established the agency. For example, consider some entitlement programs specified by statute, such as Social Security and Medicare, in which the agency has no discretion over either who qualifies for assistance or how much they will receive. Another example is the widespread use of "sunset" provisions, whereby an agency's legal authority expires unless the legislature passes a new law to renew the agency's mandate.

Courts also play a role in the political control of the bureaucracy. Administrative procedures affect an agency's policy agenda only if they are enforced. The legislature can delegate enforcement to the courts, in which case procedure can affect policy with minimal oversight by politicians. For supervision by the courts to serve this function, judicial remedy must be highly likely when the agency violates its rules. If so, the courts and the constituents who bring suit guarantee compliance with procedural constraints, which in turn guarantees that the agency choice will mirror political preferences without any need for active 'police-patrol' oversight. Of course, for this process to work, the courts must be willing to ensure that agencies adhere to the requirements of their underlying statutory mandates and procedural requirements, which is the topic that is explored in Section 7.0.

PPT analysis of the political control of the bureaucracy does not provide protection against the most insidious potential problem with delegation, interest-group capture. PPT only argues that agencies are not a source of capture that is independent of the actions and goals of elected officials. If elected officials are a willing co-conspirator

in agency capture, evidence that they influence policy will not assuage fears that the public interest is subverted. In this case, the structure of Congress provides some additional checks. The control committees in Congress, especially the appropriations and budget committees, serve to check capture by reducing any substantive committee's ability to act unilaterally (Kiewiet and McCubbins 1991). That is, by requiring committee proposals to pass through the appropriations process, substantive committees can be disciplined by the appropriations committees' ability to reject their proposals. Recall that substantive committees are more likely to represent specific constituencies, but control committees are representative of the entire legislature and so protect each party's brand name to voters. Hence, capture of the latter is less likely.

Nevertheless, some policies do not require budget authority (such as regulations). If party leaders do not possess sufficient information or incentives to detect and to constrain capture when it emerges in legislation, the “iron triangle” among a constituency, an agency, and its oversight committees can emerge and be difficult to undo. In this case, understanding how capture arises is still useful, because it provides information about the likely performance of an agency while legislation is pending without requiring expertise about the substance of the policy.

Essentially PPT identifies the political conditions under which Congress is likely to create a captured agency (i.e., a policy that is of primary interest to a small constituency and of minor interest to others), and PPT of administrative law provides a check-list of procedures that facilitate capture of an agency. This check-list can be considered by party leaders, control committees (such as Rules), and other interests considering the implicit deck-stacking in proposed legislation. If members of Congress and their leaders choose to ignore this information, and thereby to let a small subset of

their peers create a captured agency, delegation becomes abdication, but the condition under which it happens is that no one other than the favored interest groups cares very much that a captured agency is being created.

### ***6.3 PPT of Political Control of the Bureaucracy: Summary***

Delegation can succeed when one of two conditions is satisfied (Lupia and McCubbins 1998). The first is the *knowledge condition*, which is that the principal, through personal experience or knowledge gained from others, can distinguish beneficial from detrimental agency actions. The second is the *incentive condition*, which is satisfied when the agent has sufficient incentive to take account of the principal's welfare. These conditions are intertwined in that a principal who becomes enlightened with respect to the consequences of delegation can motivate the agent to take actions that enhance welfare.

The institutions that govern the administrative process often enable legislators both to learn about agents' actions and to create incentives for bureaucratic compliance, so that one or both of the conditions for successful delegation are satisfied. Legislators' implementation and reliance on these institutions is the keystone of successful delegation. These institutions imply that their day-to-day operation often goes unseen, but bureaucratic output still is affected (Weingast 1984).

We are not arguing that all necessarily is well in the Washington establishment. Delegation produces agency losses and entails agency costs, and the sum of these can exceed the benefits gained from delegating. The interesting questions are when does this happen and how can we tell? But delegation, while problematic, is not equivalent to abdication of law-making authority by elected officials. Instead, delegation is just a cost.

Taken together, the findings of PPT suggest a new view of administrative law. Unlike the Civic Republicans, who see administrative law as bureaucratic-led democratic deliberation, unlike the Progressives, who see it as ensuring political and scientific quality, and unlike the New Progressives, who see it as creating procedural justice, PPT sees administrative law as a political choice that channels the direction of policy outcomes in a manner favored by those who write the laws. In this sense, administrative procedures, in general, are normatively neutral in that they can be used to create agencies that behave in any way the political principals desire, from enlightened experts seeking to benefit society through the provision of pgs to captured hacks doing the bidding of a particular interest as part of an iron triangle. In short, delegation is neither inherently good nor bad for democracy; it depends on the details.

## **7.0 The Courts**

Most modern schools of legal thought turn to the courts to check and redress wrongs created by electoral and legislative processes. The preponderance of modern legal theory holds that the centuries old tradeoff between popular sovereignty and elite control weighs heavily in favor of elite – i.e., *judicial* – control of dispute resolution.

Should judges play a bigger or smaller role in creating and implementing governmental policy? What are the tradeoffs? Precisely what role for the judiciary produces the best policy outcomes? These questions – whether judges should be passive or active, or modest or aggressive – ought to be confronted head-on rather than obscured by endless talk about legitimacy (Posner 1990).

PPT of the courts seeks to identify the conditions under which the court can exercise independent discretion, and when its authority is final and supreme. By

necessity, PPT addresses when the court is not supreme, and instead acquiesces to or acts as an agent of the legislature and President. In addition, given the similarities between PPT scholarship on the judiciary and the bureaucracy, PPT examines the issues of judicial independence and discretion in the same fashion.

As observed by Posner (1990) and Shapiro (1964), the conclusions of a positive analysis of the courts have implications for the normative debates between democrats and elitists. For example, our theory of the legislative process, and the evidence we presented, provides a means of assessing the premises of the various schools of legal and bureaucratic thought. These results push us to accept some and to reject other arguments about the role of the courts in statutory interpretation and judicial review of agency procedures. Further, by addressing when courts are supreme, and how supremacy is conditioned on institutional structure and procedure, we can demarcate limits to normative arguments about how law ought to be made. That is, we can comment on the plausibility of premises, and we may be able to address when these premises, and the theories built on them, are reasonable bases for judicial and bureaucratic reforms.

PPT provides a different view of the courts than the treatments in either legal scholarship or political science. Because PPT embeds courts in a political process, it shows how the courts interact with Congress, the President, and the bureaucracy.

### ***7.1 PPT and Statutory Interpretation***

Scholars of law and politics typically regard judicial decisions as subsequent to legislation. From this perspective courts are omnipotent actors, imposing any outcome they wish. This perspective also allows theories and recommendations concerning how judges ought to decide cases to be unconstrained. In statutory interpretation, for example, courts are free to make any interpretation they wish, perhaps based on

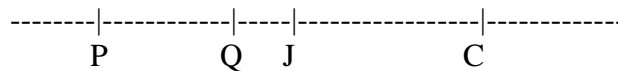
normative principles of law, moral philosophy, policy preferences or ideology. Thus, a court decides wrongly is at fault, and the corrective is to extort the court to mend its ways.

PPT provides a different framework for analyzing courts by observing that statutory interpretation is an on-going process. Legal scholars are right to observe that a necessary condition for a statutory interpretation case to come before the courts is that Congress must pass a law. But they are wrong to assume that courts have the last word. Congress can act in response to judicial decisions, which implies that statutory interpretation is not a two step-process that ends with the judiciary, but an on-going process in which Congress and the courts interact repeatedly. PPT demonstrates that this change in perspective provides a very different way of understanding judicial decisionmaking in general, statutory interpretation in particular.

### 7.1.1. The Strategic Judiciary in PPT.

To see the logic of the approach consider a one dimension spatial model and three actors, the President (P), the Congress (C), and the courts (J), and with status quo Q.<sup>25</sup> Consider the political configuration depicted in Figure 7.1.

**Figure 7.1:  
The Power of Courts in Statutory Interpretation**



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<sup>25</sup> Marks (1988) initiated this form of analysis. See also Epstein and Knight (1999), Eskridge and Ferejohn (1992), Eskridge (1992) and Levy and Spiller (1994).

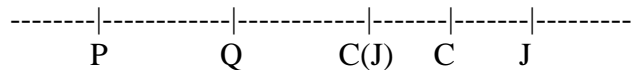


Notice that every policy between P and C is a legislative equilibrium in that if any of these points is the status quo, any bill that is preferred by one makes the other worse off, so no legislation can pass. The point Q, therefore, is a stable legislative equilibrium.

Not all points between P and C are necessarily a policy equilibrium in a larger game on which the judiciary interprets the meaning of the law. Given their preferences and the latitude afforded them by their role as interpreters, the court will move policy from Q to its ideal point, J, which is a new stable equilibrium in the legislative process.

The court's ability to influence legislation depends on the configuration of preferences. If the court's ideal is outside the interval between P and C, as shown in Figure 7.2, the court is constrained by politics.

**Figure 7.2:  
Constraints on an Extremist Court**



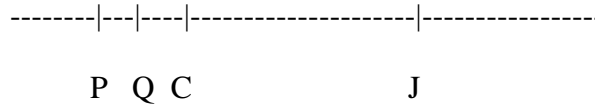
If the court attempts to implement its ideal policy, J, it will fail because J is not between P and C. If the court adopts J, both Congress and the President are better off moving policy back between their ideals – specifically, to any point between C(J) and C.<sup>26</sup>

These examples illustrate a general result. In a system of separation of powers, the range of discretion and hence independence afforded the courts is a function of the differences between the elected branches. If the branches exhibit little disagreement about the ideal policy, judicial discretion is low. Figure 7.3 demonstrates this point.

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<sup>26</sup> C(J) is the policy that makes the median voter in Congress indifferent with J, imply that the median prefers all policies between C(J) and J to either C(J) or J.

**Figure 7.3:  
Courts Facing Political Officials  
With Closely Aligned Preferences**



In this political setting, J stands the same relation to P as in the previous figures, but C is located much closer to P. Figures 7.1 and 7.2 might correspond to a case of divided government (different parties hold the two branches), while Figure 7.3 might represent united government (a united party holds the presidency and a majority in Congress). If the courts attempt to implement their ideal policy, J, under the conditions of Figure 7.3, they will fail. Both P and C prefer all points between their ideal policies to J. The best the court can do is to implement policy C. This configuration shows that courts freedom of action is highly constrained when it faces a relative united set of elected officials.

More generally, these results show how judicial independence depends on the political environment. Some judicial decisions located between P and C will stand in the sense that elected officials cannot reverse them. But other decisions will be reversed – those outside of P and C. To the extent that judges want avoid being overturned by Congress, they have an incentive to make strategic decisions; namely, decisions that take into account the political configuration so that their decisions will not be overturned.

**7.1.2. Application to Affirmative Action.**

The above discussion left policy abstract. To show the power of these models to yield new conclusions, consider the evolution of an important policy area in the United States, expanding the meaning of civil rights legislation (see Weingast 2002).

The landmark Civil Rights Act of 1964 forced Southerners to end their system of apartheid that suppressed African-Americans. Beginning in the early 1970s, a series of court cases expanded the meaning this act.<sup>27</sup> In brief, the civil rights act was an anti-discrimination law, requiring equal opportunity for all individuals regardless of race, creed, or gender. In a series of decisions in the 1970s, the Supreme Court expanded the meaning of the act to include a degree of affirmative action.

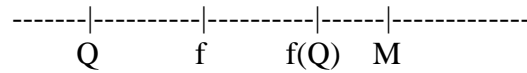
This phenomenon raises the political and legal question: Why did a conservative Supreme Court under Chief Justice Warren Burger expand civil rights? Undoubtedly the conservative majority on the Court preferred the status quo to this outcome. To solve this puzzle, Eskridge (1992) uses PPT models to explain that the answer lies in the interaction of Congress and the courts. Eskridge argues that the conservative Court expanded civil rights strategically. By taking modest steps to expand rights, the Court forestalled an even larger change in the scope of the law by Congress. The argument draws on the idea of the “filibuster pivot” (Brady and Volden 1997, Krehbiel 1999). Senate rules allow a minority of senators to defeat a bill by “filibustering,” continuing the debate to prevent a measure from coming up for a vote. The Senate can end a filibuster only by a successful motion to end debate (cloture), which requires a super-majority of 60 positive votes.

To pass the 1964 bill required defeating a filibuster by southern Democrats. At that time cloture required obtaining support from two-thirds of the Senate. The policy setting depicted in Figure 7.4 reveals the effect of the filibuster.

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<sup>27</sup> Notably, *Duke Power* (1971) and *United States Steelworkers v Weber* (1979).

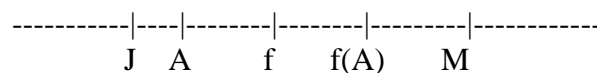
**Figure 7.4:  
The Effect of the Filibuster**



In Figure 7.4,  $Q$  is the status quo,  $f$  is the ideal policy of the filibuster pivot (that is, the last Senator who must be brought on board to end debate), and  $M$  is the median legislator's ideal. Without a filibuster rule, policy would move from the status quo to  $M$ , the median voter's ideal policy. The filibuster pivot prefers all policies between  $Q$  and  $f(Q)$  to  $Q$ , but  $Q$  to all policies outside this region. Any policy outside of the interval  $[Q, f(Q)]$  makes the pivot worse off. If the Senate tries to pass the median senator's ideal,  $M$ , Senators who prefer  $Q$  to  $M$  will filibuster, and the majority favoring  $M$  will not be able to end debate. Thus, the biggest policy change that the Senate can pass is  $f(Q)$ , which is the point nearest  $M$  that is filibuster-proof.

Much of the drama in the passage of the 1964 act concerned the parliamentary maneuvers to defeat the filibuster (see, e.g., Eskridge and Frickey 1988, Graham 1990, Whalen and Whalen 1985, and Rodriguez and Weingast 1995). To understand the transformation of civil rights by a conservative Supreme Court in the 1970s, consider the policy setting in Figure 7.5, where the set of policy alternatives represents the degree of

**Figure 7.5:  
Civil Rights Policy**



federal support for civil rights, J represents the ideal policy of the conservative Supreme Court majority, A represents the policy enacted by the 1964 Act, f is the ideal policy of the filibuster pivot (a conservative Republican), and M is the median senator's ideal policy. As before, f prefers all policies between A and f(A).

The critical feature of the new political environment of the 1970s is that the median in Congress was far more liberal than the median in the 1964 Congress that passed the Civil Rights Act. Eskridge argues that the more liberal Congress would have passed new civil rights legislation, moving policy to the maximum that is feasible in the Senate, that is, from A to f(A).

In this setting, the Supreme Court acted first to preserve as much of the status quo as possible. By acting first, the Supreme Court moved policy from A to f. This move precluded any further move by Congress because any policy change from f toward M would make the filibuster pivot worse off.

This model has several implications. First, it shows the power of the model in specific policy settings to give new answers to important political puzzles.<sup>28</sup> More broadly, it shows the strategic role of the courts in the United States policymaking process. Courts are not the end of the process of policymaking and implementation; they interact with Congress and the president. This forces them to be strategic; failing to do so implies less influence and hence less force of their decisions.

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<sup>28</sup> PPT scholars have used analyses of this type in many contexts. In addition to the references in the text, see Brady and Volden (1997) on the minimum wage, Ferejohn and Shipan (1989) on telecommunications policy, Riker (1986) on federal aid to education, Weingast and Moran (1983) on the FTC and Weingast (1984) on the SEC.

The political logic of PPT models implies that judicial decisions cannot solely be based on normative principles. Following normative principles alone requires that the courts ignore the political situation, implying that political officials will sometimes overturn their decisions. This political reality forces the courts to face a choice: either act strategically, and hence compromise their normative principles, or act according to principle but then have Congress overturn both the court's decision and the normative logic underlying it.

### ***7.2 The Courts and Legal Doctrine in a System of Separated Powers***

The normative and positive debates regarding the role of the courts in policy-making closely parallel each other. Both debates rely on assumptions about congressional decisions and the efficacy of congressional oversight and control over the judiciary. The overwhelming consensus on the latter issue is that, except under rare circumstances, Congress and the President are unable, in the short run, to exert much influence over the Supreme Court's choice of legal doctrine. Others, such as Murphy (1962) and Rosenberg (1991) argue that management tools such as appointment power, budgets and selection of jurisdiction, which work effectively against the bureaucracy, have only limited effect on judicial incentives.

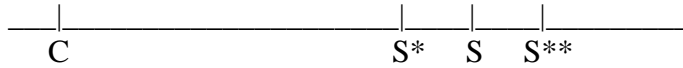
Missing from this debate is the approach implied by PPT of Law. The question pioneered by Shapiro (1964) and pursued in depth by Cohen and Spitzer (1994, 1996) is how the structure and process of the judiciary affect the Supreme Court's ability to influence legal doctrine. When will the Supreme Court have the ability to set legal doctrine and to have its doctrine implemented, and when will its influence be restrained? Under what conditions can Congress and the President affect legal doctrine through manipulating judicial structure and process?

Congress and the President have access to substantial mechanisms of control over the judiciary, which become apparent when one considers seriously the judicial system as a whole, and not just the Supreme Court in isolation. To see this, we consider our earlier discussion (McNollgast 1995) showing an indirect route of political influence: by changing the structure of the federal judiciary, Congress and the President can bring potent influence to bear on the Court.

In response to political and partisan considerations and constraints, the elected branches manipulate the size and jurisdiction of the federal judiciary, which Congress and the President have determined since 1789 in a series of Judiciary Acts. Congress and the President have expanded the federal judiciary when: (1) the branches of government are under unified control of a single party; (2) unified control arose after a period of control by the now “out” party or after a prolonged period of divided government; and (3) the Supreme Court’s policy preferences are out of alignment with the preferences of the new governing party. Under these circumstances, Congress and the President create new judicial slots to make partisan appointments to the lower bench. These appointments change the political orientation of the lower federal bench. This political change, in turn, forces the Supreme Court to adjust its doctrine in favor of elected officials.

Then following model illustrates how a change in the composition of the lower courts alters judicial doctrine, and thereby is a means by which Congress and the President can influence the Supreme Court without changing its membership. For simplicity, assume that feasible judicial decisions can be arrayed on one dimension, that the Supreme Court and every lower court each has an ideal decision, and that each court prefers decisions closer to its ideal to those further away. The Supreme Court’s doctrine

is represented as the set of decisions around the Supreme Court’s ideal policy that will not lead to a reversal. This circumstance is depicted in Figure 7.6., where C is the ideal



Position of the lower court, S is the ideal point of the Supreme Court, and  $[S^*, S^{**}]$  is the Supreme Court’s doctrine, or the interval of decisions that will not be reversed. Note that if C were inside the interval  $[S^*, S^{**}]$ , the lower court faces no dilemma: the ideal decision can not be successfully appealed. But for the preference configuration shown, the lower court must consider the likelihood of successful appeal in picking a decision.

If the Supreme Court can not review all decisions by the lower courts, decisions face some probability  $p < 1$  that they will be reviewed. For simplicity, assume that at the time of appeal the Supreme Court does not know the position of decision on the continuum – it must hear the case to figure out whether it complies. If there are N decisions by lower courts and the capacity of the Supreme Court to hear cases is K, then the probability a case will be reviewed is  $K/N$ .<sup>29</sup> In this case, if a lower court picks its own ideal point, it will have its decision reset to S with probability  $K/N$  but will obtain its most preferred outcome C with probability  $K/N$ . Or, the lower court can pick  $S^*$  and have no fear of reversal. If the lower court maximizes expected value, it will pick its ideal decision if  $V(S^*) < (K/N)V(S) + [1 - (K/N)]V(C)$ , where  $V(^*)$  is the value the lower court places on each outcome. In this setting, if the Supreme Court’s doctrine is

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<sup>29</sup> This assumption is clearly unrealistic, but it also is not necessary for the general results to follow. We use it because it vastly increases the transparency of the model.



repugnant to the lower court, it will pick C and risk reversal, whereas if the lower court does not see much of a difference in the values of C and  $S^*$ , it will comply by picking  $S^*$ .

In this setting, the Supreme Court chooses doctrine strategically as a means of influencing lower courts. The optimal strategy for the Supreme Court is to set  $S^*$  and  $S^{**}$  so as to minimize the average distance between its ideal point and the decisions of the lower courts. As the size of the interval  $[S^*, S^{**}]$  grows larger, lower courts have less to gain by picking their ideal points rather than either  $S^*$  or  $S^{**}$ , whichever is nearer to C. In the example above, as  $S^*$  approaches C,  $V(S^*)$  increases, while the value of defying the Supreme Court remains the same. Hence, the lower court is more likely to pick  $S^*$  rather than C, so that a wider set of acceptable decisions induces more compliance.

Now consider the effect if Congress and the President expand the lower courts and appoint new judges of a different ideology than Supreme Court, causing more lower court judges to be threats to defy the Supreme Court. In response to expansion of the lower courts, the Supreme Court will expand its doctrine. Since the Supreme Court cannot review all lower court decisions, it has an incentive to expand the set of acceptable decisions so that some lower courts that would otherwise defy it now choose to comply. The Supreme Court's doctrinal expansion favors the preferences of elected officials who were responsible for appointing the defiant lower court judges.

In this model, doctrine is a function of both normative principles and strategic aspects of the judicial hierarchy, namely, the need of the Supreme Court to police the lower courts. Elected officials can take advantage of the logic of that system to alter the Supreme Court's doctrine. McNollgast (1995, 2004) show that this is most likely to occur under the conditions noted above: when a new party takes united control of the

government after a period in opposition or of divided government, and when the ideology of a new government is at variance with the Supreme Court's doctrine. Historically, these situations correspond to the largest expansions of the lower courts: under Abraham Lincoln, Franklin Roosevelt, and Ronald Reagan.

### ***7.3 Interpreting Statutes in a System of Separated and Shared Powers***

The positive and normative debates on statutory interpretation also parallel each other. Again, at the heart of these debates is disagreement about the role of Congress in American democracy and about the efficacy of Congress and the Presidency as representative institutions.

On one side of the debate are the intentionalists, who argue that courts should, and in fact do, follow legislative intent in their decisions. For some scholars and jurists, intent is defined solely by the plain language of the text (Easterbrook 1984). Others argue that language is often ambiguous, especially when it comes to applying general statutory rules to the facts of a particular case, and thus jurists and bureaucrats must look beyond the text to discover its meaning (Posner 1990, Eskridge 1994).

On the other side of the debate are non-intentionalists: scholars who are not interested in the intent of the authors of a statute. These scholars believe that Congress is not representative, including scholars in Critical Legal Studies, Public Choice, and Political Science *cum* Realist schools discussed earlier, as well as those who argue, somewhat nihilistically, that collective intent is an impossible standard (see, e.g., Riker and Weingast 1988, Shepsle 1992). This work argues that courts should and/or do ignore the text of statutes and other legislative signals in favor of other commands.

The critics are correct in arguing that *only* if Congress is a representative body, and *only* if collective intent is a useful concept do courts have an obligation to follow the

sovereign commands of the legislature. That is, if Congress is corrupt, captured by interest groups, or otherwise seriously unrepresentative of all citizens, if majorities within Congress act without regard to the will of minorities, or if legislative actions are a random result from chaos and agenda manipulation so that collective intent is an impossible anthropomorphism, then jurists have no good reason not to ignore statutes.

As previous sections of this essay argue, PPT provides reason to believe that Congress *is* representative, that legislative intent *is* a meaningful concept, and, further, that legislative intent *is* discoverable (McNollgast 1992,1994, Rodriguez and Weingast 2003). We make this intentionalist argument on the basis of modern research that rejects the most extreme views about the failure of democratically elected government as a representative institution.<sup>30</sup> Congress chooses collectively between relatively clear alternatives, and thus the intent of those voting can be discerned, if viewed through the proper lens. Through deliberation, members of Congress and the President reach an agreement about the intent of legislative language, such that it is not a fool's errand to discover intent. Understanding the legislative process provides us with a set of criteria by which to judge which statements and documents are credible with respect to revealing collectively agreed upon intentions, and which are likely to be strategic or merely

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<sup>30</sup> This literature is large and rapidly expanding in recent years, and includes Fenno (1978), Brady (1988), Jacobson (1990b), Kiewiet and McCubbins (1991), Rohde (1991), Snyder (1992), Cox and McCubbins (1993), Aldrich (1995), Sinclair (1995), and Lupia and McCubbins (1998).

political grandstanding.<sup>31</sup> While this approach may not always yield unique interpretation, it yields fewer mistakes than other approaches to interpretation.

PPT of statutory interpretation begins by considering the incentives of legislatures when building a record for agencies and courts to consider when deciding the meaning of a statute (see Eskridge and Ferejohn 1992, McNollgast 1992, 1994, and Rodriguez and Weingast 2003). PPT begins with the same assumptions that are used by those who argue that the legislative process is chaotic, namely that legislators have divergent preferences and that all legislators seek to advance their own interpretation of the statute, rather than the compromise that arises from the legislative bargain. In the course of consideration of a controversial bill, through its many committee versions and through the floor amendment process, in some circumstances legislators are likely to reveal where their preferences lie in the policy space at issue in the bill. Some are ardent supporters or opponents, while others are pivotal, i.e. those with centrist positions who actually determine whether the bill passes.

The preferences of legislators are derived from those of their supporting constituents, so that it is natural that legislators will want to make statements that show constituents that they are being faithfully and energetically represented. This, ardent supporters have an incentive to make statements for the benefit of their constituents that imply a more expansive version of the statutes than was actually adopted. But ardent supporters face a conflicting incentive: supporters want the bill to pass, and so will seek to make statements that convince less ardent, pivotal legislators to vote for the bill.

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<sup>31</sup> McNollgast (1994) and Rodriguez and Weingast (2003) explore the implications and importance of credibility for statutory interpretation. Generally, see Lupia and McCubbins (1994, 1998) for more on the topic of credibility.

Likewise, opponents of the statute have an incentive to please their constituents by claiming that the proposed bill is a catastrophe, but also to convince pivotal members that the statute does not really move existing policy in hopes that others will interpret the statute as narrow and limited. As a result, the legislative history is likely to contain conflicting statements by the same legislators, depending on which incentive is motivating their behavior.

To make sense of inconsistent statements, one must take account of the context of statements in the legislative record. Statements that represent joint agreements by all supporters, such as committee reports when committees include both ardent and pivotal supporters, or statements as part of a colloquy between ardent and pivotal supporters, reflect communications of mutual agreement among the coalition that enacted the statute. By contrast, statements such as speeches outside the context of negotiating the content of the bill, such as personal memoirs or *ex post* statements to “revise and extend the record,” have no role in forging the bargain that gave rise to the statute, and so have no credibility as indicators of legislative intent. Indeed, legislators share a desire to have an opportunity to play to the home constituency by making statements that reflect the preferences of constituents. Likewise, statements by opponents, whether aimed at constituents or future interpreters, have no credibility because opponents are not part of the coalition that enacted the statute. The only credible statements by opponents are those than are made in the context of convincing pivotal members to vote against the statute.

The preceding discussion PPT offers simultaneously an explanation for why the legislative history is conflicting and yet a useful guide for determining which statements are useful indicators of the agreement among supporters of a statute. Whereas the

legislative history is rarely so complete that all ambiguities in a statute can be clearly resolved, PPT does support the value of some “canons” of statutory interpretation that have broad validity. An obvious canon is that any interpretation that is more consistent with language that was rejected anywhere in the process – committee or the floor – does not reflect legislative intent. Another obvious canon is that floor leaders of a bill, when discussing the interpretation of the statute with members who are pivotal, are the most likely source of accurate statements of intent because their statements are made in their role as a representative of the entire enacting coalition, not as an individual member.

## **8.0 PPT of Law: Concluding Observations**

One of PPT’s principal objectives is to broaden the study of law to include elections, elected officials and the bureaucracy as well as the courts in the system of making law. Congress, the president, and the bureaucracy all produce law directly, and these branches as well as citizens indirectly influence law-making by the courts because of the interactions and interdependencies among them. Put simply, studying judicial sources of law is too restrictive fully to understand law.

An essential feature of PPT of Law is the contention that that law *is* structure and process. That is, in writing and passing statutes Congress and the President decide not just the aims of a law, but also the structure and process that govern how decisions will be made to embellish and implement that law, including with some precision precisely when, how and on what grounds the courts can play a role in thus process. Thus when elected officials make policy, they also establish the institutions, procedure and rules by which that policy will be made. The creation of structure and process directs policy toward some outcomes and away from others, and these outcomes entail winners and losers. The policy itself is not law. Law is the set of instructions to agencies and courts

about what they should do and how they should do it. Policy is the anticipated consequence of the law that emerges from the strategic choices by all of the relevant actors, as mediated and channeled by structure and process.

PPT of Law is further distinguished by the fact that it assumes that the purpose of law – i.e., the purpose of a structure and process for making policy – is political. That is, law is designed to advance the political agenda of a winning political coalition. By designing the structure and process of policy-making, political actors allocate rights, determine the relative importance of different costs and benefits, and ultimately affect the level and distribution of wealth in society. The key normative assumption within this framework is that the choice of structure and process, like the choice of substantive purpose, is governed by the democratic procedures proscribed by the Constitution, to which the citizens give their consent.

How we view the democratic sources of law – those from Congress, the President, and the bureaucracy, as opposed to the courts – depends on how effective democratic institutions are at representing citizen interests. This survey reviewed the literature on each element in the chain from citizens to Congress and the President, to the bureaucracy, to the courts. Although public failures, legislative pathologies, and interest group capture are all a source of problems in democratic system, these elements are not the only factors influencing democratic law-making. PPT of law provides a coherent framework for understanding how each component of the government operates, and how each shapes the behavior of the others.

As a positive theory that focuses on how institutions affect behavior by shaping incentives, it provides understanding about the relationship between democratic governance institutions and law. Regardless of the relative weights anyone wants to

place on various normative principles, whether democratic legitimacy, economic efficiency, individual liberty or distributive justice, a necessary first step is to connect actions to outcomes. In this sense PPT is of value to all sides of ideological disputes. Beyond this, PPT offers comfort to those who believe that government actions must have democratic legitimacy to be normatively compelling. PPT focuses on the properties of democratic institutions, shows theoretically that policies are weakly responsive to citizen preferences and empirically that these theoretical predictions are supported by the data.



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