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| 3 | THE POLITICAL ECONOMY OF LAW | | 3 |
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| 29 | Abstract | | 29 |
| 30 | | | 30 |

31 In the 1980s scholars began applying Positive Political Theory (PPT) to study public 31
32 law. This chapter summarizes that body of research and its relationship to other schools 32
33 of legal thought. Like Law and Economics, PPT of Law uses sequential game theory to 33
34 examine how rules and procedures shape policy and evaluates these outcomes from the 34
35 perspective of economic efficiency. Like the Legal Process School in traditional legal 35
36 scholarship, PPT of Law focuses on how the structure and process of legislative, bureau- 36
37 cratic and judicial decision-making influences the law and evaluates these procedures 37
38 using the principle of democratic legitimacy; however, rather than using procedural 38
39 norms derived from moral and political philosophy to evaluate procedures, PPT of Law 39
40 conceptualizes the decision-making procedures of government as rationally designed 40
41 by elected officials to shape the policies arising from decisions by executive agencies, 41
42 the courts, and future elected officials. After summarizing this theory, the essay turns to 42
43 applications of this approach in administrative law and statutory interpretation. 43

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1. 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 \(2005, p. 2\)](#) 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

1 these sources of law depends on the extent to which they are responsive to citizens, as 1
 2 opposed to interest groups or the personal ideology of decision makers. 2

3 After reviewing the executive and legislative branches, we turn to the courts. PPT of 3
 4 Law provides insights about how judges make decisions and create judicial doctrine, 4
 5 and hence about the content of law. Of particular interest is how the other branches 5
 6 influence judicial law-making by forcing the courts to act strategically in developing 6
 7 doctrine and deciding cases. 7

8 Before discussing each major institution that makes law, we first review the main 8
 9 schools of legal thought, explaining the differences in the structure of their arguments. 9
 10 The positive and normative approaches of PPT are best understood when placed within 10
 11 the broader context of other important approaches to the study of law and policy. 11
 12
 13
 14

14 2. Schools of legal thought 14

15
 16 Since the earliest days of English legal scholarship (Coke, 1608 and Hobbes 1651, 1971) 16
 17 legal scholars have debated the question: “What is and/or ought to be the law?” During 17
 18 the last century, this debate was expanded to address the more vexing question: “Who 18
 19 has and/or should have the authority to make, interpret, and apply the law?” The schools 19
 20 of legal thought that contend to understand law and to shape its creation and use can be 20
 21 distinguished by how they answer these questions. 21

22 At any point in time, a society inherits a mutual understanding of what law is, say 22
 23 L_0 . This understanding may be subject to uncertainty, so that each member of society, i , 23
 24 believes that the state of law is really $L_0 + u_i$, where u_i is a random variable. The insti- 24
 25 tutions of society then determine who participates in interpreting (reducing the variance 25
 26 of u_i) and changing (altering the value of L_0) the law. The “what is” question addresses 26
 27 reducing u_i to explicate L_0 more clearly, while the “what ought” question identifies the 27
 28 optimal law, L^* . The “who has authority” question seeks a cause-effect explanation for 28
 29 why the law is L_0 , and the “who should have authority” question identifies those who 29
 30 ought to make the law, presumably because they are most likely to move the law from 30
 31 L_0 towards L^* . 31

32 Until the last third of the 20th Century, scholars made few attempts to ground the 32
 33 answers to these questions in coherent theories of the behavior of participants in the 33
 34 process of governance, whether voters, elected officials, civil servants or judges. For the 34
 35 most part, answers to these questions were based on either philosophical or religious 35
 36 arguments, or simple observation of who appeared to have the power to make law that 36
 37 had to be obeyed. 37

38 The “what is and/or ought to be the law” questions have three contending answers: 38
 39 law as nature, law as process, and law as policy. *Traditionalist* legal thought does not 39
 40 separate “is” from “ought.” Traditionalists regard law as exogenous to politics, society 40
 41 and individual mortals. To traditionalists, law emerges from a source outside of human 41
 42 manipulation, such as God’s will, nature or an abstract system of moral philosophy. 42
 43 Law is “good” if it is consistent with these external standards, regardless of its policy 43

1 implications. Law that is not “good” is not really law in that it need not be obeyed, and 1
2 in some cases ought to be disobeyed out of duty to “good law.” 2

3 By contrast, *Realists* see law as constructed and manipulated by humans to serve 3
4 earthly purposes. Most modern Realists are consequentialists in that they regard law as 4
5 policy—a statement of the purposes and obligations of government to be evaluated on 5
6 the basis of its effects. To these Realists, “good law” is law that produces normatively 6
7 compelling policy outcomes. Economists will recognize Law and Economics as a form 7
8 of Realism, wherein the normative objective is economic efficiency. 8

9 Another branch of Realism, the *Legal Process School*, is Kantian in that it focuses 9
10 on law as a means to obtain social purposes, without specifying the social goal. The 10
11 Legal Process School focuses on the procedural architecture that defines the policy- 11
12 making process. “Good law” is law that satisfies principles of good decision-making 12
13 processes that are derived from normative democratic theory, such as assuring rights of 13
14 participation and according respect to all individuals. 14

15 “Who makes the law” is a practical question about the distribution of authority in 15
16 society. To Traditionalists, law is created outside the context of human institutions and 16
17 decisions, perhaps by a divinity or simply inherited as part of the natural order, like the 17
18 physical laws of nature. To Realists, people who have political power create the law. 18
19 Political power is institutionalized by law that sets forth the rules and procedures of the 19
20 political and legal system. This component of law also is created by those with power, 20
21 usually to solidify their authority. 21

22 In democratic societies, many players have a role in making law as Realists define it. 22
23 Voters elect legislators, and sometimes executive officials and judges, and in so doing 23
24 influence the development of law through their choices among candidates for office. 24
25 Sometimes voters even pass laws themselves (e.g. through initiatives or referenda). 25
26 Legislators enact statutes. Where one is present, an independent chief executive vetoes 26
27 legislation and issues decrees or executive orders. Elected legislatures and chief execu- 27
28 tives delegate law-making authority to bureaucrats, who then issue rules and regulations, 28
29 decide how to enforce the law, make expenditure decisions, and produce public goods. 29
30 Finally, the courts interpret law, resolve conflicts within the law, and make new law, 30
31 typically when established law is vague, incomplete or contradictory. In some societies, 31
32 the power given to all of these players depends on a form of higher law, or Constitution, 32
33 that establishes rules and allocates authority for making law, including amending the 33
34 Constitution. 34

35 “Who should make law?” is fundamentally a question about the legitimacy of the law, 35
36 and therefore the circumstances under which law should be obeyed. This question also 36
37 has three contending answers: popular sovereignty (supremacy in creating law should 37
38 be given to citizens or their elected representatives), judicial sovereignty (supremacy in 38
39 creating law should be given to the judiciary), and expert sovereignty (supremacy in 39
40 creating law should reside in the hands of technically trained bureaucrats). The first answer 40
41 views legitimacy as arising from popular consent, and so is related to the liberal theory 41
42 of justice and normative democratic theory. In essence, popular sovereignty theories 42
43 evaluate law on the basis of the extent to which it arises from the consent of the gov- 43

1 earned. The other two answers view legitimacy as arising from authorities who possess 1
 2 appropriate skills and/or values, such as religious leaders, judges, technicians or roy- 2
 3 alty, regardless of the popularity of their decisions among citizens. From combinations 3
 4 of these answers emerge eight major schools of legal thought.¹ 4

5 2.1. Traditionalists 5

6
 7 The oldest school of legal thought is the *Traditionalist* (or *Classical*) *School*, and finds 7
 8 its most complete expression in Anglo-American law in Langdell (1871, 1880). Tradi- 8
 9 tionalism is the pinnacle of formalism, focusing exclusively on the internal structure of 9
 10 law regardless of its consequences. This focus on internal structure implicitly assumes 10
 11 that law is separate from politics and other worldly pursuits. 11

12 Following Coke (1608) and Blackstone (1765–1769), Traditionalists argue that law 12
 13 emerges from inherited cultural norms, such as Saxon traditions, God’s command, or 13
 14 nature. According to Traditionalists, humans do not make law; however, some humans 14
 15 must interpret the inherited law and decide how it applies to daily life. In this sense, 15
 16 humans make law, and, according to Traditionalists, those who make law should be 16
 17 “oracles” who are trained in appropriate traditions and are independent of outside in- 17
 18 fluences, including those arising from the political process. In some societies law is 18
 19 thought to emanate from deities, and legislators and judges must be selected from or 19
 20 approved by the clergy, as is the case in Islamic Law states such as Iran. 20

21 2.2. Realism 21

22
 23 Legal Realism is a broad category of schools of legal thought. All positive Realist leg- 23
 24 al theories regard law as made by humans to serve the objectives of those who make 24
 25 law, and all normative Realist theories evaluate law according to the extent to which 25
 26 it conforms to some version of a liberal theory of justice. But Realist schools differ in 26
 27 their assumptions, logic and conclusions in addressing the core positive and normative 27
 28 questions about the development of the law. 28

29 The first Realists, though not known by that name, were from the *Sociological Ju-* 29
 30 *risprudential School* (SJS), represented most clearly by Holmes (1881, 1897), Cardozo 30
 31 (1922), Pound (1931) and H.L.A. Hart (1961). SJS replaced Traditionalists in Anglo- 31
 32 American law. SJS argues that because law has social consequences, it ought to be 32
 33 regarded as an element of, or input to, policy. In this view, law should be evaluated on 33
 34 the basis of whether it improves society according to democratic principles, implying 34
 35 that law should serve the interests of most citizens while respecting individual rights. 35
 36 Although acknowledging the connection of law to the welfare of citizens, SJS, like 36
 37 Traditionalism, relies on philosophical reasoning or observations of cultural norms, not 37
 38 theory or facts about how citizens behave or perceive their interests, to evaluate policies. 38

39 Modern heirs of Holmes and Pound go one step farther, treating law as policy it- 39
 40 self, i.e., an allocation of resources or a division of winners and losers by use of force 40
 41

42
 43 ¹ For surveys see Horwitz (1992); Posner (1990); Eskridge and Frickey (1994). 43

(Llewellyn, 1930, 1931, 1960; see also Landis and Posner, 1975 and Posner, 1990).² 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 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, the 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.³ 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; Kobyłka, 1991; Epstein and Kobyłka, 1992).

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

³ 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), Kobyłka (1995) and Songer and Lindquist (1996).

1 The MPS work that is closest to PPT is the self-designated “Neo-Institutionalist” 1
 2 School (see Epstein, Walker, and Dixon, 1989). Following Peltason (1955) and Dahl 2
 3 (1957), these scholars regard court decisions as derived from the individual policy pref- 3
 4 erences of judges, but these preferences are constrained and directed by the institutional 4
 5 structure of the judiciary and its relation to the rest of the political process.⁴ These schol- 5
 6 ars regard Supreme Court justices as mediating their own policy preferences according 6
 7 to the norms of jurisprudence and democratic legitimacy. They also regard justices as 7
 8 behaving strategically through their interactions with each other and with lower courts. 8
 9 While each judge seeks to achieve the best feasible outcome, the institutions of the 9
 10 court, such as procedures for assigning the task of writing opinions and the shared norm 10
 11 of precedent, affect both their goals and their strategies (Epstein and Knight, 1998). 11

12 2.2.2. Public Choice 12

13 13
 14 Public Choice is a modern branch of Realism because it also assumes that law is policy 14
 15 that serves the interests of those in power (see Farber and Frickey, 1991; “Symposium 15
 16 on Public Choice and Law,” 1988).⁵ Public Choice also is another close relation to PPT 16
 17 because of its use of economic analysis to study politics; however, it has some unique 17
 18 elements that causes scholars in both camps to regard themselves as not part of the 18
 19 other. The distinctive features of the Public Choice School are a strong form of the 19
 20 liberal theory of justice that comes very close to Libertarianism (in fact, some leaders of 20
 21 the Public Choice School are Libertarians), an equally strong suspicion of democratic 21
 22 processes for producing policies that respect this theory, and an absence of concern for 22
 23 distributive justice. 23

24 Public Choice scholars regard the normative purpose of government as maximizing a 24
 25 combination of freedom and wealth, implying that the role of government is to ensure 25
 26 individual liberty, to protect private property, and to promote economic efficiency. The 26
 27 goal of economic efficiency is defined by the strong Pareto Principle: a hypothetical 27
 28 social state is superior to the status quo and ought to be adopted if its makes some better 28
 29 off while harming no one. Public Choice rejects the weak Pareto Principle, i.e. that a 29
 30 policy is preferred if the winners could compensate the losers and still experience a 30
 31 net gain from the change, on the grounds that it does not respect liberty or property. In 31
 32 Public Choice liberty and property rights always trump distributive justice. 32

33 Public Choice theory is highly skeptical about the efficacy of democracy for achiev- 33
 34 ing economic efficiency, enhancing personal liberty and protecting private property. 34

35 35
 36 ⁴ Examples of New Institutional scholarship are Adamany (1973, 1980), Funston (1975), O’Brien (1986), 36
 37 Gates (1987, 1992), Marks (1988), Epstein, Walker, and Dixon (1989), Gely and Spiller (1990, 1992), 37
 38 Rosenberg (1991), Eskridge and Ferejohn (1992a, 1992b), George and Epstein (1992), Schwartz (1992), 38
 39 Spiller (1992), Spiller and Spitzer (1992), Zuk, Gryski, and Barrow (1993), Cameron (1994), Schwartz, 39
 40 Spiller, and Urbiztondo (1994), Epstein and Walker (1995), Epstein and Knight (1996), and Knight and Ep- 40
 41 stein (1996). 41

42 ⁵ We define the Public Choice School narrowly, as the term is used in economics, rather than broadly, as 42
 43 in much legal scholarship (e.g., Farber and Frickey, 1991) that regards all work applying microeconomic 43
 reasoning to study law and politics as Public Choice.

1 One Public Choice critique of democracy is that decisions are driven by rent-seeking 1
2 elected officials and by special interest groups who essentially buy policy from politi- 2
3 cians (Buchanan, 1968; Buchanan, Tollison, and Tullock, 1980). Public Choice theory 3
4 regards policy as purchased by the highest bidder, usually by sacrificing efficiency, lib- 4
5 erty and property rights, and therefore as lacking a compelling normative defense. 5

6 Another Public Choice critique of democracy is that collective choice is a meaning- 6
7 less concept from both a positive and normative perspective. The basis for this critique is 7
8 one of the cornerstones of PPT, the Condorcet paradox and the Arrow Impossibility The- 8
9 orem (Arrow, 1951). Condorcet (1785, 1989) was the first to observe that majority-rule 9
10 voting can lead to intransitive and unstable social decisions, even though each person 10
11 votes non-strategically according to a stable, transitive preference ordering. Arrow's Im- 11
12 possibility Theorem, which we discuss more fully in the section on elections, states that 12
13 if rational individuals have different values and objectives, all social decision process 13
14 are normatively ambiguous (see also Chipman and Moore, 1976) and, without arbitrary 14
15 rules that restrict the decision-making process, unstable (McKelvey, 1976, 1979; Cohen 15
16 and Matthews, 1980). Public Choice scholars infer from these theoretical results that all 16
17 collective decisions reflect either the imposition of agenda control by someone in power 17
18 or the random result of an inherently chaotic process (Riker, 1982). 18

19 Public Choice challenges the normative legitimacy of all forms of law, whether leg- 19
20 islative, judicial or administrative (see Farber and Frickey, 1991 and Eskridge, 1994 for 20
21 reviews). Some Public Choice scholars conclude that the only solution to these prob- 21
22 lems is to shrink the scope and power of government and to require unanimous consent 22
23 to adopt coercive law. 23

24 25 2.2.3. *The Legal Process School and its cousins* 25 26

27 Another branch of modern Realism is the Legal Process School. The origins of this 27
28 school lie in a dissatisfaction with the form of Realism that was dominant in the 1950s 28
29 and 1960s. This version of Realism thought of law solely as the expression of power, and 29
30 had largely abandoned the normative component that was prevalent among Traditional- 30
31 ists and early Realists. To bring a normative grounding back to the law, the founders of 31
32 the Legal Process School, while agreeing that law is policy, proposed that law acquires 32
33 legitimacy from the process by which it is made (Bickel, 1962; Fuller, 1964; Hart and 33
34 Sacks 1958, 1994; and Wechsler, 1959). "Neutral principles" inform the construction of 34
35 the legal process to ensure that law-making, whether legislative, administrative or judi- 35
36 cial, is reasonable and serves the common good. In *The Legal Process*, Hart and Sacks 36
37 (1994) did not adopt either popular or judicial sovereignty, but rather see law as a holi- 37
38 stic institutional system in which courts, legislatures, and administrative agencies interact 38
39 to make policy. Indeed, the subtitle of Hart and Sacks' famous 1958 manuscript is *An* 39
40 *Introduction to Decision-Making by Judicial, Legislative, Executive and Administrative* 40
41 *Agencies*. Hart and Sachs argued that if the design of this system follows principles of 41
42 representativeness and fairness, the process is legitimate and the policies it produces are 42
43 in the interest of society. 43

1 The Legal Process School is closely related to two other schools within Realism: 1
 2 Law and Economics and PPT of Law. Law and Economics does not have an articulated 2
 3 theory of political legitimacy, and so does not take a position on the issue of popular 3
 4 versus judicial sovereignty (see Posner, 1986; Cooter and Ulen, 1988; Polinsky, 1989; 4
 5 Romano, 1993, 1994; Craswell and Schwartz, 1994; Schuck, 1994; and Shavell, 1987). 5
 6 Nevertheless, Law and Economics research, following other Realists, typically assumes 6
 7 that the purpose of law is to promote collective welfare. In Law and Economics, the 7
 8 normative goal is to increase economic efficiency. But unlike Public Choice, Law and 8
 9 Economics generally uses the weak form of the Pareto Principle: policy change is de- 9
 10 sirable if the winners could fully compensate the losers and still be better off, regardless 10
 11 of whether compensation actually is paid. Thus, Law and Economics scholars are com- 11
 12 fortable with policies that improve overall welfare by reducing transactions costs, the 12
 13 dead-weight loss of monopoly, or the incentive to engage in socially undesirable behav- 13
 14 ior, even if the losers (e.g., a monopoly that is divested or regulated, or a firm that is 14
 15 barred from producing an unsafe or polluting product) are not compensated. 15

16 Law and Economics employs positive microeconomic theory, which assumes rational, 16
 17 self-interested behavior, to predict the policy outcomes that will arise from a set 17
 18 of legal rules, and welfare economics to evaluate alternative approaches to the law for 18
 19 solving the same problem. The essential feature of work in Law and Economics, and 19
 20 arguably its most important contribution to legal scholarship, is the application of se- 20
 21quential game theory to explore the consequences of law, using a two-step analysis: 21
 22

23 Stage I: society adopts law to constrain and to direct rational, self-interested be- 23
 24havior. 24

25 Stage II: members of society maximize their selfish interests, given the law that 25
 26 shapes their incentives. 26

27
 28 Socially desirable rules parallel the accomplishment of perfectly competitive markets 28
 29 as perceived initially by Adam Smith (1776): channel individual greed so that it leads 29
 30 to maximum social welfare. This dictum is almost identical to Madison's argument 30
 31 in Federalist 10 that in designing government institutions ambition must be made to 31
 32 counteract ambition. Hence, Law and Economics typically analyzes a legal rule (e.g., 32
 33 cost-plus regulation, formulas for compensating breach of contract, tort liability stan- 33
 34 dards) to identify its incentives, to characterize the efficiency of the behavior arising 34
 35 from these incentives, and to propose an alternative that, if not perfectly efficient, at 35
 36 least is better. 36

37 PPT of Law is a close relative to Law and Economics. In fact, PPT of Law can be 37
 38 conceptualized as attacking a loose end in Law and Economics: why rational actors who 38
 39 greedily maximize their personal welfare in the second stage of the game altruistically 39
 40 adopt legal rules in the first period that constrain their subsequent behavior in order 40
 41 to maximize social welfare. PPT of Law also extends Law and Economics into new 41
 42 areas by using its method to study a broader array of legal issues, such as administrative 42
 43 procedures, statutory interpretation and judicial doctrine. 43

1 Like Law and Economics, PPT of Law employs microeconomic theory to study the 1
2 development of legal rules and institutions. The underlying assumptions are that political 2
3 actors, like participants in private markets, are rational and goal-directed, and that 3
4 government institutions, including the electoral process, shape their incentives. 4

5 As with Law and Economics, PPT of Law uses sequential game theory as its core 5
6 analogy, but in PPT the process has four stages, not two.⁶ In the first stage, citizens vote 6
7 for candidates. In the second stage, elected officials (legislators and, where relevant, 7
8 independent executives) produce law that empowers bureaucrats. In the third stage, a 8
9 bureaucratic official makes decisions to elaborate and to enforce the law as authorized 9
10 by statutes or decrees (e.g., Executive Orders). In the fourth stage judges make decisions 10
11 on the basis of their own preferences, subject to the constraints and incentives that are 11
12 established by pre-existing law (judicial precedent, statutes, the Constitution).⁷ In each 12
13 stage, decisions reflect “rational expectations” in that choices are based on expectations 13
14 of the future behavior of decision-makers in subsequent stages. Because the four-stage 14
15 game is repeated, in the fourth stage courts make decisions in expectation that all other 15
16 actors will have a chance to respond to them. 16

17 The study of regulation has played a central role in the development of both Law 17
18 and Economics and PPT, and both schools cite the early works on the economic theory 18
19 of regulation as part of their canon (e.g., Stigler, 1971; Posner, 1974; for a survey of 19
20 this work, see Noll, 1989). The economic theory of regulation grew out of a desire to 20
21 explain a key finding of early Law and Economics research, which is the divergence be- 21
22 tween normative Law and Economics (welfare maximization in the presence of market 22
23 failures) and the actual effect of some regulation (cartelization and cross-subsidization). 23
24 This research first focused on rules issued by the agency, then on legislation and over- 24
25 sight by the agency’s principals, the legislators, and, finally, the decisions by the legis- 25
26 lature to create the administrative procedures of agencies and the jurisdiction, powers 26
27 and procedures of the courts as a means of influencing the actual policies that emerge 27
28 from agencies and courts. 28

29 PPT of Law differs from the Legal Process School in two important ways. First, PPT, 29
30 along with Law and Economics, argues that legal processes are designed to achieve 30
31 policy objectives, and not as ends in themselves to satisfy neutral principles. PPT and 31
32 Law and Economics are consequentialist in that they evaluate processes on the basis of 32
33 their outcomes. Second, PPT extends Law and Economics by providing an alternative 33
34 answer to the question “Who makes law?” In particular, PPT accords more weight to 34
35 the role of citizens and elected officials, in other words the processes of democratic 35
36 policy making, and less weight to the role of bureaucrats and judges, in other words the 36
37 processes of policy implementation, than does the Legal Process School. 37
38 38
39 39

40 ⁶ Of course, in some cases, a stage may be missed, such as when a Constitutional challenge is raised against 40
41 a statute, or when voters create a statute through the initiative. 41

42 ⁷ Each of the four stages is further divisible into a sequence of substages. For example, in a hierarchical 42
43 judiciary, decisions are made sequentially by courts at each level. This elaboration of PPT of Law is examined 43
in subsequent sections. 43

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, 1983; 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, 1977b, 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, 1992a, 1992b; Ferejohn and Weingast, 1992a, 1992b; 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, 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).

1 2. **Strategic behavior**—PPT assumes that individuals recognize that the conse- 1
 2 quences of their actions can depend on and affect the actions of others, and take 2
 3 this dependence into account when making decisions. PPT uses games as an anal- 3
 4 ogy to specify how choices and consequences are jointly determined by multiple 4
 5 actors, and characterizes people’s choices as strategies within a game. 5
 6 **Component analysis**—while an individual simultaneously engages in many dif- 6
 7 ferent interactions with many different people (i.e., people play many games at 7
 8 once), PPT assumes that studying the actions of individuals one interaction at a 8
 9 time produces useful insights. This assumption parallels analysis in Law and Eco- 9
 10 nomics, and economics generally. Moreover, it closely corresponds to the concept 10
 11 of “factoring” in cognitive psychology, which refers to the observation that hu- 11
 12 mans tackle complex problems by segmenting them into a sequence of simpler 12
 13 problems. PPT assumes that real social behavior can be explained and predicted on 13
 14 the basis of studying more simple interactions of individuals in a specific decision- 14
 15 making setting. 15
 16 Each of these assumptions foments debate, particularly the rationality assumption. 16
 17 Assessing this debate is beyond the scope of this essay (c.f. Green and Shapiro, 1994; 17
 18 *Critical Review*, 1995; Cox, 1999; Lupia, McCubbins, and Popkin, 2000). 18
 19
 20

21 3. Elections, representation and democratic legitimacy 21

22
 23 The responsiveness of elected officials to the values and preferences of citizens is central 23
 24 to both democratic theory and the theory of law. The question of what sort of democracy 24
 25 we *should* have is informed by positive, analytical answers to the questions about what 25
 26 sort of democracy we *can* and *do* have, and how changes in the details of democratic 26
 27 institutions would influence the law that emanates from it. PPT of Law is about making 27
 28 policy in a democracy, and it inevitably must address whether the policies that emanate 28
 29 from democratic processes are normatively attractive. PPT provides two answers to 29
 30 those who challenge the normative significance of its results, given that individual goals 30
 31 may not deserve respect. 31

32 First, if institutions are evaluated on the basis of their policy outcomes, and if people 32
 33 usually do behave rationally as defined here, then PPT is normatively important because 33
 34 it links institutions to consequences, regardless of whether the goals of rational actors 34
 35 are normatively attractive. A necessary preamble to “what ought to be” in institutional 35
 36 design is “what are the consequences” of specific forms of institutions. One need not 36
 37 believe that individual choice is normatively interesting to find useful a good positive 37
 38 theory of how individual behavior is shaped by institutions. 38

39 Second, normative democratic theory argues that the best method of governance bases 39
 40 policy decisions on individual expressions of political preferences through voting. The 40
 41 relevance of PPT to normative democratic theory is that it examines the extent to which 41
 42 a specific set of political institutions truly are democratic, i.e. that voting actually affects 42
 43 the content of the law so that one can say that policy has the consent of the governed. 43

1 PPT of Law asks whether the policy emanating from the four-stage game has democratic 1
2 legitimacy, which means that law can be said to reflect the preferences of citizens or, if 2
3 not, whether it fails to do so only because of other conflicting values, such as protection 3
4 of liberty and property. PPT provides an understanding of the extent to which the values 4
5 and preferences of citizen/voters are transmitted to their elected representatives, and 5
6 whether these preferences are then embodied in the law. 6

7 8 *3.1. Elections and democratic legitimacy* 8 9

10 PPT of law begins with elections for two reasons. First, PPT of Law addresses the 10
11 normative issue of democratic legitimacy by examining whether, as a matter of positive 11
12 theory, electoral institutions enable citizens to influence policy. Second, PPT of Law 12
13 must encompass elections to the extent that elections shape the preferences and behavior 13
14 of elected officials, bureaucrats and judges. The development of normative and positive 14
15 theories of the linkages between elections and law are not the only reasons to study 15
16 voting behavior, so our review of this research is selective and incomplete. 16

17 If the preferences of all citizens influence policy, they do so through elections. Three 17
18 necessary conditions for elections to influence policy are as follows. First, the electoral 18
19 process must produce elected officials who broadly represent or respond to the prefer- 19
20 ences of citizens. Second, the legislative process must yield statutory law that broadly 20
21 reflects the preferences of legislators that are, in turn, derived from or represent the 21
22 preferences of voters. Third, the law-making actions of elected officials must be car- 22
23 ried out by the players in subsequent stages of the game, bureaucrats and judges. This 23
24 section addresses the first condition. Sections on the legislature, the chief executive, the 24
25 bureaucracy and the courts discuss the second and third conditions. 25

26 Whether the first necessary condition is satisfied depends on the nature of elections. 26
27 To ensure that elected officials are responsive to the preferences of all citizens, the 27
28 power to influence elections and hence candidates must be distributed universally and 28
29 equally. In addition, elections must be competitive in that entry to run for office must be 29
30 sufficiently easy that incumbents who pursue unpopular policies will attract opposition 30
31 candidates who will advocate and implement more popular policies. 31

32 PPT of democratic elections argues that the presence of political competition leads 32
33 to the election of candidates who are broadly responsive to citizen preferences. The 33
34 simplest and most commonly used positive theory of elections is the one-dimensional 34
35 spatial model of majority-rule decision-making, sometimes called the Black-Downs 35
36 model after the pioneering work of Downs (1957) and Black (1958). This theory as- 36
37 sumes that candidates and voters are arranged spatially on a one-dimensional continuum 37
38 and that each voter has “single-peaked” preferences. A single-peaked preference refers 38
39 to a preference ordering in which each voter has a “most preferred” point on the policy 39
40 continuum and the desirability of other policies to a voter is inversely proportional to 40
41 their distances from the voter’s most desired policy. 41

42 If elections are limited to a single candidate and citizens must either vote for that 42
43 candidate or not vote at all, elections have no effect on policy because the sole candidate 43

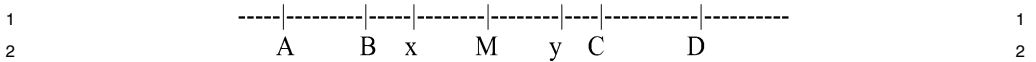


Figure 3.1. Majority-rule equilibrium in one dimensional policy space.

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 unformed 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.

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 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 3.1, 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

1 voter would not change but x would be the new equilibrium. But if the position of the 1
 2 person who formerly most preferred C switched only to proposal y , the majority-rule 2
 3 equilibrium still would be M . 3

4 These two theorems provide a positive theoretical basis for democratic legitimacy. 4
 5 Together they imply that the preferences of citizens affect the policy preferences of 5
 6 elected officials if all citizens have equal opportunity to vote, if voters are informed, 6
 7 and if candidates adopt the policies that they espouse in a campaign. The theoretical 7
 8 basis for believing that candidates will do more or less what they say they will is that 8
 9 elections are repeated, so that if voters believe that candidates have not lived up to their 9
 10 promises, they will vote against incumbents who seek re-election. Thus, the key issues 10
 11 in whether the outcome of democratic elections confers legitimacy on the policies that 11
 12 are adopted by elected officials is whether all citizens have equal access to the polls 12
 13 and all voters are sufficiently informed to evaluate candidates reasonably accurately. If 13
 14 voter participation is biased—say, if citizens whose most preferred policies are A and B 14
 15 above are unable to vote—then the median voter will not represent the median of citizen 15
 16 preferences. If voter evaluation errors are small, policy outcomes will be responsive to 16
 17 voter preferences, but if these errors are large, policy outcomes will have no coherent 17
 18 relationship to the underlying preferences (utility) of citizens. 18

19 A more complex spatial theory, beginning with [Davis, Hinich, and Ordeshook \(1970\)](#), 19
 20 relaxes the assumption that policy is a choice in a single dimension. This theory begins 20
 21 with two facts: governments adopt many policies (the textbook example is the choice 21
 22 between guns and butter), and citizens differ in their policy preferences, including the 22
 23 importance they assign to more policy output compared to more private consumption. 23
 24 To capture these facts in a model, the theory represents elections as a choice in a multi- 24
 25 dimensional policy space, which presents the danger of instability and unpredictability 25
 26 due to the Condorcet paradox (majority-rule cycles).⁸ 26

27 Although the multidimensional spatial model generally lacks an equilibrium outcome 27
 28 that corresponds to the median voter theorem, it does predict a centralizing tendency of 28
 29 winning policy positions. In the standard multidimensional model, the preferences of 29
 30 each citizen are characterized by an ideal point and a utility function in which utility is 30
 31 inversely proportional to distance from the ideal point. In this model, the Pareto Set is 31
 32 the smallest compact subset of points that contains the most-preferred outcome, or ideal 32
 33 point, of every citizen. The Pareto Set has the property that in an election involving a 33
 34 candidate who takes a position outside the Pareto Set, at least one position in the Pareto 34
 35 Set is unanimously preferred to that position. Majority-rule instability arises because 35
 36 each alternative in the Pareto Set can be defeated by some other alternative, although 36
 37 never unanimously. Thus, in competitive majority-rule elections in which candidates are 37
 38 motivated to win, the winning platform will be in the Pareto Set, but will not be stable 38
 39 over a sequence of elections.⁹ 39

40 ⁸ In the one-dimensional spatial model transitive individual preferences lead to transitive social preferences 40
 41 under majority rule if individual preferences are single-peaked. 41

42 ⁹ PPT has sought largely unsuccessfully to identify a smaller set that contains all feasible majority-rule 42
 43 outcomes. See [Banks, 1991](#); [Epstein, 1998](#) and [Penn 2006](#). 43

1 Elections in a multidimensional space also obey positive responsiveness, albeit in a
2 weaker form than in the one-dimensional model. Because the composition of the Pareto
3 Set is determined by the collection of the ideal points of citizens, the set of potentially
4 winning platforms changes if citizen preferences change. If a change in preferences
5 causes the Pareto Set to shift so that it no longer contains the status quo, then policy will
6 move into the Pareto Set, thereby tracking the general shift in preferences.

7 The significance of voting theory is that it establishes a weak form of democratic leg-
8 itimacy. Elections do respond to shifts in preferences, and the power of citizens whose
9 preferences are most completely satisfied arise not from their identity or position, but
10 from the fact that their preferences are in the middle of the distribution. Nevertheless,
11 the choices arising from majority rule clearly can not lay claim to social optimality, as
12 many critics of democracy have shown. The next section addresses these critiques and
13 assesses the extent to which they undermine the democratic legitimacy of elections.

14 3.2. *Critiques of democratic elections*

15
16
17 Realists in economics, law and political science have developed a long litany of criti-
18 cisms of democracy as an effective method of making decisions. These criticisms all
19 are related to the same fundamental theoretical result: the outcome under majority-
20 rule democracy either is unstable (no equilibrium exists), or, even if the outcome is
21 an equilibrium, it does not necessarily (or even probably) maximize social welfare. The
22 following discussion pinpoints the causes of these problems, and how their significance
23 depends on the design of political institutions.

24 3.2.1. *Tyranny of the majority*

25
26
27 Perhaps the best-known critique of majority-rule is the possibility of a “tyranny of the
28 majority,” which refers to a circumstance in which a majority extracts a small gain but
29 in so doing imposes an enormous cost on a minority. This problem arises primarily
30 because voting transmits little information about the intensity of preferences. If citizens
31 vote for one alternative over another, all that one can infer is that the intensities of their
32 preferences are sufficient to offset the cost of voting. Thus, a majority with moderately
33 intense preferences can impose its will on a minority with very intense preferences. In
34 the absence of side payments (one side purchases the votes of its opponents), majority-
35 rule is unlikely to pick policies that maximize social welfare because of the inherent
36 difficulty in weighing the gains of the victors against the losses to the vanquished.

37 Despite this problem, democratic theory, in requiring a test of the consent of the gov-
38 erned to legitimate a policy, is not without a normative defense because of the absence
39 of compelling alternatives. If the preference intensities of every individual are measur-
40 able and are described by convex functions over all feasible bundles of private goods
41 and public policies, one can then identify an optimal social state. Unfortunately, the les-
42 son of the Arrow Impossibility Theorem is that the only decision-making process that
43 would select that state is a dictatorship run by a perfectly informed altruist. As long as

1 those who make policy choices are not perfect altruists, no mechanism exists for select- 1
2 ing policies that achieve the social optimum—not the market mechanism because of its 2
3 indifference to whether the initial allocation of endowments corresponds to differences 3
4 among citizens in their abilities to derive welfare from income, and not the surrogate 4
5 for a market mechanism in the public sector, benefit-cost analysis. Thus, the Arrow Im- 5
6 possibility Theorem is a counsel of despair for creating institutions that are capable of 6
7 picking optimal policy. 7

8 Nevertheless, the failure of an institutional system to attain the optimal policy is 8
9 not fatal to all normative inquiry about the performance of alternative decision-making 9
10 processes if two conditions hold. First, normative analysis must be able to rule out some 10
11 outcomes as worse than others, even though it can not produce a complete preference 11
12 ordering over all possible outcomes. Second, positive analysis must be able to compare 12
13 alternative decision-making procedures in terms of their abilities to avoid bad outcomes 13
14 and select acceptably good ones. The Arrow Impossibility Theorem does not say that 14
15 one can never determine whether one social state is better than another, or that all in- 15
16 stitutions are equally inept at avoiding bad outcomes. Instead, it says that as a general 16
17 proposition one can not always determine which of two social states is socially more 17
18 desirable, and that no decision-making institution always implements the optimal social 18
19 state. For example, the compensation test (the weak Pareto Principle) can be conclu- 19
20 sive, but in some circumstances it is not. As shown by Besley and Coate (1997, 1998), 20
21 the multidimensional spatial model does produce policy outcomes that are not strictly 21
22 Pareto dominated by other alternatives with respect to their effects in the current elec- 22
23 tion cycle, although they may not be efficient when one takes into account their effects 23
24 across multiple election cycles. 24

25 The exploration of the meaning of Arrow Impossibility Theorem adds context to both 25
26 PPT and normative democratic theory. The consent of the governed as a criterion for the 26
27 legitimacy of policy links to the spatial model in that it confers normative approval on 27
28 a process in which the set of outcomes predicted by the theory excludes those that are 28
29 unanimously regarded as inferior to others. Moreover, constitutional democracy, with 29
30 its guarantees of certain individual rights combined with democratic decision making, 30
31 can be interpreted as a system in which actions to provide valuable public goods are 31
32 feasible, but are unlikely to impose enormous harm on anyone unless their preferences 32
33 are widely at variance with the rest of society. 33
34

35 3.2.2. *Imperfect information* 35

36 A potential problem with democratic decision making arises from the unreality of the 36
37 assumptions that voters know the positions of candidates, candidates know the prefer- 37
38 ences of voters, and all voters participate equally and independently in the election. The 38
39 transmission of citizen preferences to the preferences of elected officials is subject to 39
40 distortions if these assumptions are relaxed. This section examines the distortions can 40
41 arise from imperfect information, as examined initially by Downs (1957). 41
42
43

1 PPT provides a rich interpretation of the information problem in democratic elections 1
2 as well as an understanding of how citizens deal with this problem. One important in- 2
3 sight from Downs (1957) is that uninformed citizens (because a single vote is unlikely 3
4 to be decisive in an election in which more than a few voters participate) are “rationally 4
5 ignorant”—that is, they have no instrumental incentive to become informed, or even to 5
6 vote if doing so is costly. Nevertheless, candidates and their intense supporters have an 6
7 incentive to reduce the participation costs of voters who are likely to favor them, such as 7
8 by supplying free information and providing transportation to the polls. Other inexpen- 8
9 sive signals are available to voters, such as the party of the candidate, the candidate’s 9
10 career record in and out of public office, and, for incumbents, the general state of the 10
11 nation. 11

12 Fiorina (1981a, 1981b) explains that, in the absence of information about the likely 12
13 policy preferences of candidates, the optimal voting strategy for a rational voter is “ret- 13
14 rospective voting:” to keep a tally of positive and negative evaluations and, when an 14
15 election occurs, to vote for the incumbent if the running score is positive. If citizens use 15
16 a high discount rate, this strategy simplifies to observing the state of the nation at the 16
17 time of the election and voting for incumbents if the voter is better off now than at the 17
18 time of the last election but against them otherwise. Retrospective voting emphasizes 18
19 the importance of repeated elections in forcing candidates to be responsive to citizens. 19

20 Political parties play an especially important role in overcoming information prob- 20
21 lems. Parties focus on increasing their overall power in the government, not on winning 21
22 a particular seat, and as a result have an incentive to nationalize elections by appealing 22
23 to a broad range of citizens. Parties perform this role by taking actions that connect 23
24 imperfectly informed citizens to politicians, such as by developing a collective brand 24
25 name, raising money collaboratively, and arranging for cooperation among members on 25
26 policy goals (Petrocik, 1981; Cox, 1987). 26

27 If citizens rely on interested parties to provide information, one danger is that these 27
28 groups will provide false or misleading information that will cause citizens to vote 28
29 against their actual preferences. Cue theory analyzes how voters effectively can use 29
30 the information that they acquire from easily accessible signals, such as parties, inter- 30
31 est groups and other citizens, to inform their decisions while minimizing the danger of 31
32 manipulation (Berelson, Lazarsfeld, and McPhee 1954; Downs, 1957; Schelling, 1960; 32
33 Popkin, 1991; Lupia and McCubbins, 1998). In cue theory political parties play an es- 33
34 pecially prominent role because parties are easily identified and have a strong incentive 34
35 to secure their reputations among voters (c.f., Cox and McCubbins, 1993, 2005). 35
36 36

37 3.2.3. *Mobilization bias* 37

38 38
39 Mobilization bias refers to systematic over-representation of some preferences relative 39
40 to others in political decision-making, which includes voting, lobbying, litigating and 40
41 participating in administrative processes. Mobilization bias arises because some prefer- 41
42 ences are more easily aggregated and represented by organizations that seek to influence 42
43 policy through political participation. Mobilization bias is closely connected to the con- 43

cept of “salience” in MPS, whereby citizens are said to consider only 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

1 to many voters, narrow constituencies are not likely to bias the pattern of representation 1
2 in the government; however, narrow constituencies also make it easier for a group with 2
3 less access to information and lower turnout, or a group with atypically intense prefer- 3
4 ences in a particular policy domain, to influence an election. Hence, a larger number 4
5 of smaller constituencies can increase the extent to which the induced preferences of 5
6 legislatures emphasize narrow policies to benefit a small fraction of the population. The 6
7 legislators then have a further incentive to form a coalition that delivers targeted benefits 7
8 to each of their small constituencies. 8

9 The pathology arising from this system of representation is the tendency to focus on 9
10 policies such as pork barrel, where the benefits but not the costs of projects are salient 10
11 in a majority of districts. But small districts have other consequences that may be more 11
12 important. Small districts can give representation to small groups with atypical prefer- 12
13 ences that otherwise would not be represented in the legislature and so would stand no 13
14 chance of being part of a controlling coalition. Moreover, in small districts citizens are 14
15 more likely to be familiar with candidates, so that votes are more informed. Thus, the 15
16 tendency to provide pork barrel projects is properly viewed as the price associated with 16
17 having a legislature that is a more representative cross-section of the entire population. 17

18 In the U.S. House of Representatives and the dominant legislative branches in 18
19 Canada, the United Kingdom and France, the nation is divided into a large number 19
20 of distinct geographic districts, each of which is represented by a single legislator. But 20
21 other nations use different methods of converting votes into legislators. Italy has geo- 21
22 graphic districts, but each elects several legislators, as did Japan before the reforms of 22
23 the mid-1990s. In this system citizens cast a single vote, so that each elected legisla- 23
24 tor has a distinct, non-overlapping constituency in the same geographic area. Typically 24
25 the most popular candidates receive a large number of “wasted votes” (votes in excess 25
26 of the number needed to elect them), which enables other candidates to be elected with 26
27 relatively few votes. For example, compare a district of $2K$ voters electing two represen- 27
28 tatives with two separate districts, each containing K voters. In the latter case, candidates 28
29 need to receive roughly $K/2$ votes to win a two-candidate race in each district. But in 29
30 the former case, if one candidate receives K votes in a four-candidate race, the second 30
31 winning candidate may receive as few as roughly $K/3$ votes. 31

32 Holding constant the number of legislative seats, the main difference between single- 32
33 member and multi-member districts is that the latter eliminate the necessity for a small 33
34 group with intense preferences to be geographically concentrated in order to be decisive 34
35 in an election. As a result, multi-member districts are more likely than single-member 35
36 districts to enable a group with distinct preferences to achieve representation and to cre- 36
37 ate an induced demand for pork-barrel projects, c.f. [McCubbins and Rosenbluth \(1995\)](#); 37
38 [Cox and Rosenbluth \(1996\)](#); [Cox \(1997\)](#). This outcome is achieved at the cost of under- 38
39 representing citizens who favor the most popular candidates. 39

40 Another method for assuring representation of small groups is to institutionalize their 40
41 representation [[Lijphart \(1977, 1996, 1999\)](#)]. Minority representation can be assured by 41
42 reserving seats for them. In India, some legislative seats are reserved for women and for 42
43 members of “scheduled castes and tribes.” This representation requirement has changed 43

1 the bundle of policies that are adopted by local governments in favor of health and 1
2 education (Besley and Burgess, 2002; Besley et al. 2004). 2

3 Many Western Europe nations and Japan since reform use a proportional representa- 3
4 tion system, whereby citizens vote for parties, seats are allocated among parties in 4
5 proportion to their votes, and parties decide who will fill the seats that they win. Proportional 5
6 representation from large constituencies reduces the electoral payoff from policies 6
7 that cater to narrow constituencies, and so reduces the influence of mobilization bias and 7
8 the political attraction of pork barrel. Proportional representation also substantially in- 8
9 creases the role of parties, which orients campaigning more towards national as opposed 9
10 to local issues. 10

11 Whereas the U.S. House is designed to represent relatively small constituencies, the 11
12 Senate is composed of representatives of states. In small states, Senate constituencies 12
13 are equal to one or two House districts, so that representation is not likely to differ much 13
14 between Senators and House members. But most states have several House districts, and 14
15 a few have twenty or more. In these states, Senators represent a broader and typically 15
16 more heterogeneous constituency, and hence are less likely to be able to generate ma- 16
17 jority support by adopting platforms that appeal to the small, mobilized groups that may 17
18 be decisive in House elections. 18

19 Many democracies, including the U.S., elect an independent Chief Executive who 19
20 also has law-making powers, and some, including many U.S. states, elect several inde- 20
21 pendent executives, each with authority in specific areas of policy. The U.S. President 21
22 and U.S. governors are elected from constituencies of the whole—all voters within the 22
23 jurisdiction. As a result, votes for the President and governor, like votes for senators 23
24 in larger states, are less likely to reflect the narrow, parochial interests of a group than 24
25 can be influential in some House districts or in Senate elections in small, homogeneous 25
26 states. These votes are more likely to be determined by issues that are salient to a large 26
27 number of citizens, and so less likely to cause narrow, parochial interests to influence 27
28 the policy preferences of an elected executive. 28

29 The U.S. national government grants law-making authority to officials that are elected 29
30 from constituencies that represent different ways to aggregate the preferences of the 30
31 same citizens. As explained by Madison, this system was deliberately designed to 31
32 add stability to national policy and to provide checks and balances against the weak- 32
33 nesses and dangers in each form of constituent representation. Specifically, the House is 33
34 generally more “representative” (in the sense of office holders with heterogeneous pref- 34
35 erences) than the Senate and the President, but the latter are generally more oriented 35
36 towards national rather than local issues. 36

37 The effectiveness of this system of checks and balances hinges on how elected offi- 37
38 cials interact to produce law, for the process of enacting statues determines the extent to 38
39 which bargains among independently elected officials can be said genuinely to reflect 39
40 the preferences of their constituents and, therefore, to have the consent of the governed. 40
41 The next two sections analyze how the three forms of elected law-makers in the U.S. 41
42 interact to produce law and the extent to which the law that they produce can be said to 42
43 have democratic legitimacy. 43

4. 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 20th Century jurists agree that legislatures are suspect sources of law. For example, Posner (1990, p. 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, p. 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, pp. 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

1 alternative laws (policies), so that a theory of legislatures rests on a conceptualization of 1
2 how the heterogeneous preferences of a decisive group of legislators (usually a major- 2
3 ity) becomes aggregated into law. To the extent that legislatures really are democratic, 3
4 the median voter and positive responsiveness theorems ought to apply. And, since the 4
5 preferences of legislators are induced by elections, then the democratic legitimacy of 5
6 majority-rule elections confers democratic legitimacy on legislatures. But are legisla- 6
7 tures really miniature democracies that represent citizens? 7

8 In practice, the view that statutes arise from a democratic interaction among legisla- 8
9 tors is not the basis of most theories of a legislature. Instead, most theories hold that 9
10 legislative authority is controlled (some say “seized”) by some group of political actors. 10
11 The theories differ according to who seizes power. Non-partisan theories point to 11
12 congressional committees, interest groups, and/or the executive branch, while partisan 12
13 theories point to political parties and their leaders. By contrast, PPT views legislatures 13
14 as democracies, and their structure and process as selected by majority rule to serve 14
15 the goals of its members. Thus, what others interpret as seizing power PPT sees as a 15
16 delegation of limited and reversible authority to serve the majority’s common end. The 16
17 key questions addressed by this debate are whether responsible democratic governance 17
18 is possible and how legislative outcomes should be interpreted and understood. 18

19 A key institutional feature of most legislatures is that the task of crafting legislation 19
20 typically is delegated to a subset of the members. In most legislatures, and especially 20
21 legislatures with an independently elected executive, the task of proposing legislation 21
22 is assigned to committees. Some parliamentary systems do not have committees. In 22
23 these cases the responsibility for proposing legislation usually is delegated to ministries, 23
24 which in turn are managed by one or more members of the legislature (a minister and 24
25 perhaps one or more deputy ministers). Conceptually this system can be viewed as one 25
26 with very small committees. 26

27 Among the powers given to committees is agenda control. One form of agenda control 27
28 is the *ex ante veto*, or the power to prevent proposals from being considered by the 28
29 entire legislature (Shepsle, 1979; Shepsle and Weingast, 1987; Weingast and Marshall, 29
30 1988). Thus, in both houses of the U.S. Congress, all bills are referred to a commit- 30
31 tee, and rarely are they considered by the parent body unless the committee formally 31
32 approves the bill, perhaps after extensive amendment in committee. Another form of 32
33 agenda control is the *ex post veto*, whereby the committee has the authority to block en- 33
34 actment of the bill as amended and approved by the parent body (Shepsle and Weingast, 34
35 1987). For example, the U.S. House and Senate frequently pass different versions of 35
36 the same bill, and then appoint a joint conference committee to iron out the differences. 36
37 A legislative body can grant an *ex post veto* to a committee by allowing the committee 37
38 to act as its representatives on the conference committee. 38

39 Although some models of the legislature are based on the assumption that agenda- 39
40 setting power is delegated to committees by the chamber as a whole (Weingast and 40
41 Marshall, 1988; Gilligan and Krehbiel, 1990; Krehbiel, 1991), others argue that in some 41
42 cases committees have usurped their agenda-setting powers (Mayhew, 1974; Fiorina, 42
43 1977a; Smith and Deering, 1984; Shepsle and Weingast, 1987). These two types of 43

1 models have profoundly different implications with respect to the democratic legitimacy
2 of legislative outcomes.

3 4 *4.1.1. Non-partisan theories*

5
6 Non-partisan theories of legislatures do not necessarily ignore political parties, but in-
7 stead see them as unimportant manifestations of a more fundamental division of the
8 legislature according to the policy preferences of its members. The fundamental build-
9 ing block of non-partisan theories is that legislators have heterogeneous preferences,
10 which presumably reflects heterogeneity of preferences among citizens. Parties are sim-
11 ply groups of legislators that exhibit much less within-group heterogeneity than the
12 legislature as a whole.

13 The baseline that we employ for analyzing more complex positive theories of legisla-
14 tures is the simplest non-partisan theory in PPT, which ignores not only parties but also
15 all other organizational features of a legislature. In this theory, a legislature is a group
16 of equal legislators in which none has greater resources or agenda-setting power than
17 any other. This idealized legislature is organized as if it were a town meeting or a social
18 group, without order or rules, except those that define voting rights. The simplest non-
19 partisan theory is the application of the one-dimensional spatial model of majority-rule
20 decision-making to legislatures, as depicted in Figure 3.1, in which legislative outcomes
21 are the ideal point of the median legislator. This model is the most widely used theory
22 for understanding policy choice in legislatures, and is represented by the work of Riker
23 (1962), Smith (1989) and Krehbiel (1998).

24 This simple theory has been extended to incorporate and explain the committee
25 organization of legislatures (Krehbiel, 1991). According to this theory, the policy pref-
26 erences of legislators (and constituents) are uncertain because of imperfect information
27 about the consequences of changes in the law. Committees are a mechanism for legisla-
28 tors to divide labor, develop expertise, and collect relevant information. Each legislator
29 bears the cost of becoming informed on only a relatively small part of policy. With
30 special knowledge may come the ability to mislead less knowledgeable legislators into
31 enacting laws that, with full information, a majority would oppose; however, this ad-
32 verse consequence of legislative specialization can be overcome if the committee is
33 broadly representative of the membership of the legislature. If the median voter on
34 a committee has approximately the same ideal point as the median voter in the en-
35 tire legislature, then the legislative outcome of the committee will be the majority-rule
36 equilibrium in the legislature. The fact that committees include members of minority
37 parties is regarded as evidence that committees are selected to be broadly representative
38 in order to protect against strategic information manipulation by a committee.

39 The significance of the degree to which committees are representative of the legis-
40 lature is apparent from considering various committee structures in the model depicted
41 in Figure 3.1, and reproduced here is Figure 4.1. The entire legislature consist of five
42 members, whose ideal points are A, B, C, D and M, three of whom form a majority-rule
43 committee to propose legislation to the parent body. The status quo is SQ, and SQ* is

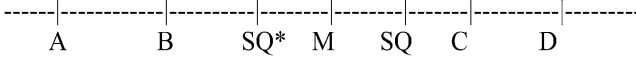


Figure 4.1. Committees as legislative agenda setters.

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-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.

1 The multidimensional spatial model also has been applied to study legislatures. These 1
2 models view the organizational structure of legislatures—especially committees—as 2
3 a means to overcome the instability of majority-rule outcomes, creating a “structure- 3
4 induced equilibrium” where equilibrium would not exist otherwise. 4

5 One version of multi-dimensional theory interprets committees as a means of break- 5
6 ing down the dimensions of policy into a series of single dimensions, one for each com- 6
7 mittee, which then yields a unique median-voter equilibrium in each dimension. The 7
8 stability of these equilibria are protected by “germaneness” requirements on proposed 8
9 amendments, which are interpreted as preventing a legislator from creating instability 9
10 by offering an amendment that introduces a second dimension into a proposed bill. 10

11 A related multi-dimensional non-partisan theory argues that the committee system is 11
12 a means to facilitate vote trades and bargains among legislators (Mayhew, 1974; Fiorina, 12
13 1977a; Weingast, 1979; Shepsle and Weingast, 1981; Weingast and Marshall, 1988). 13
14 Vote-trading is a mechanism for taking into account intensities of preferences. Suppose 14
15 that a legislature is considering two issues (separate dimensions), each of which has 15
16 the same preference configuration as shown in Figure 4.1. Suppose that on one issue 16
17 legislators with ideal points C and D have intensely held preferences while the others 17
18 do not feel strongly, while on another issue the legislator with ideal point B has intensely 18
19 held preferences. If the legislature as a whole picks committees, a majority consisting 19
20 of the legislators with most preferred points B, C and D would assign the members with 20
21 ideal points M, C and D to the first committee, which would then propose C, and the 21
22 members with ideal points A, B and M to the second, which would then propose B. The 22
23 members with ideal points at B, C and D could “trade votes”—the member with ideal 23
24 B agrees to vote for outcome C from the first committee if the members with ideals C 24
25 and D agree to vote for outcome B from the second committee. Because each makes a 25
26 small sacrifice for a large gain, all are better off from trading. 26

27 The normative implications of these theories are disputed. On the plus side, a com- 27
28 mittee system with vote-trading is a means for producing stable outcomes that take into 28
29 account preference intensities when the alternative could be some combination of chaos 29
30 and tyranny of the majority. If policy choices are multi-dimensional and, therefore, leg- 30
31 islative outcomes are unstable due to preference heterogeneity, some mechanism for 31
32 achieving stable legislative bargains is necessary for society as a whole to acquire valu- 32
33 able public goods and other desirable policy outcomes. The fact that many bargains may 33
34 emerge from this process, some of which may be preferred to the actual outcome, is a 34
35 normative quibble if the actual outcome is substantially better for society than doing 35
36 nothing or having policy instability. Thus, a committee system that facilitates bargains 36
37 and enforces vote trades can improve policy outcomes for most or all legislators. 37

38 On the negative side, a particular vote-trading agreement is typically one among 38
39 many that could emerge. All agreements by a majority of legislators that produce poli- 39
40 cies within the Pareto Set are feasible coalitions, so that the particular agreement that 40
41 emerges is not obviously superior to others that might have emerged but did not. More- 41
42 over, vote-trading coalitions can lead to policy excesses in all dimensions. If outcomes 42
43 in each policy dimension are driven by legislators with atypically intense preferences, 43

1 policy outcomes will not reflect the preferences of the median or pivotal legislator as 1
 2 predicted by the Black-Downs model (this view dates to [Wilson, 1885](#)). An example of 2
 3 policy excess that is widely attributed to the committee structure of Congress is “pork 3
 4 barrel” bills, which overspend on public works because spending is distributively at- 4
 5 tractive to legislators and constituents ([Ferejohn, 1974](#)). In practice, the incentive to 5
 6 avoid exclusion from the list of approved projects can and often does cause legislators 6
 7 to agree to a coalition of the whole, in which each legislator who votes for the bill re- 7
 8 ceives a project ([Weingast, 1979](#)) even when no project generates more benefits than 8
 9 costs. 9

10 Some scholars who emphasize the cost of the committee system see committees as 10
 11 groups of individuals who *seize* legislative power. In this view, the distribution of power 11
 12 in the legislature is as if it were an assortment of monopolies that use their market 12
 13 power to expropriate maximum profits. That is, each committee holds a monopoly over 13
 14 changes in policy on each dimension of the policy space ([Shepsle, 1979](#); [Shepsle and](#) 14
 15 [Weingast, 1987](#)). Thus, policy is stable, bargains are enforceable and stable ([Shepsle](#) 15
 16 [and Weingast, 1981](#); [Laver and Shepsle, 1996](#)), but policy outcomes hardly can be said 16
 17 to represent the majority will unless all committees are representative of the distribution 17
 18 of preferences in the legislature. 18

19 The process by which legislators build support constituencies among voters has led 19
 20 to the theory that committees are influenced or controlled by interest groups. One such 20
 21 theory is Pluralism ([Bentley, 1949](#); [Truman, 1951](#); [Dahl, 1967](#)), which takes a san- 21
 22 guine view of the process because it views policy as the outcome of bargains among 22
 23 many interest groups with conflicting interests. Another is the “political marketplace” 23
 24 in Public Choice, in which committees auction public policy “rents” to the highest- 24
 25 bidding interest groups ([Becker, 1983](#); [Buchanan, 1968](#); [Peltzman, 1976](#); [Posner, 1974](#); 25
 26 [Stigler, 1971](#)). Some scholars with the latter view argue that interest groups form “iron 26
 27 triangles” or “unholy trinities” with the committees and executive agencies that control 27
 28 the legislative agenda, or that interest groups “capture” congressional committees and 28
 29 executive agencies ([Schelling, 1960](#); [Lowi, 1969](#)).¹⁰ 29

30 Whether the sanguine view of the Pluralists or the darker view of Public Choice 30
 31 is more accurate depends in part on the process by which interest groups form and 31
 32 influence legislators. If interest groups from the spectrum of support and opposition to 32
 33 a policy are represented on a committee and participate in crafting its legislation, then 33
 34 committee bargains are likely to embody a balancing of interests, lending support to the 34
 35 view that committee bargains improve welfare. But if interest representation is biased 35
 36 on one side of an issue, the legislative bargain may harm the majority in service of a 36
 37 minority. Of course, even this outcome is normatively ambiguous, for a policy that is 37
 38 intensely desired by a few but mildly opposed by a majority can still increase social 38
 39 welfare. 39

40
 41
 42 ¹⁰ Nonetheless, as [Ramseyer and Rasmussen \(1994\)](#) observe, bribes in most modern democracies are not 42
 43 prevalent and tend to be small relative to the stakes. 43

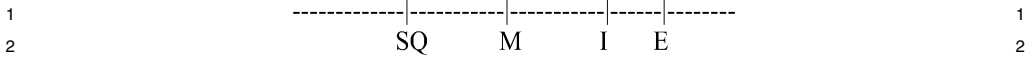


Figure 4.2. Legislative outcomes with executive agenda setters.

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; 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) the appropriations process (Niskanen, 1971), or the issuance of executive orders (Moe and Howell, 1999a, 1999b). 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).¹¹ 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 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

¹¹ 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.

1 legislative procedure, keeping measures unfavorable to it off the agenda (Cox and Mc- 1
2 Cubbins, 1993, 2002, 2005) and pushing their platform onto the agenda (Rohde, 1991; 2
3 Aldrich, 1995; Aldrich and Rohde, 1998, 2001). 3

4 A system of single-member legislative districts with plurality voting, such as 4
5 the United States, tends to have two effective parties (Duverger, 1954; Cox, 1997; 5
6 Taagepera and Shugart, 1989). In this case, legislative authority is seized by the majority 6
7 party, and understanding legislative organization and operation involves understanding 7
8 party organization and operation. It is to a discussion of these theories we now turn. 8

9 A simple theory of partisan organization conceives of parties as fraternal gatherings 9
10 of like-minded individuals (Young, 1966; Krehbiel, 2000). For example, some argue 10
11 that parliamentary coalitions (Laver and Shepsle, 1996), committee decision-making in 11
12 the German Bundestag (Saalfeld, 1997), and the boardinghouse origins of American 12
13 political parties (Young, 1966) resemble a structureless social gathering. The implica- 13
14 tion for legislative organization and policy outcomes is that a majority party or coalition 14
15 controls the legislature simply because its members are like-minded and can implement 15
16 their harmonious goals by majority rule. 16

17 Another theory of partisan organization emphasizes preference heterogeneity within 17
18 the party and the role of party leadership. One version of this theory draws an analog- 18
19 ogy between parties and armies, with generals (party leaders) in charge of the direc- 19
20 tion, promotion, and placement of the rank-and-file (backbenchers) (Gosnell, 1937; 20
21 American Political Science Association, 1950; Cohen and Taylor, 2000). In these mod- 21
22 els, party leaders determine the organization and agenda of the legislature, and their 22
23 preferences determine policy outcomes, so that party governance is a form of dicta- 23
24 torship. Some European parties and American party machines at the turn of the 20th 24
25 century resemble the parties-as-armies model (Gosnell, 1937; Cohen and Taylor, 2000). 25

26 Recent approaches to understanding party organization see party leaders not as the 26
27 principals of party members (as in the army model), but as the agents of party mem- 27
28 bers in charge of solving collective-action problems within the party. Analogous to 28
29 the theory of the firm in industrial organization, this approach argues that party mem- 29
30 bers, recognizing their incentives to “free ride,” empower a boss (party leader) to 30
31 manage and discipline them such that they all can achieve the benefits of coopera- 31
32 tion (Cooper and Brady, 1981; Sinclair, 1983; Cox, 1987; Stewart, 1989; Rohde, 1991; 32
33 Maltzman and Smith, 1994; Binder, 1997). Rohde (1991) and Aldrich and Rohde (2001) 33
34 argue that the amount of authority that backbenchers delegate to the party leaders waxes 34
35 and wanes in accordance to the internal homogeneity (like-mindedness) of the party 35
36 members’ preferences and the heterogeneity between the majority party or coalition 36
37 and the other (minority) parties in the legislature. According to this view, the impor- 37
38 tance of the party for legislative organization and output is conditional on the amount 38
39 of authority given to party leaders by party backbenchers; legislative governance is thus 39
40 “conditional party government.” 40

41 Building on the “parties as firms” approach, another partisan theory conceptualizes 41
42 party leadership as a team (Kiewiet and McCubbins, 1991; and Cox and McCubbins, 42
43 1993, 1994, 2002, 2005). In this approach, legislative leadership is collegial because it 43

1 is distributed among the majority party leadership—the Speaker, the majority leader, 1
 2 and so on—as well as among the chairs of the standing committees, especially control 2
 3 committees such as Rules, Appropriations, Budget, and Ways and Means. 3

4 Partisan models of legislatures are analogous to vote-trading models in non-partisan 4
 5 theories. A problem with vote-trading models is that, in a large legislature, coalitions 5
 6 emerge from bargaining among legislators and, as a result, many vote-trading coalitions 6
 7 are feasible. In partisan models, if a single party is in the majority, the membership of 7
 8 the vote-trading coalition is largely determined by party affiliation. And, in legislatures 8
 9 in which no party has a majority, the set of feasible coalitions is vastly reduced to the 9
 10 combinations of a few parties that could form a majority. 10

11 12 4.2. *Delegation, monitoring and legislation* 12 13

14 One major contribution of PPT is a better understanding of the legislative process. This 14
 15 process has three basic elements. First, because each legislature must allocate scarce 15
 16 plenary time, a substantial fraction of the rules, procedures, and structure of a legisla- 16
 17 ture is devoted to defining how the legislature’s agenda will be determined (Oleszek, 17
 18 2004; Cox and McCubbins, 1993, 2005). Second, the rules must also proscribe what 18
 19 happens if no new law is passed, which scholars call the “reversionary policy.” Usually, 19
 20 but not always, the reversionary point is the status quo; however, for bills authorizing 20
 21 expenditures and appropriating funds, the reversionary point normally is zero spending. 21
 22 Third, once plenary time is allocated and the reversionary policy is set, the legislature 22
 23 must have rules and procedures that dictate how a collective decision on policy change 23
 24 will be reached (Oleszek, 2004). These rules and procedures include the duties and 24
 25 powers of committees and the process for assigning members and jurisdiction to them. 25
 26

27 Research to explain the structure and process of legislators focuses on two questions. 27
 28 The first is the extent to which legislatures actually delegate power, and the second is 28
 29 the mechanisms for controlling agents once authority has been delegated. 29

30 On the first question, Aldrich and Rohde (2001) suggest that the majority party will 30
 31 delegate more as the preferences of its members become more homogeneous. The logic 31
 32 behind this argument is that if all members of the majority party have very similar policy 32
 33 preferences, the policy that any one would adopt is “close enough” to the optimal policy 33
 34 of other party members that party members do not fear any significant cost to delegating 34
 35 authority; however, if party members have widely differing preferences, each member 35
 36 risks losing a great deal if authority is delegated to someone with very different policy 36
 37 objectives. 37

38 Laver and Shepsle (1996) examine a condition in which preferences do differ sub- 38
 39 stantially by studying multi-party coalitions in European nations. They conclude that 39
 40 coalitions will determine which policy dimension matters most to each member of the 40
 41 coalition, and then will delegate control over each dimension to a party that values it 41
 42 highly by letting that party appoint the minister. Thus work highlights an important role 42
 43 of delegation: keeping the majority together, whether it is a single majority party or a 43

1 coalition of parties. To keep a majority together requires making certain that each part- 1
 2 ner has more to gain from remaining in the majority than by defecting to the minority. 2

3 Regarding the second question, much of the legislative process involves attempts to 3
 4 mitigate the problems that result from delegation inside the legislature, principally to 4
 5 committees and party leaders (Kiewiet and McCubbins, 1991; Cox and McCubbins, 5
 6 1993, 2005). The purpose of these mechanisms is to capture the benefits of delegation 6
 7 without giving so much power to agents that agents become dictators. These mech- 7
 8 anisms for controlling the behavior of agents have important effects on the flow of 8
 9 legislation. 9

10 Research on delegation deals with the ways in which majorities can exercise influence 10
 11 over the discretion of the agents to whom agenda authority is delegated. Controlling 11
 12 the legislative agenda involves creating and delimiting two powers. One power is the 12
 13 authority to put proposed policy changes on the legislative agenda, or *positive agenda* 13
 14 *power* (c.f. Shepsle and Weingast, 1981, 1987). The other power is the authority to keep 14
 15 proposed policy changes off the legislative agenda, and thereby to protect the status 15
 16 quo—or reversionary policy—from change, or *negative agenda power* (c.f. Cox and 16
 17 McCubbins, 2000, 2002, 2005). Negative agenda power is similar to an *ex ante* veto. 17
 18 Committees with positive agenda power have an *ex ante* veto because they can decide 18
 19 not to let a proposed bill within their jurisdiction reach the floor of the legislature; 19
 20 however, others can be given the power to block proposals independently of the power 20
 21 to make them. For example, the chair of a committee can refuse to allow a committee 21
 22 vote on the final version of a bill, and the Rules Committee can refuse to allocate floor 22
 23 time to a bill that passes out of committee. 23

24 There is, of course, an inherent tradeoff between the use of positive and negative 24
 25 agenda power. The more that the majority party distributes veto rights (at the expense 25
 26 of proposal rights), the harder it is to pass legislation. The more it distributes proposal 26
 27 rights (at the expense of veto rights), the greater the risk that some proposals will impose 27
 28 external costs on other members of the majority party—even to the point of adopting 28
 29 proposals that make a majority of the members of the majority party worse off. Thus, 29
 30 the majority party always faces the question of the optimal mix of veto and proposal 30
 31 powers (Cox and McCubbins, 2005; and Aldrich et al., in progress). 31

32 A simple model illustrates these issues. Suppose that the ideal point of the median 32
 33 voter of the party is P and for the entire legislature is M , and that, like the Senate, bills 33
 34 are considered under an open rule so that if a bill is proposed, regardless of its initial 34
 35 content, it will be amended to be M and then passed. Note that by definition both P and 35
 36 M are members of the majority party. Assuming that the majority party is democratic, 36
 37 its policy position will be P ; however, if it enacts P , it may cause the median voter (and 37
 38 other party members whose ideal points are to the right of M) either to be defeated 38
 39 or to defect. If membership in the majority party is valuable, the median voter in the 39
 40 legislature need not be fully satisfied with the policy outcome for the majority party to 40
 41 retain control. For example, if policy can be as far away from M as M^1 without causing 41
 42 the loss of the legislative median, then status quo policy SQ can be retained; however, 42
 43 if the median voter in the legislature can tolerate no deviation from M beyond M^2 , then 43

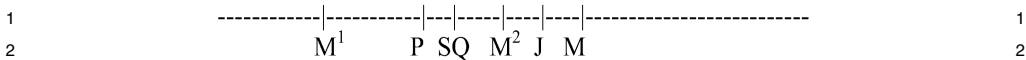


Figure 4.3. Agenda power and party control of legislatures.

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 part 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 M². This member will veto any proposal if the status quo is between M and M², 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.¹² 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.

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,¹³ 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, 2005), which in turn is controlled by the Speaker, who is elected by the majority party. Party leaders also determine the membership of other committees.

¹² 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.

¹³ The U.S. House Standing Rules grants the privilege to five committees to have direct access to the floor on select legislation.

1 Committees act as filters, shaping nearly all proposals in their particular policy ju- 1
2 risdiction. They exercise positive agenda control in the sense that they write the bills 2
3 that are submitted to the Rules Committee to be placed on the agenda of the legislature. 3
4 They also have negative agenda (or gatekeeping) power in that they can decide simply 4
5 not to pass legislative proposals on to the Rules Committee. This power is limited in 5
6 that the floor can pass a “discharge petition” that forces the committee to report a bill, 6
7 but such a petition is costly to undertake and so is rarely undertaken. 7

8 The delegation of the legislature’s agenda-setting authority to party leaders and com- 8
9 mittees creates the potential for mischief, i.e., agency loss, and is the reason why the 9
10 discretion of each agent of the majority party is limited. At issue is how members as- 10
11 sure that the people to whom the agenda-setting authority has been delegated do not 11
12 take advantage of this authority to use it for personal gain. Legislatures use both checks 12
13 and balances to accomplish these tasks. These checks and balances provide others with 13
14 a veto over the actions of agenda setters. 14

15 The agenda power of the majority leadership provides an incentive for the majority 15
16 party’s representatives on a committee to take actions that are responsive to the interests 16
17 of the whole party (Cox and McCubbins, 1993; Kiewiet and McCubbins, 1991). To 17
18 the extent that the party exercises control over committee assignments and that some 18
19 assignments are more valued by members than others, committee members have an 19
20 incentive to be responsive to the party’s collective interests (Cox and McCubbins, 1993) 20
21 in order to be rewarded with subjectively desirable assignments. The shortage of plenary 21
22 time on the floor of the legislature creates another incentive for substantive committees 22
23 to compete against each other, in something of a tournament, where the reward for 23
24 satisfying the party’s interest is time for floor consideration of their bills (c.f. Cox and 24
25 McCubbins, 1993, 2005). 25

26 A similar relationship holds between the party and its leadership with regard to the 26
27 leadership’s scheduling activities. The leadership of the majority party has an incentive 27
28 to pursue the majority party’s collective interests to the extent that the party can dis- 28
29 cipline its leaders (Cox and McCubbins, 1993, 2005). Party leaders are selected by a 29
30 majority vote of party members. Moreover, disaffected members of the majority party 30
31 can vote against the wishes of party leaders on the floor or even defect to a minority 31
32 party if they are dissatisfied with the leadership’s exercise of agenda control. The con- 32
33 straints on party leaders imply that party leaders act on behalf of the collective interest 33
34 of the party, not just themselves. 34

35 An important element of agenda control is veto power. Any person or group with 35
36 the power to block or significantly to delay policy is referred to as a veto gate or a 36
37 gatekeeper. Nations differ substantially in the number of veto gates that inhabit the leg- 37
38 islative process. The United States, for example, represents the end of the spectrum 38
39 with a large number of veto gates because it has a bicameral legislature that is decen- 39
40 tralized into numerous committees plus a President with veto power. In the House of 40
41 Representatives alone, the substantive committees and their subcommittees, the Rules 41
42 Committee, the Speaker, and the Committee of the Whole each constitute veto gates 42
43 through which legislation normally must pass, and the Senate has even more veto gates 43

1 due to their lax restrictions on debate. The United Kingdom occupies the other end of
2 the spectrum with parliamentary government and a relatively weak upper legislative
3 chamber.

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

11 To understand law-making, it can be important to know whether the reversionary pol-
12 icy can be manipulated, and if so, who possesses the power to do so (c.f. [Romer and](#)
13 [Rosenthal, 1978](#)). This requires understanding the relationships between the reversion
14 policy, the proposed policy and the preferences of policy makers. Reversionary policies
15 can be defined formally by the Constitution and/or statutes, or through informal solu-
16 tions to immediate problems. The U.S. Constitution defines the reversion point for some
17 budgetary items (a zero budget), but statutes typically define the reversionary policy for
18 entitlements, such as Social Security, as adjusted annually to account for inflation.

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

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

32 As a proposal approaches the floor, the party’s influence grows. The majority party’s
33 members delegate to their leadership the authority to represent their interests on a broad
34 variety of matters. In the U.S. House of Representatives, the Rules Committee, the
35 Speaker and (if expenditure of funds are required) the appropriations and budget com-
36 mittees all hold power that checks the ability of substantive committees to exploit their
37 agenda control. If a committee’s proposal conflicts with the party’s collective interest
38 and if the issue is important to the party, either the Speaker or the Rules Committee can
39 kill or amend the proposal, or the budget committees can refuse to supply the necessary
40 funds to implement it. This system of multiple veto points, each controlled by a par-
41 tially non-overlapping subset of the members of the majority party, constitutes a system
42 of checks and balances to constrain the ability of a substantive committee or the party
43 leaders to pursue policies that are not in the interests of other members of the majority

1 party. Legal scholars have long recognized that the legislative process has implications 1
 2 for policy (c.f. Farber and Frickey, 1991) and for statutory interpretation (c.f. Eskridge, 2
 3 1994). PPT gives a new understanding of how the elements of these key processes fit 3
 4 together. 4

6 4.3. Policy consequences of legislative structure 6

7
 8 The American system of government is defined by deliberate separation of powers, 8
 9 which creates an institutional structure rife with veto players. As the number of effective 9
 10 veto players increases, the government's ability to be resolute (to commit to 10
 11 policy) increases while its ability to be responsive (to change policy) decreases (Cox 11
 12 and McCubbins, 2001). While numerous veto points reduce policy instability, the cost 12
 13 is that government action tends to be more responsive to particularistic interests rather 13
 14 than to broad policy goals than would be the case if the Constitution made a different 14
 15 tradeoff between resoluteness and responsiveness. This Constitutional structure does 15
 16 not imply an absence of collective goods or public-regarding legislation. Rather, the 16
 17 tradeoff created by the Constitution shapes the terrain of policy tendencies that pervade 17
 18 law-making. 18

19 Both political parties in the U.S. have created relatively stable reputations for the type 19
 20 of policies they support. Since the Civil War both parties have shown consistent differences 20
 21 on tax and monetary policy (Studenski and Krooss, 1963; Berglof and Rosenthal, 21
 22 2004). The parties also express consistent differences over agricultural policy, domestic 22
 23 and foreign spending, energy policy, education and health policy (Sullivan and 23
 24 O'Connor, 1972; Bresnick, 1979; CQ Farm Policy, 1984; Browning, 1986; Kiewiet and 24
 25 McCubbins, 1991; Peterson, 1990; Den Hartog and Monroe, 2004; Monroe, 2004). In 25
 26 sum, the obstacles to policy-making in the U.S. legislature have not prevented political 26
 27 parties from presenting differentiated but consistent visions of the role of government. 27

28 The Constitutional separation of powers in the U.S. encourages some forms of 28
 29 privatization of public policy, although less than would arise if the only policy-making 29
 30 entity was the House, with its fragmented constituencies. Because the President and to 30
 31 a lesser extent Senators from large states are held accountable for the broad performance 31
 32 of government, while House members and other Senators primarily are held responsible 32
 33 for the effect of policy on relatively small constituencies, policy outcomes represent 33
 34 a compromise of the preferences that representatives derive from different systems of 34
 35 representation. In order to overcome indecisiveness and to forge coalitions among leg- 35
 36 islators with heterogeneous preferences, private goods are sometimes used as the basis 36
 37 for legislative bargaining, with the consequence that broad public policy goals are pack- 37
 38 aged with distributive politics that are dominated by special interests, characterized by 38
 39 fiscal pork and rent-seeking, and morselized—all of which contribute to inefficiency. 39

40 Perhaps the most widely discussed form of policy inefficiency is *fiscal pork*, which 40
 41 refers to geographically targeted public expenditures for which the incidence and 41
 42 location of projects follow a political rather than an economic logic (Ferejohn, 1974; 42
 43 Weingast, Shepsle, and Johnson, 1981; Cox and McCubbins, 2001). This form of pol- 43

1 icy includes classic pork-barrel projects such as dams and levies as well as projects 1
 2 involving water quality (Pisani, 2002), transportation (Baron, 1990; Hamman, 1993), 2
 3 technology (Cohen and Noll, 1991), energy (Stewart, 1975; Davis, 1982; Vietor, 1984; 3
 4 Arnold, 1990, Chapter 9), and defense (Fox, 1971; Kanter, 1972). 4

5 The institutional features of the Senate exacerbate the problems associated with 5
 6 fiscal pork. Because senators' districts are geographically defined (as opposed to 6
 7 the population-based boundaries of members of the House), Senate policy-making 7
 8 tends to favor rural interests (Lee, 1998), especially agriculture (McConnell, 1966; 8
 9 Congressional Quarterly, 1984) and other resource-based industries (e.g., coal— 9
 10 Ackerman and Hassler, 1981).¹⁴ Furthermore, because the Senate is less majoritarian 10
 11 than the House (due to the filibuster and the need to rely on unanimous consent 11
 12 agreements—see Krehbiel, 1986 and Binder and Smith, 1997), the distribution of pork 12
 13 by the Senate tends towards universalism (Weingast, 1979; Bickers and Stein, 1994a, 13
 14 1994b, 1996; Weingast, 1994), whereas the House is more partisan (Cox and McCub- 14
 15 bins, 2005). 15

16 Another source of inefficiency is *rent-seeking*—a term that refers to an array of 16
 17 subsidies, tax provisions, and regulatory exceptions that special interests extract from 17
 18 government (c.f. Tullock, 1965; Krueger, 1974; Buchanan, Tollison, and Tullock, 1980). 18
 19 Many scholars lament the ways in which rent-seeking pervert democratic accountabil- 19
 20 ity and distort economic incentives (Buchanan and Tullock, 1962; Stigler, 1971), while 20
 21 others focus on the related, yet distinct, problem of how the representation of spe- 21
 22 cial interests within the legislature causes fragmented, incoherent policy (Shepsle and 22
 23 Weingast, 1987; Weingast and Marshall, 1988). In the extreme, this “balkanization” of 23
 24 politics can lead to the dominance of sub-governments (such as subcommittees) that 24
 25 agree to let each control a particular area of policy for their private benefit (Dahl, 1956; 25
 26 Schelling, 1960; McConnell, 1966; Lowi, 1969; Shepsle and Weingast, 1987). 26

27 An example of the ways in which special interests cause inefficient policy outcomes is 27
 28 provided by Banks' (1991) discussion of the roots of the *Challenger* disaster. As Banks 28
 29 documents, once the research and development for the shuttle was underway, the pro- 29
 30 gram “picked up political steam” as core political constituencies—shuttle contractors 30
 31 and manned space-flight advocates in NASA—grew in number as expenditures on the 31
 32 project increased. This example shows how programs create support constituencies as 32
 33 they are implemented (Noll and Owen, 1981). Indeed, political support for the project 33
 34 became powerful enough to overcome growing evidence of the severe economic and 34
 35 technical shortcomings of the project. 35

36 The core political constituencies for the shuttle program placed great emphasis on the 36
 37 timing of the first launch, leading Congress to push NASA for a quick launch despite 37
 38 misgivings about the operational readiness of the technology among those responsible 38
 39 for implementing the program. Thus, distributive politics conflicted with and overcame 39
 40 40

41
 42
 43 ¹⁴ To a large extent, this was also true of the House prior to redistricting. See McCubbins and Schwartz 42
 (1988) for further discussion. 43

1 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
 2 R&D would have entailed delaying the transition to the more expensive—and hence
 3 politically more beneficial—operational phase, which was opposed by contractors and
 4 advocates of manned space flight. Thus, distributive politics led to declaring operational
 5 a vehicle that was regarded as unsafe and economically unsound by the managers of the
 6 program.

7
 8 Distributive politics also causes policy in the U.S. to be *morselized*—that is, divided
 9 into subcomponents (morsels). Morselization allows elements of a program to be dispersed
 10 among politicians as “goodies” for constituents. For example, the broad policy
 11 goal of reducing water pollution is divided into many grants to cities for sewage treatment
 12 plants (Arnold, 1979; Weingast, 1994), for which members of Congress then can
 13 claim credit. While such morsels still aggregate to a public good, the morselization
 14 process is inefficient in that the means of production are politically determined, and so
 15 do not constitute the least costly means of providing the public good to society.

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

22 23 24 **5. The President** 25

26 In the U.S. and most European democracies, the legislature is the dominant institution
 27 for making law. Nevertheless, despite the unequivocal wording of Article I, Section 1,
 28 the U.S. Constitution grants some law-making authority to the President. And, in many
 29 democracies throughout the world, the Chief Executive possesses the power to issue
 30 decrees that have statutory status (Shugart and Carey, 1992, Shugart and Haggard, 2001).
 31 Thus, in the U.S. and many other democracies, the Chief Executive plays a significant
 32 role in forging legislative bargains that yield new laws, and so the content of law in part
 33 reflects the Chief Executive’s policy preferences. As with the legislature, if the President’s
 34 decisions are corrupt, then so, too, is the law that emanates from the President’s
 35 participation in the law-making process.

36 In the analysis of citizen voting we noted that the President and the legislature face
 37 distinctly different political incentives in making policy because they are elected from
 38 different constituencies. Another important factor influencing presidential behavior is
 39 the career time-horizon inherent in the office. Unlike other Constitutional positions in
 40 the government, the President is limited to two terms. This provision not only shortens
 41 the time horizon of the President, but also attenuates the responsiveness of the President
 42 to citizen preferences, especially in the second term. In addition, because of the
 43 importance, visibility, historical significance and clear accountability of the office, the

1 President's personal reputation hinges much more on the broad performance of the gov- 1
2 ernment than is the case for legislators. To the extent that the desire for respect and 2
3 status motivate human behavior, the President's behavior is likely to be influenced more 3
4 by these concerns than is the behavior of a legislator. All of these factors together im- 4
5 ply that the decisions of the President are likely to be more responsive to the overall 5
6 efficiency and effectiveness of government than are the decisions of the legislature. 6

7 Of course, for these differences in incentives and policy orientation to influence the 7
8 law, the President must have the power to affect the law, which is the issue to which we 8
9 now turn. 9

10 11 *5.1. Presidential law-making powers* 11 12 12

13 The Constitution grants the President two types of powers: 1) legislative as defined in 13
14 Article I, Section 7 (veto power), Article II, Section 2 (treaties), and Article II, Section 3 14
15 (statutory proposals and the power to convene special sessions of Congress); and 2) ex- 15
16 ecutive, as described elsewhere in Article II. In addition, nothing in the Constitution 16
17 prevents the President from using the visibility of the office and the information that the 17
18 executive branch collects to organize public support for policies. 18
19 19

20 *5.1.1. Veto power* 20 21 21

22 The ability to veto legislation is the most powerful presidential legislative tool, espe- 22
23 cially when the President faces a Congress that is controlled by the opposition. The veto 23
24 power confers more wide-reading influence than simply the authority to prevent the en- 24
25 actment of legislation that is not overwhelmingly popular in both branches of the legisla- 25
26 ture. Both actual vetoes (Cameron, 2000) and veto threats, either implicit (see Matthews, 26
27 1989; Cameron and Elmes, 1995; McCarty, 1997) or explicit (Ingberman and Yao, 27
28 1991), provide the President with significant leverage in shaping the final contours of 28
29 legislation. This leverage is particularly useful in constraining and influencing congres- 29
30 sional policy initiatives during periods when the President is not a member of the party 30
31 that controls Congress (Kiewiet and McCubbins, 1988; Kernell, 1991). Even during pe- 31
32 riods of unified partisan control, the veto stabilizes policy (Hammond and Miller, 1987; 32
33 Brady and Volden, 1998; Krehbiel, 1998). If the President prefers policies that are closer 33
34 to the status quo (or reversion) than Congress, the veto is a very powerful tool. 34

35 Nevertheless, the efficacy of the Presidential veto is limited. Although the veto en- 35
36 ables the President to limit the departure of new laws from the reversion point, it does 36
37 not give the President leverage to pull policy further from the reversion point than 37
38 Congress prefers. Kiewiet and McCubbins (1988) demonstrate the limits of this "asym- 38
39 metric" veto power on appropriations decisions. They show that the President, while 39
40 able to use the veto to limit congressional appropriations, cannot use the veto to ex- 40
41 tract appropriations that exceed the amount preferred by Congress. Furthermore, the 41
42 President's ability to use the veto successfully is tied to the President's "resources" 42
43 (presidential popularity and the seat share of the President's party in Congress) and the 43

1 “political environment” (when a bill is enacted in relation to the election cycle) (Rohde 1
2 and Simon, 1985; Wooley, 1991). 2

3 The President’s veto power is also limited because the President may face elec- 3
4 toral punishment for vetoing legislation. Groseclose and McCarty (2001) show that, 4
5 on average, presidential approval drops significantly following vetoes, particularly dur- 5
6 ing periods of divided government. This argument implies that Congress may be able 6
7 to use the veto power against the President by passing legislation that harms a key 7
8 constituency of the President’s party, thereby forcing the President to lose support re- 8
9 gardless of whether the bill is signed or vetoed (Gilmour, 1995, Ch. 4, 1999). 9

10
11 5.1.2. Treaty power 11

12
13 Article II, Section 2, of the Constitution grants the power to negotiate treaties to the 13
14 President, but it also states that two thirds of the Senate must concur for a treaty to be 14
15 enforceable. The Senate has, on occasion, rejected treaties that the President negotiated 15
16 (see Helbich, 1967). In other cases, the Senate has adopted only part of a treaty or rati- 16
17 fied only an amended version. Thus, the constitutional requirement of Senate approval 17
18 limits the President’s authority in foreign affairs (Glennon, 1983). 18

19 Congress sometimes passes so-called “fast-track” legislation that commits it to vote 19
20 on the treaty as proposed by the President without amendment or condition, but this 20
21 legislation, because it requires passage in both the House and Senate, requires that the 21
22 House as well as the Senate be given the opportunity to ratify the treaty. Thus, the 22
23 power granted by fast track is, to some degree, offset by making the House a second 23
24 veto player. Furthermore, some treaties require further legislation and appropriations to 24
25 be effectively implemented, and Congress can effectively veto a treaty by failing to pass 25
26 these bills. 26

27 Finally, presidents have increasingly used executive agreements with other countries 27
28 as a means of skirting the treaty process entirely (Moe and Howell, 1999a). We discuss 28
29 this topic below in Section 5.2.2. 29

30
31 5.1.3. Legislative proposal power 31

32
33 Though not a member of the legislature, the President frequently drafts legislation and 33
34 proposes it to Congress.¹⁵ In doing so, and most notably in formulating yearly budget 34
35 proposals, the President can make use of many bureaucratic resources (the OMB, for 35
36 example; see Hecló 1975, 1977). Yet, this proposal power is weak. 36

37 The proposal power of the President is conditional upon congressional consent. Some 37
38 of the most important proposal powers of the President, such as budget and tax propos- 38
39 als, are requested by statutes that specify the matters to be addressed in the proposals. 39

40
41
42 ¹⁵ Though Presidents cannot formally introduce a bill in Congress, they routinely introduce legislation by 42
43 way of a member of Congress of the President’s party, who is the official sponsor of the legislation. 43

1 Moreover, all executive legislative proposals must pass through the standard gauntlet of 1
2 congressional veto gates, starting with substantive committees. These proposals always 2
3 receive extensive scrutiny and revision by Congress (Kiewiet and McCubbins, 1991). 3

4 Presidential proposal power depends on the partisan composition of the legislature 4
5 and the presidency. In the post-war era, the raw number of “important” laws does 5
6 not vary significantly between Democratic and Republican presidential administrations 6
7 (Mayhew, 1991), yet Democratic Presidents have proposed considerably more legisla- 7
8 tion than Republican Presidents. Moreover, Presidents of both parties have proposed 8
9 more legislation under unified government (Browning, 1986, p. 80). The willingness 9
10 to propose legislation apparently is influenced by its anticipated success, and scholars 10
11 have long noted that Presidents are much more successful in the legislature if their party 11
12 controls Congress (Edwards, 1980, 1989; Bond and Fleisher, 1990; Peterson, 1990).¹⁶ 12
13 Ronald Reagan, for example, faced a Democratic House during his terms as President. 13
14 While Reagan was successful in proposing increases in defense programs, he failed to 14
15 reduce spending on domestic social programs. Reagan’s differential success in domestic 15
16 and defense spending contributed to the rapidly increasing budget deficits of the 1980s 16
17 (McCubbins, 1991).¹⁷ 17
18

19 *5.1.4. Coalition building power* 19

20
21 Beyond vetoes and treaties, the President’s most effective law-making tools are the 21
22 informal resources that aid him in building coalitions. In the modern age of media, 22
23 the President’s visibility enables the President to pressure members of Congress to 23
24 support administration proposals by “going public” (Kernell, 1986; Edwards, 1983; 24
25 Canes-Wrone, 2001). That is, the President can appeal to the public, playing on the 25
26 electoral concerns of members of Congress, to force legislative action on a bill. 26

27 Certainly, there are instances where public appeals are effective, notably during the 27
28 budget battles of the 1980’s and 1990’s; however, public appeals also have limits. First, 28
29 the President’s position must enjoy sufficient popular support to cause Congress to be 29
30 concerned. Second, even with public support, the President can only go public so many 30
31 times before the public stops paying attention (Popkin, 1991). Finally, the President 31
32 is not the only player who can go public. The President must also consider the elec- 32
33 toral consequences of a dispute with Congress, and if congressional leaders can capture 33
34 the media’s attention, Congress can parry the president’s moves by also going public 34
35 (Groseclose and McCarty, 2001). 35

36 The President also can build coalitions by doling out Presidential patronage, in 36
37 the form of fundraising assistance and campaign support (Cohen, Krassa, and Ham- 37
38 man, 1991; Davidson and Oleszek, 2000), well-publicized visits to the White House 38
39

40
41 ¹⁶ For rejoinders to Mayhew (1991), which point to the difference in the content of legislation between 41
42 periods of unified and divided government, see Sundquist (1992), Lohmann and O’Halloran (1994), Epstein 42
43 and O’Halloran (1996, 1999), Edwards, Barrett, and Peake (1997), Binder (1999), and Cameron (2000). 42

43 ¹⁷ On this point, see also Cox and McCubbins (1991) on tax policy since the New Deal. 43

(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 19th 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

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.

1 Nevertheless, Executive Orders as a source of law have important limitations. Most 1
2 executive orders have little importance, so that their overall success rate is not a particu- 2
3 larly revealing statistic. Moreover, the President is constrained by the *Youngstown Steel* 3
4 decision, which, among other things, states that Presidential actions that directly violate 4
5 the will of Congress are illegal. Furthermore, in issuing executive orders the President 5
6 is subject to limitations in dealing with the bureaucracy in the form of legislated ad- 6
7 ministrative structures and procedures, which are designed to protect the influence of 7
8 Congress over agency decision-making (McCubbins, Noll, and Weingast, 1987, 1989). 8

9 Some executive orders arise from statutory authority that has been delegated by 9
10 Congress. In these cases, executive orders either fulfill a statutory obligation or imple- 10
11 ment a statutory authority, and so are simply the result of effective policy-making 11
12 delegations by Congress, rather than the President's means of end-running the opposi- 12
13 tion. 13

14 Once a President issues an executive order, in most cases expenditures are likely to be 14
15 necessary to carry it out. Congress can undermine the order by simply writing into the 15
16 relevant appropriations bill that funds cannot be spent for the purpose of carrying out 16
17 the order. The President can veto the appropriations bill, but the President's veto threat 17
18 is usually not an effective means for increasing appropriations. Furthermore, a President 18
19 who uses delegated authority to issue executive orders that a majority of Congress finds 19
20 repugnant risks being denied such delegated authority in the future. Hence, to maximize 20
21 influence over many issues, a President will think carefully about departing from the 21
22 range of acceptable outcomes according to the preferences of congressional majorities. 22

23 From the preceding discussion, the value of executive orders as a source of presi- 23
24 dential policy control can be summarized. First, executive orders can be an important 24
25 source of presidential policy authority in areas where Congress itself is unable to act 25
26 either initially to produce a statute or reactively to prohibit implementation. These cases 26
27 enable the President to take advantage of a circumstance in which the diversity of pref- 27
28 erences in Congress causes policy gridlock. Second, for a variety of reasons Congress 28
29 may prefer to let the President control the details of policy implementation. In areas 29
30 where the outcome of policy actions is uncertain, Congress may regard the executive as 30
31 being more flexible to respond to new information (Bawn, 1995), and if the policy is 31
32 highly controversial, Congress may use delegation to increase the political accountabil- 32
33 ity of the President (and lessen the accountability of Congress) for the ultimate policy 33
34 outcome (Fiorina, 1982). In these cases Congress regards delegation of authority to be 34
35 in its collective interest, and can subsequently use the appropriations process to overturn 35
36 presidential decisions that are unacceptable to a majority of legislators. 36

37 38 5.2.2. *Executive agreements* 38 39 39

40 In order to overcome the constraints that the Senate imposes on treaty ratification, Pres- 40
41 idents often opt to negotiate executive agreements instead. Executive agreements allow 41
42 Presidents to enter into arrangements with other countries without Senate approval, 42
43 thereby enabling Presidents to sidestep treaty rejections. As Cronin (1980) empha- 43

1 sizes in discussing the “imperial presidency,” Presidents used executive agreements 1
2 throughout the 1960’s and 1970’s to arrange important mutual-aid and military-base 2
3 agreements with other countries. As O’Halloran (1994) points out, executive agree- 3
4 ments often require implementing legislation and so constitute a form of legislative 4
5 delegation. Accordingly, executive agreements are therefore subject to amendment and 5
6 authorization by both the House and the Senate. In essence, to obtain an executive 6
7 agreement, the President trades a 2/3 voting requirement in the Senate for a simple ma- 7
8 jority in both chambers. As a result, during periods of divided control, Congress places 8
9 tighter reins on the President’s authority to negotiate executive agreements (Lohmann 9
10 and O’Halloran, 1994).¹⁸ 10

11 5.2.3. *Executive oversight* 11

12 As the Chief Executive Officer, the President controls hundreds of agencies and seem- 12
13 ingly unlimited resources. Among the executive powers granted to the President in 13
14 Article II of the Constitution are the position of commander in chief of the army and the 14
15 authority to require written reports from heads of executive agencies. Furthermore, as a 15
16 practical matter, almost all appointment powers are also vested in the President. 16
17 17

18 As Chief Executive, the President seems to have a powerful advantage in policy- 18
19 making. In reality, the President’s control over agencies is far less extensive than a 19
20 CEO’s control of a corporation. Because Congress controls the budget, the President 20
21 lacks funds to pay for programs and authority to sanction agencies by withholding 21
22 appropriations; legislation controls expenditures. Furthermore, legislation determines 22
23 administrative structure and process (McCubbins, Noll, and Weingast, 1987, 1989). Bu- 23
24 reaucratic structure and process is created with the aim of making bureaucratic agencies 24
25 responsive to the will of the legislature, not just the President (Weingast and Moran, 25
26 1983; McCubbins and Schwartz, 1984; McCubbins, 1985; McCubbins and Page, 1987; 26
27 Calvert, Moran, and Weingast, 1987; Epstein and O’Halloran, 1999). 27
28 28

29 The disparity between Congress and the President is exemplified by comparing 29
30 the Office of Management and Budget (OMB) in the Executive Office of the Pres- 30
31 ident (Pfiffner, 1979; Moe, 1985), the General Accounting Office (GAO) and Con- 31
32 gressional Budget Office (CBO), which work directly for Congress. GAO investigates 32
33 federal programs and audits expenditures, while the CBO estimates the budgetary im- 33
34 pact of proposed legislation and provides economic expertise about anticipated rev- 34
35 enues and expenditures of cyclically sensitive policies. Both CBO and GAO also 35
36 provide economic evaluations of specific policies. OMB performs the same functions 36
37 and prepares the President’s annual budget, but despite its formal location in the Ex- 37
38 ecutive Office of the President, it exists at the pleasure of Congress and is much 38
39 smaller than the GAO. As much as anything else, OMB aids Congress in formu- 39
40 lating the budget—if it did not serve this purpose, it would not exist (Heclo, 1984; 40
41 Kiewiet and McCubbins, 1991). 41

42 42
43 ¹⁸ See Cronin (1980) on Congress limiting the President’s use of executive agreements. 43

1 5.2.4. *Appointments* 1

2
3 The President controls the top administrators in the executive branch. Senate confirma- 3
4 tion is required of nominees for most top posts. Because Senate approval is virtually 4
5 always granted, even in times of partisan division between the President and the Sen- 5
6 ate, many conclude that the President determines the policy preferences of political 6
7 appointees (Moe, 1985), but others conclude that the Senate has considerable influence 7
8 (Snyder and Weingast, 2000). The fact that Presidential nominees are rarely rejected 8
9 does not necessarily mean that the Senate does not influence appointments. In some 9
10 cases, at least, rejection of an appointment is costly to the President. For example, the 10
11 process of rejecting a nominee gives the President's opponents a very public forum for 11
12 criticizing the policies and judgment of the President. Moreover, a rejected nominee's 12
13 embarrassment makes potential nominees more reluctant to let their names be sent for- 13
14 ward. Hence presidents usually succeed in appointments, but the reason may be that 14
15 they allow the Senate to have influence.¹⁹ 15

16 The President can fire most high-level officials, the exceptions being political ap- 16
17 pointees to independent agencies and positions that are reserved for the civil service. 17
18 The President can influence the civil servants who can not be fired by controlling the 18
19 allocation of bonuses among the Senior Executive Service and their promotion to the 19
20 Senior Executive Service, which are the jobs with the greatest prestige and highest pay. 20

21 The President's authority to make appointments is an important source of policy in- 21
22 fluence, but is nevertheless subject to the same limitations that apply to executive orders 22
23 and agreements. While a President can pick executives who prefer particular policies 23
24 and fire those who do not, the decisions of Presidential appointees are constrained by 24
25 statutory mandates, the appropriations process and administrative procedures. Here the 25
26 power of the President is more negative than positive: an agency can slow down im- 26
27 plementation of a program or fail to spend all of its appropriations, but it is unlikely to 27
28 succeed in carrying out policies that are not supported by its statutory mandate or the 28
29 requirements of its statutory decision-making procedures. 29

30 31 5.3. *Assessing of the role of the president* 31

32
33 PPT of the role of the President provides good news and bad news. The good news is 33
34 that the Constitutional separation of powers achieves two useful ends: the system of 34
35 checks and balances grants considerable power to influence the law, and the incentives 35
36 created by the method of electing the President counteract the excessive responsiveness 36
37 to particularistic interests in the legislature. The bad news, of course, is that the law- 37
38 making powers of the President are not as strong as those of the legislature. In essence, 38
39

40
41 ¹⁹ As McCarty (2004) shows, the willingness of Congress to delegate authority to an agency depends on 41
42 the harmony of preferences between the agency and Congress. If an appointee reflects only the President's 42
43 authority by appointing someone who is more compatible with congressional interests. 43

1 the President has the authority to use the office to influence Congress and even to make 1
 2 policy within a range of discretion that Congress will tolerate, but, in the end, the role 2
 3 of Congress in making law is dominant. Presidents can constrain pork, rent-seeking and 3
 4 morselization, and within limits can push policy in the direction of economic efficiency 4
 5 and universalistic goals, but they cannot prevent these inefficient activities. 5

6 An important issue with respect to the power of the President is the degree to which 6
 7 the President controls the bureaucracy. Because legislation frequently contains broad 7
 8 delegations of authority to agencies, the ability of the President to impose more univer- 8
 9 salistic objectives in policy implementation turns the responsiveness of the bureaucracy 9
 10 to presidential policy preferences. To this issue we now turn. 10

11 6. The bureaucracy 11

12 12
 13 13
 14 14
 15 15
 16 During the 20th Century, the debate over the nature of the bureaucracy pitted Weberi- 16
 17 ans (Weber, 1946) and Progressives (see Landis, 1938; Mashaw, 1985a, 1985b, 1994, 17
 18 1997; Moe, 1987, 1989), who favored giving substantial law-making power to elite 18
 19 civil servants, against Democrats (not the party, but a school of thought about the demo- 19
 20 cratic legitimacy of delegation to the bureaucracy), who favor popular and legislative 20
 21 sovereignty (Shapiro, 1964; and Woll, 1977). The issue animating the original debate 21
 22 between Progressives and Democrats was whether professional experts without the en- 22
 23 cumbrances of political pressure should undertake administration, or whether elected 23
 24 officials should take as much control as possible of the details of policy, only reluc- 24
 25 tantly delegating authority to bureaucrats and then only with detailed instructions and 25
 26 safeguards to prevent the bureaucracy from seizing control of policy. 26

27 Shapiro (1964, p. 45) summarizes the point of contention between Progressives and 27
 28 Democrats: “Somewhere in the examination of every agency of American government, 28
 29 we may wish to ask to what extent the structure and function of this agency accords with 29
 30 whatever theory of democracy we have.” Woll (1977) offers the typical worry about 30
 31 the expanded role of the bureaucracy advocated by the Progressives. “In this respect 31
 32 the development of a bureaucracy that is not elected and that exercises broad political 32
 33 functions has apparently resulted in the breakdown of a primary constitutional check on 33
 34 arbitrary governmental power” (p. 29). 34

35 The debate between Progressives and Democrats, though framed in normative terms, 35
 36 is rooted in a disagreement about the positive theory of relationships among citizens, 36
 37 elected officials and bureaucrats. Whether elected officials *should* delegate authority 37
 38 to an expert bureaucracy hinges on another question. As a matter of positive analysis, 38
 39 *can* elected officials control the bureaucracy in the sense that the policy preferences 39
 40 of the bureaucracy reflect the policy agreement among legislators that gave rise to the 40
 41 statutory law that empowered the agency? If the answer to this question is yes, then 41
 42 elected officials can enlist the technical expertise of civil servants without ceding to 42
 43 them control of policy. 43

1 Whether the control of the bureaucracy by elected officials is desirable in turn hinges 1
2 on two questions addressed in preceding sections. First, as a matter of positive analy- 2
3 sis, do elections and the legislative process cause statutes to reflect the preferences of 3
4 citizens? If the answer to this question is yes, then the decisions of bureaucrats are re- 4
5 sponsive to citizens. Second, as a matter of normative analysis, are the preferences of 5
6 citizens as reflected in elections normatively compelling? If the answer to this question 6
7 is yes, then bureaucratic delegation is normatively compelling as well since the chain of 7
8 arguments implies that delegation marshals the skills of analysts to advance the norma- 8
9 tively attractive goals of citizens. 9

10 The schools of thought about bureaucracy differ according to how they answer each 10
11 of these questions. Explicating these differences and the insights that PPT brings to this 11
12 debate are the subjects of this section. 12
13 13

14 *6.1. Schools of thought on bureaucratic autonomy* 14 15 15

16 There are five distinct modern schools of thought with respect to the debate about the 16
17 desirability of delegating policy-making (hence law-making) authority to a bureaucracy. 17
18 These five schools are linked to the eight general schools of legal thought discussed in 18
19 Section 2. Progressives and their New Deal successors argued that the bureaucracy is 19
20 the only forum in which technocratic, scientific, apolitical policy-making is feasible. 20
21 Landis (1938), a leading Realist, argued: “The administrative process is, in essence, our 21
22 generation’s answer to the inadequacy of the judicial and the legislative processes.” This 22
23 school favors broad, vague delegations to a bureaucracy populated by civil servants who 23
24 are hired and promoted on the basis of merit. 24

25 In the early 1950s, Pluralists, exemplified by Truman (1951) and building on the 25
26 work of Bentley (1908), replaced Progressives as the dominant school of thought about 26
27 the role of bureaucracy. The premises of Pluralism are similar to the Sociological Ju- 27
28 risprudential School and Realists in that they believe that law is policy and that making 28
29 policy is necessarily political. Pluralists also believe that bureaucrats (and the courts) 29
30 are competent to make political decisions that serve a general public interest. To Plural- 30
31 ists, the bureaucracy is just another arena where groups compete and communicate their 31
32 interests so that bureaucracy is a mechanism for forging deals among competing social 32
33 interests. Pluralists view this competition as taking place in a political environment in 33
34 which power is distributed among antagonistic interests, so that the outcome is likely to 34
35 be a compromise of interests that serves the social good. 35

36 Four newer schools of thought have responded to different components of the opti- 36
37 mistic picture painted by the Progressives and Pluralists. These are Public Choice, Civic 37
38 Republicans, New Progressives and Neodemocrats. 38

39 The view of Public Choice about bureaucracy is derived from their skeptical view 39
40 about democracy. Public Choice scholars argue that special interests, not public in- 40
41 terests, capture the benefits of government intervention (Buchanan and Tullock, 1962; 41
42 Kolko, 1965; MacAvoy, 1965; McConnell, 1966; Lowi, 1969; Stigler, 1971). These 42
43 scholars extend this argument to bureaucrats by regarding them as another device for 43

1 creating and allocating rents, either for their own benefit (Niskanen, 1971) or for the 1
2 benefit of elected officials (Stigler, 1971) to the detriment of economic efficiency and 2
3 society as a whole. Mashaw (1997, p. 4) has characterized this view of American pol- 3
4 itics “somewhat hyperbolically, as a world of greed and chaos, of private self-interest 4
5 and public incoherence. It is this vision that provides the primary challenge for today’s 5
6 designers of public institutions; for it is a vision that makes all public action deeply 6
7 suspect.” 7

8 Public Choice scholars level two main criticisms against bureaucracy. First, bureau- 8
9 crats, in maximizing their personal welfare, have bargaining power over elected officials 9
10 and use this power to extract budgets that are in excess of the amounts necessary to 10
11 provide services (Niskanen, 1971). Second, special interests dominate agencies, either 11
12 because the bureaucrats or their elected over-seers sell policy to the highest bidder. The 12
13 inevitability of bureaucratic implementation costs leads these scholars to advocate strict 13
14 limits to the size and scope of government and “undelegation” of legislative authority 14
15 to avoid selfish misuse of discretion (Lowi, 1969). 15

16 While Public Choice is by no means the dominant school of thought about either 16
17 bureaucracy or democracy, its critiques have been taken seriously by scholars of other 17
18 schools. The other responses to Progressives and Pluralists actually accept some aspect 18
19 of the Public Choice critique, but place it in a broader context that soften or even reverse 19
20 its harsh conclusions about the efficacy of democratic government. 20

21 Two new forms of Progressivism resurrect the social desirability of bureaucracy while 21
22 incorporating at least the possibility of democratic pathologies as put for by Public 22
23 choice scholars. The first is called Civic Republicanism and the second is the New 23
24 Progressivism. 24

25 In a twist on Jacksonian Republicanism, Sunstein (1990) and Seidenfeld (1992) argue 25
26 that the bureaucracy can lead citizens in policy deliberation and, moreover, in doing so 26
27 can instill “civic republicanism.” Civic Republicans see democracy as coming in two 27
28 flavors. Day-to-day politics is not carefully followed by most citizens, and as a result is 28
29 capable of the pathologies noted by the critics of democracy, whether Public Choice or 29
30 the others that were summarized in Section 3. But “deliberative democracy” arises when 30
31 citizens think seriously about policy and engage in public investigation and discussion 31
32 about the consequences of alternative policy actions. Civic Republicans argue that in 32
33 deliberative processes, citizens are not as likely simply to pursue narrow, short-sighted 33
34 personal interests, and more likely to take into account the general welfare of society. 34
35 Thus, one task of society is to maximize the extent to which policy is the outcome of 35
36 deliberation. 36

37 Civic Republicans view delegation to properly designed agencies as a mechanism for 37
38 creating deliberative democracy. Specifically, Seidenfeld argues that “given the current 38
39 ethic that approves of the private pursuit of self-interest as a means of making social 39
40 policy, reliance on a more politically isolated administrative state may be necessary to 40
41 implement something approaching the civic republican ideal.” 41

42 Two positive theoretical hypotheses underpin the normative prescription of Civic Re- 42
43 publicans. First, elections and the process of law-making by elected officials do a poor 43

1 job of transmitting citizen preferences into statutes. In this regard Civic Republicans 1
 2 resemble Public Choice in rejecting the optimism of Pluralists. Second, a largely inde- 2
 3 pendent bureaucracy that must satisfy procedural requirements to interact with citizens 3
 4 produces decisions that are more responsive to citizen preferences. In this case, Civic 4
 5 Republicans reject Public Choice and resemble Pluralists in that they emphasize the rep- 5
 6 resentation of citizen interests within the bureaucratic process rather than the technical 6
 7 expertise of a well-selected civil service. 7

8 New Progressivism, most completely explicated by Mashaw (1985a, 1985b, 1994, 8
 9 1997), also rejects pessimism about bureaucracy as a necessary feature of delegation. 9
 10 Mashaw (1997, p. 206) argues that agencies can be constructed to be competent and 10
 11 responsive to public desires, but not because the process is deliberative. A distinctive 11
 12 feature of New Progressivism is that it recognizes that not all bureaucratic delegations 12
 13 do lead to policy implementation that serves a plausible definition of the public interest. 13
 14 But New Progressives tend to see these examples as exceptions that can be avoided. 14

15 One cause of bureaucratic failure is simply mistakes—errors by elected officials in 15
 16 setting up the procedures and powers of agencies (Breyer, 1982, 1993; Mashaw, 1983). 16
 17 Here the solution is not unlike the prescription advocated by Civic Republicans: elected 17
 18 officials should take greater care (engage in more deliberation) in designing policies. 18
 19 The other source of bureaucratic failure is invisible day-to-day involvement of elected 19
 20 officials in the affairs of agencies, typically in responding to a demand for service from 20
 21 an unhappy supporter (Mayhew, 1974; Mashaw, 1994). This problem can be mitigated 21
 22 by ensuring the oversight is rare and politically visible, such as by enacting sunset provi- 22
 23 sions and making multi-year appropriations and authorizations. Thus, New Progressives 23
 24 propose that agencies should have broad and vague mandates and that Congress should 24
 25 exercise more care in designing policies and methods for oversight. 25

26 Neodemocrats (not the contemporary branch of the party, but a reference to the De- 26
 27 mocrat School) agree with Pluralists and Democrats that the bureaucracy is political.²⁰ 27
 28 Unlike Progressives and Pluralists, Neodemocrats agree that excessive or uncontrolled 28
 29 delegation undermines democratic legitimacy (Shapiro, 1964; Melnick, 1983). But un- 29
 30 like Democrats and like Progressives and Pluralists, Neodemocrats see delegation as a 30
 31 potentially valuable way to negotiate political compromises and to bring technical ex- 31
 32 pertise to making law, and therefore as a necessary part of modern government. In short, 32
 33 Neodemocrats see delegation as having costs (as emphasized by Democrats and Public 33
 34 Choice) and benefits (as emphasized by Progressives and Pluralists). 34

35 The distinctive feature of Neodemocrats is that they also argue that elected offi- 35
 36 cials can and do control the policies that are pursued by agencies (early examples are 36
 37 Wilmerding, 1943 and Fenno, 1973). These scholars focus their attention on study- 37
 38 ing how democratic, principally legislative, control of the bureaucracy comes about. 38
 39 39

40
 41 ²⁰ The term “Neodemocrat” emphasizes that this group favors popular control of administration. These schol- 40
 42 ars adopt the Progressives’ premise that political problems can be mitigated through the design of political 41
 43 institutions, so they could be called Neoprogressives. We eschew the latter to avoid confusion with the self- 42
 44 proclaimed New Progressive School, discussed below. 43

1 The recent work uses PPT to analyze the structure and process of legislative delegation 1
2 (see, for example, Fiorina, 1977a; Cohen, 1979; Wilson, 1980; Fisher, 1981; Weingast 2
3 and Moran, 1983; McCubbins and Schwartz, 1984; Weingast, 1984; McCubbins, 1985; 3
4 McCubbins and Page, 1987; Moe, 1987; Noll, 1983; McCubbins, Noll, and Weingast, 4
5 1987, 1989; Kiewiet and McCubbins, 1991; Bawn, 1995, 1997; Epstein and O'Halloran, 5
6 1996). 6

7 The debate amongst scholars of delegation and the bureaucracy revolves around the 7
8 efficacy of democratic institutions. Progressives and their recent offshoots see elections 8
9 and elected officials as at best capable of providing only general directions about poli- 9
10 cies, but unable to do well in specifying the details (c.f. Abramson, 1994 and Posner, 10
11 1995). Citizens and elected officials lack the information available to administrative 11
12 agencies. Elected officials, once they get past the general goals of policy, are susceptible 12
13 to capture by a special interest when they tackle the largely invisible tasks of designing 13
14 policy details and engaging in day-to-day oversight of agencies. Due to these limita- 14
15 tions of the democratic system, old and new Progressives argue that the details of policy 15
16 implementation should be delegated to apolitical bureaucratic experts. 16
17

18 This conclusion is directly at odds with that of Public Choice, which sees bureau- 18
19 cracy as a seeker of rents and server of special interests. This conclusion also is at odds 19
20 with the analysis of Neodemocrats, who agree that broad bureaucratic discretion repre- 20
21 sents an abdication of a legislative responsibility and allows the usurpation of popular 21
22 sovereignty. But Neodemocrats also argue that elected officials design agencies so that 22
23 generally their objectives are served. Whether this political control of bureaucratic de- 23
24 cisions works for good or ill depends on whether the goals that the legislature pursues 24
25 and embeds in agencies are responsive to citizens. 25

26 The normative and positive debates regarding the role of the bureaucracy in policy- 26
27 making closely parallel each other. Weber and the Progressives argue that policy-making 27
28 is best left to apolitical, appointed administrators, because politicians lack the exper- 28
29 tise, patience and public spirit necessary to make good public policy. In line with this 29
30 normative argument is positive analysis claiming that much of the modern American 30
31 bureaucracy is independent of legislative and executive oversight and control. Much of 31
32 Public Choice scholarship accepts the positive argument that bureaucrats have great au- 32
33 tonomy, but then claims that bureaucrats use their unbridled leeway in policy-making to 33
34 allow themselves to be captured by special interests, to shirk their duties, and to engage 34
35 in corruption (Tullock, 1965; Niskanen, 1971). 35
36

37 PPT seeks to develop a theory of bureaucratic behavior that takes into account both 37
38 the objectives of elected officials in delegating policy-making authority and the in- 38
39 struments available to elected officials to solve the agency problem that accompanies 39
40 delegation. In this sense, PPT is most closely aligned with the view of delegation put 40
41 forth by Neodemocrats. The resulting theory describes how the Congress and the Pres- 41
42 ident influence bureaucratic law-making, which has led to a new view of administrative 42
43 law. We now turn to a review of this work. 43

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 re-election 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, Gellhorn, and Robinson, 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, 1981a, 1981b; 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).

6.2.2. 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

1 *in advance*.²¹ This puts the principal in the position of having to respond to the action 1
 2 *ex post* after its consequences are observed, rather than being able to veto it *ex ante* 2
 3 on the basis of accurate expectations about its likely effects. The second condition is 3
 4 a *conflict of interest* between the principal and the agent. If the two have the same 4
 5 interests, or if they share common goals, then the agent will likely choose an outcome 5
 6 that the principal finds satisfactory. The third condition is that the principal *lacks a* 6
 7 *fully effective means of correction*, in the sense that the principal cannot overturn the 7
 8 decision after the agent makes it without incurring cost. Conventionally, the lack of 8
 9 an effective means of reversing the agent's decisions frequently is said to be due to 9
 10 the agent's expertise—the agent is chosen because of expertise, so the principal must 10
 11 acquire expertise or hire another expert to evaluate and then alter the agent's choice. 11

12 Members of Congress may lack an effective check over agency decisions because 12
 13 of the separation of legislative powers (held jointly by Congress and President) and 13
 14 executive power (held by the President, but supervised by the Congress). This sets up 14
 15 the so-called “multiple principal” problem. The legislative process in the United States 15
 16 ensures that the consent of at least majority coalitions in the House and Senate, plus 16
 17 either the President or additional members of both chambers, is given before a proposal 17
 18 becomes law. Because these principals must all agree to legislation—even legislation 18
 19 to check an agency's actions—the agency may be unconstrained within some sphere 19
 20 of activity. Broad agency discretion may exist even if all principals match the agency's 20
 21 expertise. The breadth of agency discretion depends on the extent of conflicting inter- 21
 22 ests among the many principals. An agency needs only to make a single “veto player” 22
 23 (someone who can block legislation) sufficiently happy to sustain the agency's policy 23
 24 against an override or other form of punishment (McCubbins, Noll, and Weingast, 1989; 24
 25 Ferejohn and Shipan, 1990; Gely and Spiller, 1990, 1992; Ferejohn and Spiller, 1992).²² 25

26 Agencies take many types of actions, such as proposing rules and adjudicating cases. 26
 27 Often these actions are taken without the appearance of congressional oversight, and 27
 28 therefore many deem these bureaucrats as unaccountable. Of course, when agencies 28
 29 make decisions, their actions are not necessarily final. Congress can overturn their 29
 30 decision by passing new legislation, which can be as simple as a brief rider on an ap- 30
 31 propriations bill that orders the agency not to spend any funds enforcing a particular 31
 32 rule. Even though Congress does not frequently override agencies, the possibility that 32
 33 they can do so creates an incentive for the agency to take the preferences of members 33
 34 of Congress into account. In a similar fashion, the threat of rewarding or sanctioning an 34
 35 agency for its actions may also create incentives for the agent to respect the wishes of 35
 36 members of Congress. These factors constitute an *ex post* form of control, by which is 36
 37 meant possible actions that can be taken after the agency has made a decision. The next 37
 38 section explores how *ex post* controls resolve some aspects of the delegation dilemma. 38
 39

40 ²¹ Informed consent means that the principle possesses at least as much information as the agent about the 40
 41 consequences of the action. 41

42 ²² Of course, the President, courts and often individual House and Senate committees have the ability to 42
 43 unilaterally reject a proposal or punish an agent. 43

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, p. 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

1 non-complying behavior to be not worth the cost of detecting and correcting. The proper
 2 response to this problem by Congress is to find cost-minimizing methods to monitor
 3 agencies, to which we now turn. 3

4 6.2.4. *Solving the agency problem: oversight* 5

6
 7 The information requirement for evaluating policy implementation is sometimes inter- 7
 8 preted to mean that in order to ascertain whether an agency is doing its job, political 8
 9 leaders must engage in proactive oversight: they must gather enough information to as- 9
 10 sess whether an agency is producing good solutions to the problems that it confronts. 10
 11 This idea is false, however. Legislators do *not* need to master the technical details of 11
 12 policies in order to oversee effectively an agency's actions. Legislators need only to 12
 13 be capable of collecting and using enough information to reach reasonable conclusions 13
 14 about whether an agency is serving their interests. Moreover, if legislators *can* engage in 14
 15 effective oversight, they need not always *actually* engage in oversight to cause agencies 15
 16 to take their preferences into account in making decisions. The probability of detecting 16
 17 noncompliance with legislative purpose need not be 100 percent to cause agencies to 17
 18 ponder the risk of noncompliance. 18

19 Congressional oversight takes two forms: "police patrol" and "fire alarm" (McCub- 19
 20 bins and Schwartz, 1984). In the former, members of Congress actively seek evidence of 20
 21 misbehavior by agencies, looking for trouble much like a prowling police car. In the lat- 21
 22 ter, members wait for signs that agencies are improperly executing policy: members use 22
 23 complaints to trigger concern that an agency is misbehaving, just as a fire department 23
 24 waits for citizens to pull a fire alarm before looking for a fire.²³ Conventional wisdom 24
 25 nearly exclusively assumes that oversight is of the police patrol form. 25

26 Fire-alarm oversight has several characteristics that are valuable to political leaders. 26
 27 To begin, leaders do not have to spend a great deal of time looking for trouble. Waiting 27
 28 for trouble to be brought to their attention ensures that if it exists, it is important enough 28
 29 to cause complaints. In addition, responding to the complaints of constituents allows 29
 30 political leaders to advertise their problem-solving role and to claim credit for fixing 30
 31 problems (Fiorina and Noll, 1978). In contrast, trouble discovered by patrolling might 31
 32 not concern any constituents and thus would yield no electoral benefit. Thus, political 32
 33 leaders are likely to prefer the low-risk, high-reward strategy of fire-alarm oversight to 33
 34 the more risky and costly police-patrol system. 34

35 The logic of fire-alarm oversight can be incorporated into the one-dimensional model 35
 36 of policy choice, and shown in Figure 6.1. Let M represent the policy goal of the leg- 36
 37 islation that gives an agency its mandate, and A represent the preferred policy of the 37
 38 agency. Also assume that the enabling legislation grants standing in the process of the 38
 39 agency to a group that has a most-preferred policy of M. Thus group, at some cost K, 39
 40

41
 42 ²³ The intuition behind fire alarm oversight has also been formally modeled in the context of the judiciary's 42
 43 appeals process (Shavell, 2004). 43

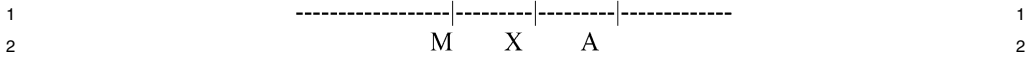


Figure 6.1. Controlling agencies with fire alarms.

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, 1999). These requirements force agencies to collect

1 information to guide its decisions, but this goal could be achieved in much less elaborate 1
2 ways—including judicial review on the basis of the balance of evidence supporting the 2
3 agency’s position. The important additional insight about these procedures is that they 3
4 facilitate the political control of agencies in five ways. 4

5 (1) Procedures ensure that agencies cannot secretly conspire against elected officials 5
6 to present them with a *fait accompli*, that is, a new policy with already mobilized 6
7 supporters. Rather, the agency must announce its intentions to consider an issue 7
8 well in advance of any decision. 8
9

10 (2) Agencies must solicit valuable political information. The notice and comment 10
11 provisions assure that the agency learns which relevant political interests are 11
12 affected by its proposed decision and something about the political costs and 12
13 benefits associated with various actions. That participation is not universal (and 13
14 may even be stacked) does not entail political costs to members of Congress. 14
15 Diffuse groups that do not participate, even when their interests are at stake, are 15
16 much less likely to become an electoral force in comparison with those that do 16
17 participate. 17
18

19 (3) The proceeding is public, thereby enabling political principals to identify not 19
20 just the potential winners and losers of the policy but their views. Rules against 20
21 *ex parte* contact protect against secret deals between the agency and some con- 21
22 stituency it might seek to mobilize against Congress or the President. 22

23 (4) The sequence of decision-making—notice, comment, deliberation, collection of 23
24 evidence, and construction of a record to support an action—creates opportunities 24
25 for political leaders to respond when an agency seeks to move in a direction 25
26 that officials do not like. By delaying the process, Congress has time to decide 26
27 whether to intervene before a decision becomes a *fait accompli*. 27
28

29 (5) Because participation in the administrative process is expensive, it serves to 29
30 indicate the stakes of a group in an administrative proceeding. These stakes are 30
31 indicators of the resources the group can bring to bear in taking out political 31
32 reprisals against congressional principals whom they hold accountable for policy 32
33 outcomes. 33

34 These features of the APA reduce an agency’s information advantage and facili- 34
35 tate fire alarm oversight. By granting rights of participation and information to interest 35
36 groups, administrative procedures reduce an agency’s information advantage. Congress 36
37 uses the APA to delegate some monitoring responsibility to those who have standing 37
38 before an agency and who have a sufficient stake in its decisions to participate in its 38
39 decision-making process, and, when necessary, to trigger oversight by pulling the fire 39
40 alarm. In addition, administrative procedures create a basis for judicial review that 40
41 can restore the status quo without requiring legislative correction. As a result, administrative 41
42 procedures cope with the first-mover advantage of agencies. 42
43

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. 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.

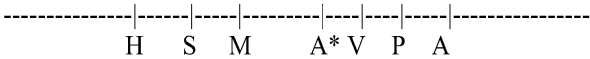


Figure 6.2. Agency power without ex ante oversight.

1 A variant of all of these results holds regardless of the relative positions of the four 1
2 major players. All that is required for ex post correction to be inadequate is that the 2
3 status quo legislative bargain differs from the preferred policy of the agency and that the 3
4 three branches have different ideal points. The agency always has some discretionary 4
5 power to move policy within the range of outcomes between the two extreme ideal 5
6 points without fear of legislative correction or punishment. 6

7 This analysis explains why most administrative procedures that have been adopted 7
8 are for the purpose of preventing non-complying behavior before it happens or through 8
9 the courts, rather than correcting it after it occurs through legislation. 9

10 In creating and funding bureaucratic agencies, the legislature anticipates the problems 10
11 just discussed. When delegating, legislators decide consciously whether to take steps to 11
12 mitigate these problems. This section examines ways that members of Congress and the 12
13 President can structure an agency's decision-making process so that it is more respon- 13
14 sive to their preferences. 14

15 One important countermeasure that Congress and the President may take to mitigate 15
16 the power of bureaucratic agenda control is the aforementioned strategy of employing 16
17 institutional checks. Checks on agency agenda power can also be created so that they 17
18 affect the agency's choice *ex ante*, that is, before it makes a proposal. In our earlier work 18
19 (McCubbins, Noll, and Weingast, 1987, 1989) we argued that tools available to political 19
20 actors for controlling administrative outcomes through process, rather than substantive 20
21 guidance in legislation, are the procedural details, the relationship of the staff resources 21
22 of an agency to its domain of authority, the amount of subsidy available to finance 22
23 participation by underrepresented interests, and resources devoted to participation by 23
24 one agency in the processes of another. 24

25 By structuring who gets to make what decisions when, as well as by establishing the 25
26 process by which those decisions are made, the details of enabling legislation can stack 26
27 the deck in an agency's decision-making. In effect, this is the same problem that we 27
28 discussed earlier in terms of a legislative majority delegating to its agents the discretion 28
29 to determine a policy agenda. We have argued that the winning coalition in Congress 29
30 will use its ability to establish the structure and process of agency decision-making to fix 30
31 the range of feasible policies. This, in turn, implies a definition for the agency's range 31
32 of policy discretion'. 32

33 For example, elaborate procedures, with high evidentiary burdens for decisions and 33
34 numerous opportunities for seeking judicial review before the final policy decision is 34
35 made, benefit groups having considerable resources for representation. When combined 35
36 with the absence of a budget for subsidizing other representation or a professional staff 36
37 for undertaking independent analysis in the agency, cumbersome procedure works to 37
38 *stack the deck* in favor of well-organized, well-financed interests (Noll, 1983). 38

39 Congress and the President can use procedural deck-stacking for many purposes. 39
40 A prominent example of how procedures were used to create a "captured" agency was 40
41 the original method for regulation of consumer product hazards by the U.S. Consumer 41
42 Product Safety Commission (CPSC). Although the CPSC was responsible for both iden- 42
43 tifying problems and proposing regulations, it was required to use an "offeror" process, 43

1 whereby the actual rule writing was contracted out. Usually the budget available to the 1
2 CPSC for creating a regulation was substantially less than the cost of preparing it. Con- 2
3 sequently, only groups willing to bear the cost of writing regulations became offerors, 3
4 and these were the groups most interested in consumer safety: testing organizations 4
5 sponsored by manufacturers or consumer organizations. Thus, this process effectively 5
6 removed agenda control from the CPSC and gave considerable power to the entities 6
7 most affected by its regulations (Cornell, Noll, and Weingast, 1976). 7

8 In 1981, Congress amended this process by requiring that trade associations be given 8
9 the opportunity to develop voluntary standards in response to all identified problems, 9
10 assuring that agenda control was never granted to consumer testing organizations. The 10
11 1981 legislation illustrates how procedures can make policy more responsive to a po- 11
12 litically relevant constituency by enhancing that special interest's role in agency proce- 12
13 dures. 13

14 The U.S. National Environmental Policy Act (NEPA) of 1969 provides another ex- 14
15 ample of how this works. In the 1960s, environmental and conservation groups in the 15
16 United States became substantially better organized and more relevant politically. By 16
17 enacting NEPA, Congress imposed procedures that required all agencies to file envi- 17
18 ronmental impact statements on proposed projects. This requirement forced agencies to 18
19 assess the environmental costs of their proposed activities. NEPA gave environmental 19
20 actors a new, effective avenue of participation in agency decisions and enabled partici- 20
21 pation at a much earlier junction than previously had been possible. 21

22 An example of the policy consequences of NEPA is its effects on decisions by the Nu- 22
23 clear Regulatory Commission (NRC) in licensing nuclear power plants (Cohen, 1979; 23
24 McNollgast, 1990). NEPA gave environmentalists an entry point into the proceedings 24
25 before the NRC for approving new projects. Initially the Atomic Energy Commission 25
26 (the predecessor to NRC) asserted that it was exempt from NEPA, but the 1971 deci- 26
27 sion in *Calvert Cliffs* required the agency to follow NEPA's requirements, and thereafter 27
28 environmental impact reports were a necessary part of the approval process. 28

29 Environmentalists used this entering wedge to raise numerous technical issues about 29
30 the risks of components of nuclear reactors, thereby dramatically slowing down the 30
31 licensing process. Although the interveners rarely won their contentions, their interven- 31
32 tions succeeded in raising the costs of nuclear power plants so dramatically that no new 32
33 plants were actually built. Between 1978 and 1995, no new nuclear plants were ordered, 33
34 and moreover, every single project planned after 1974 was cancelled (as were a third of 34
35 those ordered before 1974). 35
36

37 The 1972 California Coastal Zone Conservation Act required similar institutional 37
38 checks. The statute's objectives were to protect scenic and environmental resources 38
39 along California's coastline and to preserve public access to the beach. In this case, the 39
40 key procedure was to grant numerous bodies a veto over proposed changes in land use 40
41 in the coastal zone. Local governments were the first in line to approve or deny any pro- 41
42 posed project, then one of the six regional coastal commissions, and then the statewide 42
43 coastal commission reviewed all permits passed by the local governments. The commis- 43

1 sioners were also given the power to levy substantial monetary fines against violators, 1
2 which helped induce compliance. 2

3 The creation of a permit review procedure with diffused power automatically biased 3
4 the regulatory process against approving new coastal projects. By carefully choosing the 4
5 *procedure* of the California coastal initiative, the state legislature was able to achieve 5
6 its statutory goals to curtail further development even though the statute contained a 6
7 broadly-stated, seemingly balanced substantive mandate. 7

8 Perhaps the most important tool that legislatures use to stack the deck in bureaucratic 8
9 decision-making is the establishment of the burden of proof. In all agency decisions, 9
10 proof must be offered to support a proposal. The burden of proof affects agency deci- 10
11 sions most apparently when the problem that is before the agency is fraught with 11
12 uncertainty. In such a circumstance, proving anything—either that a regulation is needed 12
13 to solve a problem, or that it is unnecessary—is difficult, if not impossible. Hence, 13
14 assigning either advocates or opponents of regulation a rigorous burden of proof essen- 14
15 tially guarantees that they cannot obtain their preferred policy outcome. 15

16 For example, the U.S. Federal Food, Drug, and Cosmetics Act of 1938, as amended, 16
17 requires that before a pharmaceutical company can market a new drug, it must first prove 17
18 that the drug is both safe and efficacious. By contrast, in the Toxic Substances Control 18
19 Act of 1976, Congress required that the Environmental Protection Agency (EPA), be- 19
20 fore regulating a new chemical, must prove that the chemical is hazardous to human 20
21 health or the environment. The reversionary outcome is that companies may market 21
22 new chemicals, but not new drugs. The results of the differences in these two burdens 22
23 of proof are stark: very few new drugs are brought to market in the United States each 23
24 year (relative to the rates in other countries), while the EPA, by contrast, has managed to 24
25 regulate none of the 50,000 chemicals in commerce under these provisions in the Toxic 25
26 Substances Control Act. 26

27 Congress has successfully used modifications in the burden of proof to change the 27
28 outcome of regulation. By requiring a certain actor to prove some fact in order to take 28
29 a regulatory action, Congress can stack the deck against that particular actor's most 29
30 preferred outcome. 30

31 The Airline Deregulation Act of 1978, amending the Civil Aeronautics Act from the 31
32 1930s, provides one example. Under the original act, in order to enter a new market by 32
33 offering flights between a pair of cities, the prospective entrant bore the burden of proof 33
34 to demonstrate to the Civil Aeronautics Board (CAB) that without entry, service would 34
35 be inadequate. Thus, a potential entrant in a market that already was being served had 35
36 the virtually impossible task of showing that someone who wanted service was being 36
37 denied. In the Kennedy Amendments, Congress changed the procedure used by the 37
38 CAB, shifting the burden of proof to the existing carriers to show that new entry would 38
39 lead to less service. This modification now biased the process in favor of allowing entry, 39
40 and against the old protections that had profited carriers for so long. As a result, the 40
41 airline entry was essentially deregulated. 41

42 More recently, when stories of abuses of power by the Internal Revenue Service came 42
43 to national attention, Congress again responded by shifting the burden of proof. In this 43

1 case the burden shifted from taxpayers, who had been required to prove that they had 1
2 not violated tax law, to the IRS, which now must prove that a taxpayer has violated a tax 2
3 law. The shift in the burden of proof raises the cost of tax enforcement, and therefore 3
4 reduces the number of tax claims that the IRS can file. The effect is to benefit taxpayers 4
5 by forcing the IRS to abandon some enforcement actions that it would have filed under 5
6 the old system. Again, this change in the administrative process stacks the deck in favor 6
7 of one group of actors' preferred outcome. 7

8 Using administrative procedures as instruments to control the bureaucracy is part of a 8
9 broader concept called *the mirroring principle* (McCubbins, Noll, and Weingast, 1987, 9
10 p. 262). Political officials can use deck-stacking to create a decision-making environ- 10
11 ment in an agency in which the distribution of influence among constituencies reflects 11
12 the political forces that gave rise to the agency's legislative mandate. As argued above, 12
13 the enacting coalition faces large impediments to reforming and passing corrective leg- 13
14 islation when an agency deviates from their intended policy. This coalition therefore 14
15 has an incentive to use structure and process to enfranchise in the agency's procedures 15
16 the constituencies it originally sought to benefit. This environment endures long after 16
17 the coalition behind the legislation has disbanded. As a result, policy is more durable— 17
18 therefore raising the credit due to legislators for enacting a statute that is more valuable 18
19 to its proponents. Without policy durability, legislative victories would not be long last- 19
20 ing, and constituents would not be willing to reward legislators for policy change. 20

21 The point of mirroring and deck-stacking is not to pre-select policy, but to cope with 21
22 uncertainty about the most desirable policy action in the future. Procedures seek to ensure 22
23 that the winners in the political battle over legislation will also be the winners in the 23
24 process of implementing the program. By enfranchising interests that are represented in 24
25 the legislative majority, a legislature need not closely supervise the agency to insure that 25
26 it serves its interests, but can allow an agency to operate on "autopilot" (McCubbins, 26
27 Noll, and Weingast, 1987, p. 271). Policy then can evolve without requiring new legisla- 27
28 tion to reflect future changes in the preferences of the enacting coalition's constituents, 28
29 and political principals can be more secure in using fire-alarm oversight of the agency. 29

30 Legislatures can further limit the potential mischief of agency agenda control by care- 30
31 fully setting the reversionary policy in the enabling statute that established the agency. 31
32 For example, consider some entitlement programs specified by statute, such as Social 32
33 Security and Medicare, in which the agency has no discretion over either who qualifies 33
34 for assistance or how much they will receive. Another example is the widespread use of 34
35 "sunset" provisions, whereby an agency's legal authority expires unless the legislature 35
36 passes a new law to renew the agency's mandate. 36

37 Courts also play a role in the political control of the bureaucracy. Administrative 37
38 procedures affect an agency's policy agenda only if they are enforced. The legislature 38
39 can delegate enforcement to the courts, in which case procedure can affect policy with 39
40 minimal oversight by politicians. For supervision by the courts to serve this function, 40
41 judicial remedy must be highly likely when the agency violates its rules. If so, the courts 41
42 and the constituents who bring suit guarantee compliance with procedural constraints, 42
43 which in turn guarantees that the agency choice will mirror political preferences with- 43

1 out any need for active “police-patrol” oversight. Of course, for this process to work, 1
2 the courts must be willing to ensure that agencies adhere to the requirements of their 2
3 underlying statutory mandates and procedural requirements, which is the topic that is 3
4 explored in Section 7. 4

5 PPT analysis of the political control of the bureaucracy does not provide protection 5
6 against the most insidious potential problem with delegation, interest-group capture. 6
7 PPT only argues that agencies are not a source of capture that is independent of the 7
8 actions and goals of elected officials. If elected officials are a willing co-conspirator 8
9 in agency capture, evidence that they influence policy will not assuage fears that the 9
10 public interest is subverted. In this case, the structure of Congress provides some addi- 10
11 tional checks. The control committees in Congress, especially the appropriations and 11
12 budget committees, serve to check capture by reducing any substantive committee’s 12
13 ability to act unilaterally (Kiewiet and McCubbins, 1991). That is, by requiring com- 13
14 mittee proposals to pass through the appropriations process, substantive committees can 14
15 be disciplined by the appropriations committees’ ability to reject their proposals. Recall 15
16 that substantive committees are more likely to represent specific constituencies, but control 16
17 committees are representative of the entire legislature and so protect each party’s 17
18 brand name to voters. Hence, capture of the latter is less likely. 18

19 Nevertheless, some policies do not require budget authority (such as regulations). If 19
20 party leaders do not possess sufficient information or incentives to detect and to con- 20
21 strain capture when it emerges in legislation, the “iron triangle” among a constituency, 21
22 an agency, and its oversight committees can emerge and be difficult to undo. In this 22
23 case, understanding how capture arises is still useful, because it provides information 23
24 about the likely performance of an agency while legislation is pending without requiring 24
25 expertise about the substance of the policy. 25

26 Essentially PPT identifies the political conditions under which Congress is likely to 26
27 create a captured agency (i.e., a policy that is of primary interest to a small constituency 27
28 and of minor interest to others), and PPT of administrative law provides a check-list 28
29 of procedures that facilitate capture of an agency. This check-list can be considered 29
30 by party leaders, control committees (such as Rules), and other interests considering 30
31 the implicit deck-stacking in proposed legislation. If members of Congress and their 31
32 leaders choose to ignore this information, and thereby to let a small subset of their peers 32
33 create a captured agency, delegation becomes abdication, but the condition under which 33
34 it happens is that no one other than the favored interest groups cares very much that a 34
35 captured agency is being created. 35
36 36

37 6.3. PPT of political control of the bureaucracy: summary 37 38 38

39 Delegation can succeed when one of two conditions is satisfied (Lupia and McCubbins, 39
40 1998). The first is the *knowledge condition*, which is that the principal, through personal 40
41 experience or knowledge gained from others, can distinguish beneficial from detrimental 41
42 agency actions. The second is the *incentive condition*, which is satisfied when the 42
43 agent has sufficient incentive to take account of the principal’s welfare. These condi- 43

1 tions are intertwined in that a principal who becomes enlightened with respect to the 1
 2 consequences of delegation can motivate the agent to take actions that enhance welfare. 2

3 The institutions that govern the administrative process often enable legislators both 3
 4 to learn about agents' actions and to create incentives for bureaucratic compliance, so 4
 5 that one or both of the conditions for successful delegation are satisfied. Legislators' 5
 6 implementation and reliance on these institutions is the keystone of successful dele- 6
 7 gation. These institutions imply that their day-to-day operation often goes unseen, but 7
 8 bureaucratic output still is affected (Weingast, 1984). 8

9 We are not arguing that all necessarily is well in the Washington establishment. Dele- 9
 10 gation produces agency losses and entails agency costs, and the sum of these can exceed 10
 11 the benefits gained from delegating. The interesting questions are when do the costs ex- 11
 12 ceed the benefits and how can we tell? In any case delegation, while entailing some loss 12
 13 of control, is not equivalent to abdication of law-making authority by elected officials. 13
 14 Instead, delegation is just a cost. 14

15 Taken together, the findings of PPT suggest a new view of administrative law. Unlike 15
 16 the Civic Republicans, who see administrative law as bureaucratic-led democratic de- 16
 17 liberation, unlike the Progressives, who see it as ensuring political and scientific quality, 17
 18 and unlike the New Progressives, who see it as creating procedural justice, PPT sees ad- 18
 19 ministrative law as a political choice that channels the direction of policy outcomes in a 19
 20 manner favored by those who write the laws. In this sense, administrative procedures, in 20
 21 general, are normatively neutral in that they can be used to create agencies that behave 21
 22 in any way the political principals desire, from enlightened experts seeking to benefit 22
 23 society through the provision of pgs to captured hacks doing the bidding of a particular 23
 24 interest as part of an iron triangle. In short, delegation is neither inherently good nor bad 24
 25 for democracy; its net effect depends on the details. 25
 26 26
 27 27
 28 28

29 7. The courts 29

30 30
 31 Most modern schools of legal thought turn to the courts to check and redress wrongs 31
 32 created by electoral and legislative processes. The preponderance of modern legal the- 32
 33 ory holds that the centuries old tradeoff between popular sovereignty and elite control 33
 34 weighs heavily in favor of elite—i.e., *judicial*—control of dispute resolution. 34

35 Should judges play a bigger or smaller role in creating and implementing govern- 35
 36 mental policy? What are the tradeoffs? Precisely what role for the judiciary produces 36
 37 the best policy outcomes? These questions—whether judges should be passive or ac- 37
 38 tive, or modest or aggressive—ought to be confronted head-on rather than obscured by 38
 39 endless talk about legitimacy (Posner, 1990). 39

40 PPT of the courts seeks to identify the conditions under which the court can exercise 40
 41 independent discretion, and when its authority is final and supreme. By necessity, PPT 41
 42 addresses when the court is not supreme, and instead acquiesces to or acts as an agent of 42
 43 the legislature and President. In addition, given the similarities between PPT scholarship 43

1 on the judiciary and the bureaucracy, PPT examines the issues of judicial independence 1
2 and discretion in the same fashion. 2

3 As observed by Posner (1990) and Shapiro (1964), the conclusions of a positive 3
4 analysis of the courts have implications for the normative debates between democrats 4
5 and elitists. For example, our theory of the legislative process, and the evidence we pre- 5
6 sented, provides a means of assessing the premises of the various schools of legal and 6
7 bureaucratic thought. These results push us to accept some and to reject other arguments 7
8 about the role of the courts in statutory interpretation and judicial review of agency 8
9 procedures. Further, by addressing when courts are supreme, and how supremacy is 9
10 conditioned on institutional structure and procedure, we can demarcate limits to nor- 10
11 mative arguments about how law ought to be made. That is, we can comment on the 11
12 plausibility of premises, and we may be able to address when these premises, and the 12
13 theories built on them, are reasonable bases for judicial and bureaucratic reforms. 13

14 PPT provides a different view of the courts than the treatments in either legal schol- 14
15 arship or political science. Because PPT embeds courts in a political process, it shows 15
16 how the courts interact with Congress, the President, and the bureaucracy. 16

17 7.1. PPT and statutory interpretation 17

18 19
20 Scholars of law and politics typically regard judicial decisions as subsequent to leg- 20
21 islation. From this perspective courts are omnipotent actors, imposing any outcome 21
22 they wish. This perspective also allows theories and recommendations concerning how 22
23 judges ought to decide cases to be unconstrained. In statutory interpretation, for exam- 23
24 ple, courts are free to make any interpretation they wish, perhaps based on normative 24
25 principles of law, moral philosophy, policy preferences or ideology. A court that decides 25
26 wrongly is at fault, and the corrective is to exhort the court to mend its ways. 26

27 PPT provides a different framework for analyzing courts by observing that statutory 27
28 interpretation is an on-going process. Legal scholars are right to observe that a nec- 28
29 cessary condition for a statutory interpretation case to come before the courts is that 29
30 Congress must pass a law. But they are wrong to assume that courts have the last word. 30
31 Congress can act in response to judicial decisions, which implies that statutory interpre- 31
32 tation is not a two step-process that ends with the judiciary, but an on-going process in 32
33 which Congress and the courts interact repeatedly. PPT demonstrates that this change 33
34 in perspective provides a very different way of understanding judicial decisionmaking 34
35 in general, statutory interpretation in particular. 35

36 7.1.1. The strategic judiciary in PPT 36

37 38
39 To see the logic of the approach consider a one dimension spatial model and three 38
40 actors, the President (P), the Congress (C), and the courts (J), and with status quo Q.²⁴ 39
41 Consider the political configuration depicted in Figure 7.1. 40

42 ²⁴ Marks (1988) initiated this form of analysis. See also Epstein and Knight (1998), Eskridge and Ferejohn 42
43 (1992a, 1992b), Eskridge (1991) and Levy and Spiller (1994). 43

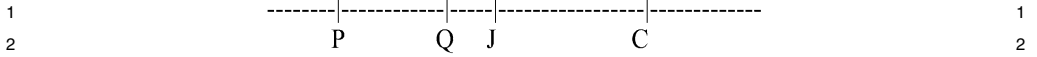


Figure 7.1. The power of courts in statutory interpretation.

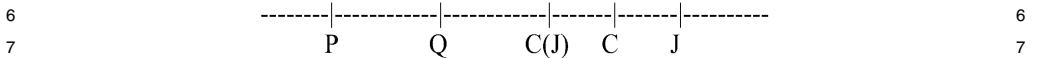


Figure 7.2. Constraints on an extremist court.

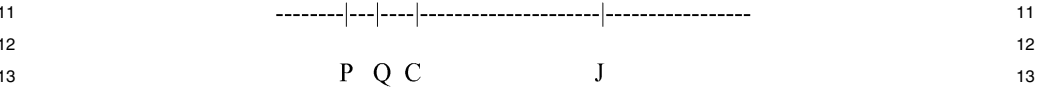


Figure 7.3. Courts facing political officials with closely aligned preferences.

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.

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.²⁵

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.

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,

²⁵ 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.

1 they will fail. Both P and C prefer all points between their ideal policies to J. The best
 2 the court can do is to implement policy C. This configuration shows that courts freedom
 3 of action is highly constrained when it faces a relative united set of elected officials.

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

10 7.1.2. Application to affirmative action 11

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

15 The landmark Civil Rights Act of 1964 forced Southerners to end their system of
 16 apartheid that suppressed African-Americans. Beginning in the early 1970s, a series of
 17 court cases expanded the meaning this act.²⁶ In brief, the civil rights act was an anti-
 18 discrimination law, requiring equal opportunity for all individuals regardless of race,
 19 creed, or gender. In a series of decisions in the 1970s, the Supreme Court expanded the
 20 meaning of the act to include a degree of affirmative action.

21 This phenomenon raises the political and legal question: Why did a conservative
 22 Supreme Court under Chief Justice Warren Burger expand civil rights? Undoubtedly
 23 the conservative majority on the Court preferred the status quo to this outcome. To solve
 24 this puzzle, Eskridge (1991) uses PPT models to explain that the answer lies in the inter-
 25 action of Congress and the courts. Eskridge argues that the conservative Court expanded
 26 civil rights strategically. By taking modest steps to expand rights, the Court forestalled
 27 an even larger change in the scope of the law by Congress. The argument draws on the
 28 idea of the “filibuster pivot” (Brady and Volden, 1998; Krehbiel, 1998). Senate rules
 29 allow a minority of senators to defeat a bill by “filibustering,” continuing the debate
 30 to prevent a measure from coming up for a vote. The Senate can end a filibuster only
 31 by a successful motion to end debate (cloture), which requires a super-majority of 60
 32 positive votes.

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

36 In Figure 7.4, Q is the status quo, f is the ideal policy of the filibuster pivot (that is,
 37 the last Senator who must be brought on board to end debate), and M is the median
 38 legislator’s ideal. Without a filibuster rule, policy would move from the status quo to M,
 39 the median voter’s ideal policy. The filibuster pivot prefers all policies between Q and
 40 f(Q) to Q, but Q to all policies outside this region. Any policy outside of the interval
 41

42
 43 ²⁶ Notably, *Duke Power* (1971) and *United States Steelworkers v Weber* (1979).

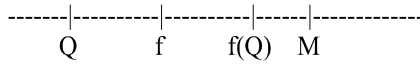


Figure 7.4. The effect of the filibuster.

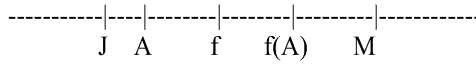


Figure 7.5. Civil rights policy.

[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, 1990; Graham, 1990; Whalen and Whalen, 1985; and Rodriguez and Weingast, 2003). 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 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.²⁷ 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.

²⁷ PPT scholars have used analyses of this type in many contexts. In addition to the references in the text, see Brady and Volden (1998) on the minimum wage, Ferejohn and Shipan (1989) on telecommunications policy, Riker (1982) on federal aid to education, Weingast and Moran (1983) on the FTC and Weingast (1984) on the SEC.

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

9 *7.2. The courts and legal doctrine in a system of separated powers*

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

20 Missing from this debate is the approach implied by PPT of Law. The question pi-
21 oneered by [Shapiro \(1964\)](#) and pursued in depth by [Cohen and Spitzer \(1994, 1996\)](#)
22 is how the structure and process of the judiciary affect the Supreme Court's ability to
23 influence legal doctrine. When will the Supreme Court have the ability to set legal do-
24 ctrine and to have its doctrine implemented, and when will its influence be restrained?
25 Under what conditions can Congress and the President affect legal doctrine through
26 manipulating judicial structure and process?

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

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

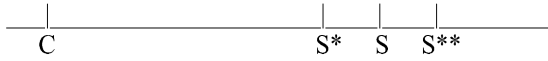


Figure 7.6. Supreme court doctrine.

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 .²⁸ 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 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.

²⁸ 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.

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

9 In this model, doctrine is a function of both normative principles and strategic as-
10 pects of the judicial hierarchy, namely, the need of the Supreme Court to police the
11 lower courts. Elected officials can take advantage of the logic of that system to alter
12 the Supreme Court's doctrine. McNollgast (1995, 2006) show that this is most likely
13 to occur under the conditions noted above: when a new party takes united control of
14 the government after a period in opposition or of divided government, and when the
15 ideology of a new government is at variance with the Supreme Court's doctrine. Histor-
16 ically, these situations correspond to the largest expansions of the lower courts: under
17 Abraham Lincoln, Franklin Roosevelt, and Ronald Reagan.

18 19 7.3. *Interpreting statutes in a system of separated and shared powers* 20

21 The positive and normative debates on statutory interpretation also parallel each other.
22 Again, at the heart of these debates is disagreement about the role of Congress in Amer-
23 ican democracy and about the efficacy of Congress and the Presidency as representative
24 institutions.
25

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

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

39 The critics are correct in arguing that *only* if Congress is a representative body, and
40 *only* if collective intent is a useful concept do courts have an obligation to follow the
41 sovereign commands of the legislature. That is, if Congress is corrupt, captured by in-
42 terest groups, or otherwise seriously unrepresentative of all citizens, if majorities within
43 Congress act without regard to the will of minorities, or if legislative actions are a ran-

1 dom result from chaos and agenda manipulation so that collective intent is an impossible 1
2 anthropomorphism, then jurists have no good reason not to ignore statutes. 2

3 As previous sections of this essay argue, PPT provides reason to believe that Congress 3
4 *is* representative, that legislative intent *is* a meaningful concept, and, further, that legisla- 4
5 tive intent *is* discoverable (McNollgast 1992, 1994; Rodriguez and Weingast, 2003). We 5
6 make this intentionalist argument on the basis of modern research that rejects the most 6
7 extreme views about the failure of democratically elected government as a represen- 7
8 tative institution.²⁹ Congress chooses collectively between relatively clear alternatives, 8
9 and thus the intent of those voting can be discerned, if viewed through the proper lens. 9
10 Through deliberation, members of Congress and the President reach an agreement about 10
11 the intent of legislative language, such that it is not a fool's errand to discover intent. 11
12 Understanding the legislative process provides us with a set of criteria by which to 12
13 judge which statements and documents are credible with respect to revealing collec- 13
14 tively agreed upon intentions, and which are likely to be strategic or merely political 14
15 grandstanding.³⁰ While this approach may not always yield unique interpretation, it 15
16 yields fewer mistakes than other approaches to interpretation. 16

17 PPT of statutory interpretation begins by considering the incentives of legislatures 17
18 when building a record for agencies and courts to consider when deciding the meaning 18
19 of a statute (see Eskridge and Ferejohn 1992a, 1992b; McNollgast 1992, 1994; and 19
20 Rodriguez and Weingast, 2003). PPT begins with the same assumptions that are used 20
21 by those who argue that the legislative process is chaotic, namely that legislators have 21
22 divergent preferences and that all legislators seek to advance their own interpretation 22
23 of the statute, rather than the compromise that arises from the legislative bargain. In the 23
24 course of consideration of a controversial bill, through its many committee versions and 24
25 through the floor amendment process, in some circumstances legislators are likely to 25
26 reveal where their preferences lie in the policy space at issue in the bill. Some are ardent 26
27 supporters or opponents, while others are pivotal, i.e. those with centrist positions who 27
28 actually determine whether the bill passes. 28

29 The preferences of legislators are derived from those of their supporting constituents, 29
30 so that it is natural that legislators will want to make statements that show constituents 30
31 that they are being faithfully and energetically represented. This, ardent supporters 31
32 have an incentive to make statements for the benefit of their constituents that imply 32
33 a more expansive version of the statutes than was actually adopted. But ardent support- 33
34 ers face a conflicting incentive: supporters want the bill to pass, and so will seek to make 34
35 statements that convince less ardent, pivotal legislators to vote for the bill. Likewise, op- 35
36 ponents of the statute have an incentive to please their constituents by claiming that the 36
37 37

38 38
39 ²⁹ This literature is large and rapidly expanding in recent years, and includes Fenno (1978), Brady (1988), 39
40 Jacobson (1990), Kiewiet and McCubbins (1991), Rohde (1991), Snyder (1992), Cox and McCubbins (1993), 40
41 Aldrich (1995), Sinclair (1995), and Lupia and McCubbins (1998). 41

42 ³⁰ McNollgast (1994) and Rodriguez and Weingast (2003) explore the implications and importance of credi- 42
43 bility for statutory interpretation. Generally, see Lupia and McCubbins (1994, 1998) for more on the topic of 43
43 credibility. 43

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

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

19 The preceding discussion PPT offers simultaneously an explanation for why the leg-
20 islative history is conflicting and yet a useful guide for determining which statements are
21 useful indicators of the agreement among supporters of a statute. Whereas the legisla-
22 tive history is rarely so complete that all ambiguities in a statute can be clearly resolved,
23 PPT does support the value of some “canons” of statutory interpretation that have broad
24 validity. An obvious canon is that any interpretation that is more consistent with lan-
25 guage that was rejected anywhere in the process—in committee or on the floor—does
26 not reflect legislative intent. Another obvious canon is that floor leaders of a bill, when
27 discussing the interpretation of the statute with members who are pivotal, are the most
28 likely source of accurate statements of intent because their statements are made in their
29 role as a representative of the entire enacting coalition, not as an individual member.

32 **8. PPT of law: concluding observations**

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

40 An essential feature of PPT of Law is the contention that law *is* structure and process.
41 That is, in writing and passing statutes Congress and the President state (often vaguely)
42 not just the aims of a law, but also the structure and process that determine how decisions
43 will be made to embellish and implement those aims, including with some precision

1 when, how and on what grounds the courts can play a role in this process. When elected 1
2 officials pass statutes, they establish the institutions, procedures and rules by which pol- 2
3 icy will be made by agencies and courts. The policy itself is not law, but the product 3
4 of the law. Structure and process direct policy toward some outcomes and away from 4
5 others, and these outcomes entail winners and losers. Law is the set of instructions to 5
6 bureaucrats and judges about what they should do and how they should do it. Policy 6
7 emerges from the strategic choices by all of the relevant actors, as mediated and chan- 7
8 nelled by law in the form of structure and process. 8

9 PPT of Law is further distinguished by the fact that it assumes that the purpose of 9
10 law—i.e., the purpose of a structure and process for making policy—is political. That 10
11 is, law is designed to advance the political agenda of a winning political coalition. By 11
12 designing the structure and process of policy-making, political actors allocate rights, 12
13 determine the relative importance of different costs and benefits, and ultimately affect 13
14 the level and distribution of wealth in society. The key normative assumption within 14
15 this framework is that the choice of structure and process, like the choice of substantive 15
16 purpose, is governed by the democratic procedures proscribed by the Constitution, to 16
17 which the citizens give their consent. 17

18 How we view the democratic sources of law—those from Congress, the President, 18
19 and the bureaucracy, as opposed to the courts—depends on how effective democratic 19
20 institutions are at representing citizen interests. This survey reviewed the literature on 20
21 each element in the chain from citizens to Congress and the President, to the bureau- 21
22 cracy, to the courts. Although public failures, legislative pathologies, and interest group 22
23 capture are all a source of problems in democratic system, these elements are not the 23
24 only factors influencing democratic law-making. PPT of law provides a coherent frame- 24
25 work for understanding how each component of the government operates, and how each 25
26 shapes the behavior of the others. 26

27 As a positive theory that focuses on how institutions affect behavior by shaping 27
28 incentives, PPT provides understanding about the relationship between democratic gov- 28
29 ernance institutions and law. Regardless of the relative weights one places on various 29
30 normative principles, whether democratic legitimacy, economic efficiency, individual 30
31 liberty or distributive justice, a necessary first step is to connect actions to outcomes. In 31
32 this sense PPT is of value to all sides of ideological disputes. Beyond this, PPT offers 32
33 comfort to those who believe that government actions must have democratic legitimacy 33
34 to be normatively compelling. PPT focuses on the properties of democratic institutions, 34
35 shows theoretically that policies are weakly responsive to citizen preferences and em- 35
36 pirically that these theoretical predictions are supported by the data. 36
37 37

38 39 **References** 39

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