

THE LEGISLATIVE PROCESS

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Legislatures make law. Law-making involves a collective effort on the part of at least a majority of legislators. This collective effort requires the allocation of scarce resources, the most important of which is plenary time, among numerous legislators who are competing over its use. To overcome the implied problems of collective action, legislatures typically delegate the task of allocating the legislature's scarce resources to the government or to the majority party leadership. This delegation, however, creates the potential for agency losses, whereby the legislature's agents might use their power to allocate resources for their own benefits rather than for the legislature's benefit as a whole.

Legislatures each attempt to strike a balance between solving collective action problems and mitigating potential agency losses by creating institutions that govern the allocation of resources and the flow of proposed legislation through the system. The rules, procedure, and institutional design of law-making make-up the legislative process.

Three elements of procedure are common to all legislatures, and these will be my focus in what follows. First, because each legislature must allocate plenary time, a substantial fraction of each legislature's rules, procedures, and structure are devoted to defining and proscribing the means by which the legislature's agenda is controlled. Second, the rules must also proscribe what happens when no new laws are passed, i.e., how is it that the "reversionary policy" is set? Third, once plenary time is allocated and the reversionary policy is set, the legislature must have rules and procedure that dictate how a collective decision on policy change will be reached. While the just listed features

of the legislative process are ubiquitous, of course, there are many additional elements to the legislative process that vary from one legislature to the next. Many of these involve attempts to mitigate the aforementioned problem of agency loss. These too have important effects on the flow of legislation. I will discuss these elements of the legislative process in the final two sections of this essay.

1. Controlling the Agenda

Controlling the legislative agenda involves the creation and proscription of two types of powers. One type of power is the authority to get proposed policy changes onto the legislative agenda; we call this authority *positive agenda control*. The alternative type of power is the authority to keep proposed policy changes off of the legislative agenda, and thereby protect the status quo—or reversionary policy—from change; we call this authority *negative agenda control*. In what follows, I discuss each.

1.1. Positive Agenda Control

Positive agenda control is the power to propose new policies. The issues of who has it or controls access to it, and who does not, may affect the decisions that a legislature can make depending on the various policy makers' preferences. Possessing positive agenda power grants the policy maker the formal right to introduce bills, or at very least, it entails the privilege to bring up for consideration a motion or an amendment before the full legislative body.

In the United States, there are a variety of routes by which bills are considered. While the Constitution grants the President the right to submit proposals to Congress, only the House of Representatives and Senate possess the power to assure that proposals

are considered in their own chamber. Within the House, committees of 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. With the exception of some bills that are “privileged,”¹ most House scheduling is controlled by the Speaker and the Rules Committee. In the United Kingdom, by contrast, the executive dominates the agenda setting process. While members of Parliament are allowed submit bills, the Cabinet initiates most legislative proposals. Because the legislature can choose and remove the executive, these two branches are interdependent; consequently, they are less likely to be at cross-purposes. The Japanese system presents another variation on positive agenda control. The Diet, Japan’s legislature, possesses a standing committee system, and the Policy Affairs Research Council (PARC), which operates as a shadow committee system within the Liberal Democratic Party (LDP). It is the PARC system that possesses formal initiation/proposal power.

To untangle who really controls the legislative agenda, it is important to know both who can initiate proposals and who controls the consideration of proposals—and to whom those actors are accountable. The power to initiate policy and the power to schedule policy consideration may be defined by the constitution or such procedural decisions may be delegated to the legislative chamber itself to resolve. In the United States, these determinations were left entirely to the chambers themselves. Over time,

¹ For example, outlined in US House Standing Rules, five committees, such as Appropriations and Budget, have direct access to the floor on select legislation.

something of a dual system has developed, in which the legislature divides positive agenda power between individual committees and the parties. Committees act as a filter, shaping nearly all proposals in their particular policy jurisdiction, but the majority party leadership may be given the power to allocate scarce common resources, including committee assignments. Presumably, each party's committee contingent acts as a representative of the whole party. To the extent that the party exercises control over committee assignments, and to the extent that those assignments are desirable to individual members, the party's representatives should be faithful to the party's collective interests. A similar relationship holds with regard to the leadership's scheduling activities, such that the leadership will pursue the majority party's preferences to the extent that the party can discipline its agents, their leaders.

1.2. Negative Agenda Control

An alternative form of agenda control also exists, which essentially is the veto power. We call the authority to halt or to delay a bill's progress *negative* agenda control, and it can be exercised either explicitly through vetoes or implicitly through inaction. Veto power is usually held by the legislature, although when the executive possesses a decree power, for example, policy may be changed without legislative assent.

Any person or faction with the power to block, or significantly delay policy, is often referred to as a veto gate. There exists significant variance across nations in the number of veto gates that inhabit the legislative process. The United States' presidential system with its bicameral, decentralized legislature represents one end of the spectrum, and the United Kingdom occupies the other end of the spectrum with its more centralized

parliamentary form of government. In the House of Representatives alone, the substantive committees, Rules Committee, Speaker, and the Committee of the Whole each constitute veto gates through which legislation must pass, and the Senate has even more veto gates due to their liberal restrictions on debate. By contrast, in the United Kingdom, the legislative process is much more efficient, since the Cabinet and Prime Minister serve as the main veto gates through which new legislation must pass. Apart from its weak negative agenda control, the Swedish committee system resembles the system found in the US House of Representatives, but represents another important variation. In the Swedish Riksdag, members of the Cabinet or backbenchers alike may submit bills for consideration, but every proposal must go the appropriate committee for consideration. That is, there is no discretion over which committee has jurisdiction; it is pre-determined. The committees, however, cannot kill a bill by failing to act on it. As their rules specify, each committee must submit a report, whether positive or negative, on all policy proposals.

2. Reversion Control

Whenever legislatures consider passing a law, they must always consider its effects relative to what would occur if no law were passed. Indeed, in virtually every legislature the final vote taken on a proposal is that for final passage, which forces members to contrast directly the proposed change and the status quo. Reversion control is the power of setting the default policy outcome that will result if no new legislation is enacted. It is important to note that the reversionary policy is not necessarily the extant policy. For example, some laws are crafted with 'sunset provisions,' which mandate that a program be dissolved or an appropriation be terminated by some specified date.

To understand law making, it may be important to know whether the reversion policy can be manipulated, and if so, who possesses the power to do so. This requires an understanding of the relationship between the reversion policy, any new policy proposal, and the various policy makers' preferences. Reversionary policies can be defined formally by a constitution and/or statutes, or as the result of informal solutions to immediate problems. In Germany and the United States, the constitution defines the reversion for budgetary items, but the reversionary policy for entitlements, such as Social Security, are typically defined by statutes to be adjusted incrementally.

The importance of reversion control can be seen in the following example of the effect of varying the regulatory burden of proof. The US 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. In one case, then, the burden of proof is on the industry that wishes to promote its product; while in the other case the burden of proof is on the regulator that wishes to halt a product's introduction. The results of the differences in the burden of proof are stark: few new drugs are marketed in the United States relative to European democracies, while the EPA has managed to regulate none of the 50,000 chemicals in commerce under these provisions in the Toxic Substance Control Act.

In fact, the effectiveness of agenda control may itself be contingent on the reversionary outcome. Whether or not 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, or unattractiveness, of the reversionary outcome to the policy makers.

3. Procedural Control

Most legislatures possess rules that structure the handling of proposed legislation. Rules define voting procedures, the types of amendments that will be allowed, if any, how amendments will be considered, provisions for debate, the public's access, and so forth. It is possible to draw a distinction between two different forms of procedural rules: standing rules and special rules. Standing rules guide the day-to-day procedure by which the legislature conducts itself and the internal lawmaking processes. Standing rules may continue from a previous legislative session, or they may be redrafted each new legislative session.

By contrast, special rules create exceptions for consideration of a bill, which violate the standing rules. In the House of Representatives, floor debate usually takes place under a special rule restricting debate and amendments, and the Rules Committee possesses the power to write special rules. Successful consideration of most nontrivial bills typically entails giving certain members procedural privileges, whether accomplished by a special rule or by a suspension of the rules. Restrictive rules, such as limiting debate or amendments, is one way the majority party leadership to eliminate opportunities for defection by their party members.

Interestingly, although Japan has a parliamentary system, its internal legislative procedure resembles that of the United States. The Diet decentralizes its policymaking into the PARC divisions, but the majority party's leadership holds a veto over their actions

through a hierarchy of party-dominated veto gates and through its control of the legislative agenda. But, since Japan is parliamentary, the majority party leadership serves at the pleasure of the full membership, and consequently the full membership has a conditional veto over the actions of the committee system.

The procedure structuring debate, and restrictions on debate, is typically encompassed by a legislature's standing and special rules. In addition to the obvious importance of who gets to participate in the deliberative process and how extensively, control of debate may have serious policy implications. For example, in the United States, judicial interpretation of laws often refers to the congressional record to ascertain the lawmakers' intent. As a consequence of the ability to participate in debate is an opportunity to possibly have your preferences or understanding of a law incorporated in its interpretation.

In the House of Representatives, unless proposed legislation is governed by a special rule or there is a suspension of the rules,² the House's standing rules and precedents limit each member's speaking time to one hour during debate and five minutes when considering amendments. Upon recognition, a member controls her allotted time to yield or allocate as she desires, but this rule is circumscribed by the fact that the Speaker

² As mentioned above, special rules (e.g., limiting debate) are recommended by the Rules Committee and approved by simple majority in the full chamber. The Rules Committee is stacked with majority party loyalists selected by the Speaker. Suspension of the rules, however, requires a two-thirds majority and thus typically requires some bipartisan support.

of the House possesses recognition power. Hence, given their power to suspend the rules, and to write special rules, and given the Speaker's discretion to recognize members, the majority party leadership is able to structure chamber debate quite effectively.

In the Senate, however, the majority party's control over debate is a bit more tenuous. The Senate's standing rules do not limit debate, and the chamber has developed a notorious reputation for members' ability to frustrate a majority through the filibuster. Over time, the rules have been modified, to allow a three-fifths majority to invoke what is called "cloture," ending a filibuster by either limiting debate to one hour per member, establishing a maximum of thirty hours more for debate.

By comparison, parliamentary debate in the United Kingdom is fairly structured. In the House of Commons, for example, there are two main types of debate: general and adjournment. General debate is to discuss specific government policies. Adjournment debate includes matters for which the government has no explicit position, such as new or bipartisan issues. Another type is emergency debate, which acts as a safety valve for issues needing immediate attention and lacking another avenue to the floor. Regardless of the classification, the actual debate, i.e., recognition, is controlled by the majority party leadership, the Speaker.

4. Delegation and the Legislative Process

The delegation of the legislature's agenda setting authority to the government, to ministers, and to the party or committee leaders creates the potential for mischief, i.e., agency loss. 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 and use it for their own, personal gain? In general, legislatures use both checks and balances to accomplish

these tasks. They provide others with a veto over the actions of agenda setters and give these others an opportunity and incentive to act as checks. These checks and balances may be very subtle. In the US House of Representatives, for example, the front-bench and back-bench may check each other through the committee system. During the Conservative Coalition era, roughly from 1937 to 1974, the Southern Democrats, who had greater seniority and safer seats, held the control committees and especially the Rules Committee, and for decades were able to bottle up civil rights legislation from those perches of power. Meanwhile the northern Democrats held control on the substantive committees, and they used the implicit gate-keeping power that came with that control to pursue a civil rights agenda by creating logrolls that could survive the control committees and would benefit both northern and southern Democrats.

Similarly, in the UK House of Commons, the Prime Minister and Cabinet may control much of the flow of legislation, but they are personally accountable to the back-bench to facilitate the development of a party brand-name, and can be removed for failure to take the back-bench's preferences into account. Many legislatures have similar mechanisms for checking the independence of a speaker or coalition leader through either a formal vote of no confidence, or with a less formal recall provision.

5. The Legislative Process

By way of summary, the following figure demonstrates many of the preceding points regarding control of the agenda, reversionary policy, procedure, and checks on delegated authority. Figure 1 is a graphic representation of the legislative process in the US House of Representatives, demonstrating the path which any piece of legislation must travel in order to become law. It is important to note the numerous places where a

proposal may be revised or amended, or halted altogether—negative agenda control. By unraveling who influences the decision at each of these points (control of agenda and procedure)—whether an individual, a faction, or a party—it is possible to assess the degree to which interests are balanced in a nation's legislative process.

//Figure 1 about here.//

In the initial stages of the US policymaking process, the substantive committees in each chamber possess significant agenda control within their jurisdiction. Given members' attraction to committees that are substantively salient to their constituents, legislators who are most concerned with the policy at hand have asymmetric influence at this early stage. As a proposal approaches the floor, however, the party's influence may be felt more and more. The majority party's members delegate to their leadership to represent their interests on a broad variety of matters. The Rules Committee and the Speaker—as well as the Appropriations Committee, if any funding is required to implement the proposal—check committee members' ability to exploit their agenda control, for these two central coordinating bodies control access to plenary time. If a substantive committee's proposal is unrepresentative of the party's collective interests, and it is an issue of importance to the party, then either the Speaker or the Rules Committee are likely to kill the proposal. The shortage of plenary time itself creates incentives for the 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. Before the proposal leaves the chamber is the floor amendments and votes themselves, which provide ordinary members with the opportunity to form coalitions in order to influence and potentially kill a bill. At all of these stages is the importance of

procedure and who controls it. Lastly, while not explicitly captured by this figure is the matter of reversionary policy. All policy is made, unmade, amended, and/or disregarded with the reversionary policy. Certain policies, which happen to command majority support, may be difficult to take up if the reversionary policy is preferred by members who occupy veto gates—negative agenda control. In sum, the three elements discussed—agenda, reversion, and procedural control—repeatedly overlap one another throughout the policymaking process to structure the policymaking, provide checks and balances between the various interests, and define the boundaries of which interests will be represented.

Figure 1: How a Proposal Becomes a Policy in the US House of Representatives, Highlighting Aspects of Party Control

