

ARTICLE

STATUTORY DESIGN AS POLICY ANALYSIS

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ABSTRACT

Statutes dominate our legal system, but we have no theory about the best way to design them. The process that the U.S. Congress follows is haphazard and obscure. Any member can introduce a bill. There are no requirements about who can draft the bill or how the basic decisions that it embodies should be made. The one requirement is that the bill must be written in statutory language, in a form that appears ready for enactment. This means that all the basic decisions about the bill's design have been reached by the time the bill is introduced, and before it is subjected to any scrutiny by elected representatives or the general public. Any changes that the members of Congress want to make, if the bill goes forward, must be done through the revision process and on an incremental basis.

This Article suggests a more systematic way to design legislation. Based on modern policy analysis, it proposes that the legislative process begin with a statement of a problem to be solved. Congressional committees would begin by analyzing the problem and generating a range of potential solutions. Drafts of proposed statutory language would only be considered at that point. A process of this sort is more likely to generate legislation that serves its basic purpose, which is to produce the results that the members who vote on it desire. Either House of Congress, or any individual chamber of a state legislature, could implement this approach without the approval of any other body, and without any significant change in its other practices or basic structure. The proposal, moreover, is nonpartisan, since members of either party will want to achieve their own purposes more effectively and reliably.

This Article proposes that Congress and American state legislatures adopt a new method for designing statutes. At present, the process almost always begins with a written draft—that is, a document phrased in statutory language that could be adopted as it stands. This Article's proposal, derived from the modern theory of policy analysis, is that legislatures begin with a statement of the problem that is being addressed. This statement, and not a draft of a proposed statute, would be the subject of the first set of hearings held by the relevant legislative committee or committees. Only after these hearings had been held, and a range of alternative statutory solutions presented to the committee, would the committee consider any document written in statutory language.

The underlying issue that this proposal addresses is the quality of statutory enactments—that is, their ability to achieve their desired purpose. There can be no question about the importance of the issue. As Guido Calabresi has observed,

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we live in the “age of statutes.”¹ Statutes are the most important component of our modern legal system; for at least a century, they have determined the basic content of our law. Common law, or judge-made law, continues to govern some areas of private relations, and the President can exercise limited domestic authority through executive order. In the domestic area, however, the law by which we govern ourselves and attempt to shape our future is statutory.²

But we have no theory, and a very limited academic discourse, about the best way to design statutes.³ Worse still, even suggesting that this topic should be the subject of academic discussion violates a norm of modern scholarship. It is considered pointless or incoherent to address recommendations to legislatures about ways to improve their procedures.⁴ Legal scholars regularly frame recommendations to courts about the best way to decide cases in general, in addition to the best answer to particular issues.⁵ Policy analysts and political scientists offer recommendations to executive agents regarding their general decision-making strategy, as well as their resolution of specific problems.⁶ But few scholars,

¹ GUIDO CALABRESI, A COMMON LAW FOR THE AGES OF STATUTES 163 (1985) (proposing an approach to statutory interpretation that uses common law principles). Similarly, William Eskridge and John Ferejohn characterize our government as a “republic of statutes.” WILLIAM N. ESKRIDGE, JR. & JOHN A. FEREOH, A REPUBLIC OF STATUTES 9 (2010).

² For a general account of the significance of legislation that does not depend on its increased contemporary importance, see generally JEREMY WALDRON, THE DIGNITY OF LEGISLATION (1999).

³ For some notable recent efforts to initiate this inquiry, see Abbe R. Gluck & Lisa Schultz Bressman, *Statutory Interpretation from the Inside—An Empirical Study of Congressional Drafting, Delegation, and the Canons: Part I*, 65 STAN. L. REV. 901 (2013); Victoria F. Nourse & Jane S. Schacter, *The Politics of Legislative Drafting: A Congressional Case Study*, 77 N.Y.U. L. REV. 575 (2002). Another recent description of the drafting process, this time in the European context, is FELIX UHLMANN & STEPHAN HOFER, PROFESSIONAL LEGISLATIVE DRAFTERS: STATUS, ROLES, EDUCATION (2016).

⁴ See Nourse & Schacter, *supra* note 3, at 576 (“Articles about statutory interpretation fill the pages of law reviews, but the vast majority of this scholarship focuses on courts. If the scholarship looks at legislatures at all, it does so from an external perspective, looking at Congress through a judicial lens. Little has been written from the legislative end of the telescope.”).

⁵ To give just one prominent example, the entire debate in constitutional law about the relative merits of textualism, originalism, an evolutionary approach, or something in between is essentially a discussion of the methodology that judges should use in interpreting the Constitution. See, e.g., Akhil Reed Amar, *Intratextualism*, 112 HARV. L. REV. 747 (1999); Jack M. Balkin, *Framework Originalism and the Living Constitution*, 103 NW. U. L. REV. 549 (2009); Michael C. Dorf, *Legal Indeterminacy and Institutional Design*, 78 N.Y.U. L. REV. 875 (2003); Richard H. Fallon, Jr., *How to Choose a Constitutional Theory*, 87 CALIF. L. REV. 535 (1999); John F. Manning, *Clear Statement Rules and the Constitution*, 110 COLUM. L. REV. 399 (2010); Adrian Vermeule & Ernest A. Young, *Hercules, Herbert and Amar: The Trouble with Intratextualism*, 113 HARV. L. REV. 730 (2000). For general discussions regarding the normative character of court-directed legal scholarship, see generally Paul Brest, *The Fundamental Rights Controversy: The Essential Contradictions of Normative Constitutional Scholarship*, 90 YALE L.J. 1063 (1981); Paul Campos, *Against Constitutional Theory*, 4 YALE J.L. & HUMAN. 279 (1992); Edward L. Rubin, *The Practice and Discourse of Legal Scholarship*, 86 MICH. L. REV. 1835 (1988); Pierre Schlag, *Normative and Nowhere to Go*, 43 STAN. L. REV. 167 (1990); Mark Tushnet, *Legal Scholarship: Its Causes and Cure*, 90 YALE L.J. 1205 (1981). A common critique of legal scholarship argues that it is not sufficiently focused on providing advice to judges. See, e.g., Harry T. Edwards, *The Growing Disjunction Between Legal Education and the Legal Profession*, 91 MICH. L. REV. 34 (1992).

⁶ Leading works in this field not only address executive policymakers, but also often do so in highly pragmatic terms. See, e.g., EUGENE BARDACH, A PRACTICAL GUIDE FOR POLICY ANALYSIS: THE EIGHTFOLD PATH TO MORE EFFECTIVE PROBLEM SOLVING (3d ed. 2009); WILLIAM N. DUNN, PUBLIC POLICY ANALYSIS (5th ed. 2012); STUART S. NAGEL, HANDBOOK OF PUBLIC POLICY EVALUATION (2002); MALCOLM K. SPARROW, THE REGULATORY CRAFT: CON-

in these disciplines or any other, address similarly normative arguments to legislatures, the primary statute-making institution in the American system of governance,⁷ about the way to structure the legislative process so that it produces effective statutes.

The legislative process has been extensively studied of course, but the great bulk of the work tends to be descriptive. With the exception of two recent articles that draw salutary attention to the drafting process and serve as the starting point for the present Article, one by Victoria Nourse and Jane Schacter and the other by Abbe Gluck and Lisa Bressman,⁸ legal and political science scholarship devotes little attention to the actual language of statutes, as opposed to the politics of their enactment.⁹ There are, to be sure, a relatively small number of books and articles that provide advice or instruction about the way to draft statutory language.¹⁰ A notable feature of this limited literature is that it is addressed to

TROLLING RISKS, SOLVING PROBLEMS, AND MANAGING COMPLIANCE (2000); EDITH STOKEY & RICHARD ZECKHAUSER, A PRIMER FOR POLICY ANALYSIS (1978). For discussions of the theory of public policy analysis, and specifically its effort to address policy-based arguments to real-world decisionmakers, see generally FRANK FISCHER, REFRAMING PUBLIC POLICY: DISCURSIVE POLITICS AND DELIBERATIVE PRACTICES (2003); AARON WILDAVSKY, SPEAKING TRUTH TO POWER: THE ART AND CRAFT OF POLICY ANALYSIS (1979); Elinor Ostrom, *Institutional Rational Choice: An Assessment of the Institutional Analysis and Development Framework*, in THEORIES OF THE POLICY PROCESS 35 (Paul Sabatier ed., 2007).

⁷ The legislature's role in designing statutes is more limited in a parliamentary democracy, as opposed to our presidential democracy. See W. IVOR JENNINGS, PARLIAMENT 183–246 (1939); PATRICK MALCOLMSON & RICHARD MYERS, THE CANADIAN REGIME: AN INTRODUCTION TO PARLIAMENTARY GOVERNMENT IN CANADA 116–29 (4th ed. 2009); see also DELEGATION AND ACCOUNTABILITY IN PARLIAMENTARY DEMOCRACIES (Kaare Strøm, Wolfgang C. Müller & Torbjörn Bergman eds., 2003). In those systems, the executive generally drafts legislation and the legislature, after debating it and sometimes amending it, approves the government bill. To reject such a bill, at least an important one, represents a vote of no-confidence in the government and will typically lead, through an election, to either a new government or a different group of legislators.

⁸ See Gluck & Bressman, *supra* note 3; Nourse & Schacter, *supra* note 3; see also UHLMANN & HOFER, *supra* note 3.

⁹ See, e.g., JOHN W. KINGDON, AGENDAS, ALTERNATIVES, AND PUBLIC POLICIES (2d ed. 2003) (discussing the origins of legislation and the formation of congressional agendas). This is even true, somewhat surprisingly, for books and articles that document the development of a particular statute. See, e.g., STEVEN K. BAILEY, CONGRESS MAKES A LAW: THE STORY BEHIND THE EMPLOYMENT ACT OF 1946 (1954); DANIEL A.M. BERMAN, A BILL BECOMES A LAW: CONGRESS ENACTS CIVIL RIGHTS LEGISLATION (2d ed. 1969); AMY E. BLACK, FROM INSPIRATION TO LEGISLATION: HOW AN IDEA BECOMES A BILL (2006) (focusing on the Safe Havens Support Act); EUGENE EIDENBERG & ROY D. MOREY, AN ACT OF CONGRESS: THE LEGISLATIVE PROCESS AND THE MAKING OF EDUCATION POLICY (1969) (focusing on the Elementary and Secondary Education Act of 1965); RONALD D. ELVING, CONFLICT AND COMPROMISE: HOW CONGRESS MAKES THE LAW (1995) (focusing on the Family and Medical Leave Act of 1993); PAUL LIGHT, ARTFUL WORK: THE POLITICS OF SOCIAL SECURITY REFORM (1985); COSTAS PANAGOPOULOS & JOSHUA SCHANK, ALL ROADS LEAD TO CONGRESS: THE \$300 BILLION FIGHT OVER HIGHWAY FUNDING (2008); ERIC REDMAN, THE DANCE OF LEGISLATION (rev. ed. 2001) (focusing on the National Health Service Corps); CHARLES WHALEN & BARBARA WHALEN, THE LONGEST DEBATE: A LEGISLATIVE HISTORY OF THE 1964 CIVIL RIGHTS ACT (1985); Daniel Lipinski, *Navigating Congressional Policy Processes: The Inside Perspective on How Laws Are Made*, in CONGRESS RECONSIDERED 337, 347–56 (Lawrence C. Dodd & Bruce I. Oppenheimer eds., 9th ed. 2009). Fewer sources trace the way the language of the bill was developed and revised to produce the final text of the legislation, and most do not reprint either the bill or the text of the bill or the statute. See BLACK, *supra*; *infra* notes 42–59 and accompanying text.

¹⁰ See, e.g., F. REED DICKERSON, LEGISLATIVE DRAFTING (1954); LEGISLATIVE DRAFTING (Aldo Zammit Borda ed., 2011); ROBERT J. MARTINEAU & MICHAEL B. SALERNO, LEGAL, LEGISLATIVE AND RULE DRAFTING IN PLAIN ENGLISH (2005); IAN MCCLEOD, PRINCIPLES OF

*hypothesized drafting expert—a policy analyst who is envisioned as drafting a statute that will subsequently be submitted to a legislature—and not to the legislature itself.*¹¹ In fact, as David Marcello observes, the underlying assumption of this work is that the drafter is an abstract entity, a value-neutral technician who simply translates her client's instructions into statutory language.¹² A somewhat larger body of scholarly literature addresses expert organizations, most notably the American Law Institute ("ALI") and the National Conference of Commissioners on Uniform State Laws ("NCCUSL"), that draft uniform statutes for submission to state legislatures.¹³ Because this literature is addressed to an expert body, however, it pays virtually no attention to the state legislatures that must ultimately enact the statutes that the ALI and NCCUSL design. Finally, there are some articles that propose a new statute or the improvement of an existing one.¹⁴ Although these would appear to be addressed to legislators, they often seem to be general policy recommendations cast in statutory terms for the sake of concreteness or precision.

An obvious explanation for this academic norm, and for the lacuna that it inevitably produces, is that scholars regard legislators as motivated by exclusively political considerations, specifically the desire to be reelected.¹⁵ To be

LEGISLATIVE AND REGULATORY DRAFTING (2009); WILLIAM P. STATSKY, LEGISLATIVE ANALYSIS AND DRAFTING (John F. O'Connell & Bruce Comly French eds., 2d ed. 1984); G.C. THORNTON, LEGISLATIVE DRAFTING (4th ed. 1996); David A. Marcello, *The Ethics and Politics of Legislative Drafting*, 70 TUL. L. REV. 2437 (1996).

¹¹ See G.J. VEERMAN, LEGISLATION, A SUITABLE CASE FOR POLICY: BUILDING BLOCKS FOR AN OPERATIONAL THEORY OF LEGISLATION (2016). Veerman adopts the same public policy approach to statutes that this Article does. See *infra* Part II. But because Veerman is writing in the European context of parliamentary systems, his recommendations are addressed to legislative drafting specialists in the administration. For one exception in the American context, see BLACK, *supra* note 9, whose account of the development of the Safe Havens Support Act is cast as advice to a hypothetical staff member (her own role in the process). This gives the book a normative cast, but the advice centers mainly on how to navigate the political complexities of developing a bill that will have a chance of being enacted. As such, she does not provide normative recommendations for improving the process. See also *infra* note 119 (discussing this somewhat distinctive work).

¹² See Marcello, *supra* note 10.

¹³ See generally John P. Frank, *The American Law Institute, 1923-1998*, 26 HOFSTRA L. REV. 615 (1997); Kathleen Patchel, *Interest Group Politics, Federalism, and the Uniform Law Process: Some Lessons from the Uniform Commercial Code*, 78 MINN. L. REV. 83 (1993); Kenneth E. Scott, *Corporation Law and the American Law Institute Corporate Governance Project*, 35 STAN. L. REV. 927 (1983); Alan Schwartz & Robert E. Scott, *The Political Economy of Private Legislatures*, 143 U. PA. L. REV. 595 (1995); G. Edward White, *The American Law Institute and the Triumph of Modernist Jurisprudence*, 15 LAW & HIST. REV. 1 (1997). The scholarly literature addressing these expert bodies is voluminous, and occupies a substantial portion of the work on the subjects that the uniform laws process has addressed, including commercial law, criminal law, corporate law, and family law. See generally, e.g., sources cited *supra*.

¹⁴ See, e.g., L. Elizabeth Chamblee, *Time for Legislative Change: Florida's Stagnant Standard Governing Competency for Execution*, 31 FLA. ST. U. L. REV. 335 (2004); John V. Jacobi, *Prosecuting Police Misconduct*, 2000 WIS. L. REV. 789 (2000); Daniel G. Moriarty, *Dumb and Dumber: Reckless Encouragement to Reckless Wrongdoers*, 34 S. ILL. L.J. 647 (2010); Richard H. Stern, *An Attempt to Reconcile Floppy Disk Claims*, 17 J. MARSHALL J. COMPUTER & INFO. L. 183 (1998).

¹⁵ The body of scholarship that adopts this position in the most thoroughgoing fashion is public choice. See, e.g., MORRIS FIORINA, CONGRESS: KEYSTONE OF THE WASHINGTON ESTABLISHMENT 39 (1977); MORRIS FIORINA, REPRESENTATIVES, ROLL CALLS AND CONSTITUENCIES 31, 35-38 (1974); DAVID MAYHEW, CONGRESS: THE ELECTORAL CONNECTION 13-17 (1974); R. Michael Alvarez & Jason L. Saving, *Congressional Committees and the Political Economy of Federal Outlays*, 92 PUB. CHOICE 55 (1997); Randall S. Krozner & Thomas Stratmann, *Interest Group Competition and the Organization of Congress: Theory and Evidence from*

sure, empirical studies of actual legislators often conclude that they are motivated by ideology, which can be regarded as their idea about what is best for the nation.¹⁶ But the scholars who conduct these studies do not act on this conclusion—that is, they do not proceed to address legislators as rational decisionmakers and recommend ideas that would make their work product more effective.¹⁷ What makes this omission even more remarkable is that scholars, as just noted, do not adopt this same approach to other government officials. That is not because they are so naïve as to assert that judges and executive agents are selfless servants of the public who are never motivated by individual self-interest.¹⁸ The premise of normative scholarship, rather, is that public officials

Financial Services' Political Action Committees, 88 AM. ECON. REV. 1163 (1988). For the methodological premises of this public choice, see III DENNIS C. MUELLER, PUBLIC CHOICE 1–2 (2003) (“The basic behavioral postulate of public choice, as for economics, is that man is an egoistic, rational, utility maximizer.”); Jonathan R. Macey, *Public Choice: The Theory of the Firm and the Theory of Market Exchange*, 74 CORNELL L. REV. 43, 43 (1988) (stating that public choice “applies game theory and microeconomic analysis to the production of law by legislatures, regulatory agencies, and courts”).

¹⁶ See, e.g., BERNARD ASBALL, THE SENATE NOBODY KNOWS 311–19 (1978) (describing Senator Edmund Muskie (D-Me.)); JAMES DAVID BARBER, THE LAWMAKERS: RECRUITMENT AND ADAPTATION TO LEGISLATIVE LIFE 163–211 (1965); CHRISTOPHER J. DEERING & STEVEN S. SMITH, COMMITTEES IN CONGRESS 78–95 (3d ed. 1997); MARTHA DERTHICK & PAUL J. QUIRK, THE POLITICS OF DEREGULATION 39–44, 96–146 (1985); ELIZABETH DREW, SENATOR 12–14 (1979) (describing Senator John Culver (D-Me.)); RICHARD FENNO, CONGRESSMEN IN COMMITTEES, 9–13, 212–42 (1973) (describing House Foreign Affairs, Education and Labor Committees); STEVEN KELMAN, MAKING PUBLIC POLICY: A HOPEFUL VIEW OF AMERICAN GOVERNMENT 58–66 (1987); MICHAEL R. LEMOV, CAR SAFETY WARS: ONE HUNDRED YEARS OF TECHNOLOGY, POLITICS AND DEATH 33–46, 67–86 (2015) (describing Representative Ken Roberts (D-Ala.) and Senator Abraham Ribicoff (D-Conn.)); ARTHUR MAASS, CONGRESS AND THE COMMON GOOD 3–31 (1983); WILLIAM K. MUIR, JR., LEGISLATURE: CALIFORNIA’S SCHOOL FOR POLITICS (1982); REDMAN, *supra* note 9, at 189–209 (describing Senator Warren Magnuson (D-Wash.)); Edward L. Rubin, *Legislative Methodology, Some Lessons from the Truth-in-Lending Act*, 80 GEO. L.J. 233, 242–51 (1991) (describing Senator Paul Douglas (D-Ga.)).

¹⁷ One possible exception that in fact supports the general observation is Hans A. Linde, *Due Process of Lawmaking*, 55 NEB. L. REV. 197 (1976). Judge Linde makes a number of sage suggestions about the way a legislature should design legislation, but he does not think it worthwhile to address the legislators in offering his suggestions. Rather, he addresses the judiciary (since judges are rational beings, after all), and urges them to use rationality review under the due process clause to impose minimal standards on the presumptively intractable legislature. He is acutely aware of doctrinal and separation of powers difficulties that this suggestion involves, but apparently sees this as the only way to get a normative purchase on the legislative process.

¹⁸ Despite our current beliefs about legal formalism, it is possible that legal scholars never accepted the idea that judicial decisions are governed exclusively and definitively by legal doctrine. See BRIAN TAMANAHA, BEYOND THE FORMALIST-REALIST DIVIDE: THE ROLE OF POLITICS IN JUDGING 67–90 (2010). If they did, however, they were disabused of that belief by the legal realists. See, e.g., JEROME FRANK, LAW AND THE MODERN MIND 35–45 (1930); Felix S. Cohen, *Transcendental Nonsense and the Functional Approach*, 35 COLUM. L. REV. 809 (1935); Karl N. Llewellyn, *A Realistic Jurisprudence: The Next Steps*, 30 COLUM. L. REV. 431 (1930). More recently, political scientists who conduct judicial attitude studies often conclude that judges are primarily, if not exclusively, motivated by political beliefs and considerations. See, e.g., LAWRENCE BAUM, THE SUPREME COURT 159–82 (12th ed. 2016); LEE EPSTEIN & JACK KNIGHT, THE CHOICES JUDGES MAKE 22–55 (1997); GLENDON SCHUBERT, JUDICIAL POLICY MAKING: THE POLITICAL ROLE OF COURTS 184–213 (rev. ed. 1974); JEFFREY A. SEGAL & HAROLD J. SPAETH, THE SUPREME COURT AND THE ATTITUDINAL MODEL REVISITED 6–26 (2002); BARBARA YARNOLD, POLITICS AND THE COURTS: TOWARD A GENERAL THEORY OF PUBLIC LAW 7–51 (1990). Policy analysis cannot be separated from politics, of course, since the policy analyst, unlike the judge, is either giving advice to, or carrying out the decisions of,

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

The issue becomes more urgent when one considers the bad repute from which our national legislature currently suffers.¹⁹ To some extent, this is irredeemable; a legislature is, by design, an arena of political conflict, and people generally find conflict distressing.²⁰ But at least part of the overwhelming public dissatisfaction regarding Congress seems to stem from the sense that it is disorganized and chaotic, that it is unable to manage conflict in a systematic way and produce desirable results.²¹ The tendency to treat the members of Congress as immune to rational discourse probably contributes to this popular belief. While the average citizen is not reading legal and political science literature, this liter-

a politician. In theory, it is possible to imagine both tasks being governed by purely instrumental rationality. See MAX WEBER, *ECONOMY AND SOCIETY* 24–26 (Guenther Roth & Claus Wittich eds., 1978) (1922); MAX WEBER, “Objectivity” in *Social Science and Social Policy*, in *THE METHODOLOGY OF THE SOCIAL SCIENCES* 50 (Edward A. Shils & Henry A. Finch trans., 1949) [hereinafter Weber, “Objectivity”]. Contemporary policy analysis, however, emphasizes the need to mediate between instrumental rationality and the political dynamics of actual policymaking contexts. See, e.g., DAVID BRAYBROOKE & CHARLES E. LINDBLOM, *A STRATEGY OF DECISION: POLICY EVALUATION AS A SOCIAL PROCESS* 61–80 (1963); FISCHER, *supra* note 6, at 73–115; JOHN FRIEDMAN, *PLANNING IN THE PUBLIC DOMAIN: FROM KNOWLEDGE TO ACTION* 181–223 (1987); ROBERT A. HEINEMAN ET AL., *THE WORLD OF THE POLICY ANALYST: RATIONALITY, VALUES AND POLITICS* 105–31 (3d ed. 2001); KINGDON, *supra* note 9, at 145–63; ALICE RIVLIN, *SYSTEMATIC THINKING FOR SOCIAL ACTION* (1971); DEBORAH STONE, *POLICY PARADOX: THE ART OF POLITICAL DECISION MAKING* 15–34 (rev. ed. 2002).

¹⁹ According to the Huffington Post collation of opinion polls, 15.3% of Americans approved of Congress’s performance as of October 1, 2016, and 64.5% disapproved. *Congress Job Approval*, HUFFPOST POLLSTER, <http://elections.huffingtonpost.com/pollster/congress-job-approval> [perma.cc/SPE4-M7FF]. The Gallup poll found that the approval rate for Congress in January 2017 was 19%, with 76% disapproving and 5% having no opinion. This abysmal rating has been relatively steady for seven years, since January 2010. Prior to that time (the poll began in 1974), the approval rate was generally in the 20% or 30% range, and the disapproval rate only rarely went above 50%, with more people expressing no opinion than they do at present. *Congress and the Public*, GALLUP NEWS, <http://www.gallup.com/poll/1600/congress-public.aspx> [perma.cc/Y8T2-C67K].

²⁰ The first writer to observe that conflict could be a source of strength, rather than weakness, to a polity was probably Machiavelli. NICCOLÒ MACHIAVELLI, *THE DISCOURSES* 113–27 (Bernard Crick ed., 1970); see *id.* at 113 (“[T]hose who condemn the quarrels between the nobles and the plebs, seem to be caviling at the very things that were the cause of Rome’s retaining her freedom . . . [I]n every republic there are two different dispositions, that of the populace and that of the upper class and . . . all legislation favorable to liberty is brought about by the conflict between them.”). This observation, although astute, remains counter-intuitive to most people.

²¹ There is certainly an argument that this approval rating is justified and that it results from the excessive partisanship of the current Congress. See generally JOHN HIBBING & ELIZABETH THEISS-MORSE, *CONGRESS AS PUBLIC ENEMY* (1995); THOMAS E. MANN & NORMAN J. ORNSTEIN, *IT’S EVEN WORSE THAN IT LOOKS: HOW THE AMERICAN CONSTITUTIONAL SYSTEM COLLIDED WITH THE NEW POLITICS OF EXTREMISM* (2012); Sarah Binder, *Elections, Parties and Governance*, in *THE LEGISLATIVE BRANCH* 148 (Paul Quirk & Sarah Binder eds., 2005). This might suggest that many current members are more concerned about discomforting their opponents than about making good public policy decisions. Mann and Ornstein’s thesis is that this situation represents a serious deterioration of the attitudes that prevailed in previous Congresses. If that is correct, it suggests that nonpartisan changes in methodology that would improve the performance of Congress would be particularly welcome at this point.

ature does affect the general public discourse, and perhaps even the legislators' views about their own institution.²² Certainly, a complete absence of scholarly discussion about ways that Congress can function more effectively can only exacerbate the general view that it cannot function at all.

I have written previously about the possible reasons for this scholarly lacuna;²³ the purpose of this Article is to counteract it by proposing a new methodology for the design of legislation. Part I describes the existing methodology, as employed by the U.S. Congress, and identifies the underlying premise of the methodology, which is that legislative drafting is a process of political argument. Part II suggests that a different methodology could be derived from the idea that legislation in the modern state is in fact a form of public policymaking. In Part III, the existing methodology is critiqued from a policymaking perspective. Part IV then proposes a new methodology for drafting legislation on the basis of the policymaking model described in Part II and the problem with the existing methodology described in Part III. Finally, Part V discusses the range of legislation to which the proposal would apply, and argues that there would be no serious impediments to its implementation.

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²² On the influence of academic writing, see DERTHICK & QUIRK, *supra* note 16, at 120; KINGDON, *supra* note 9, at 53–57.

²³ See generally EDWARD L. RUBIN, BEYOND CAMELOT: RETHINKING POLITICS AND LAW FOR THE MODERN STATE 191–226 (2005); Edward L. Rubin, *From Coherence to Effectiveness: A Legal Methodology for the Modern World*, in ROB VAN GESTEL, HANS-W. MICKLITZ & EDWARD L. RUBIN, RETHINKING LEGAL METHODOLOGY: A TRANSATLANTIC DIALOGUE 310 (2017). The basic argument is that we still think of statutes in terms of the pre-modern concept of law, that is, as a coherent body of rules governing human conduct that are accessible to reason and derived from a combination of natural law and social norms. This view prevails in modern jurisprudential definitions of law. See, e.g., RONALD DWORKIN, LAW'S EMPIRE (1986); LON FULLER, THE MORALITY OF LAW (rev. ed. 1969); H.L.A. HART, THE CONCEPT OF LAW (1961). Modern statutes, however, are administrative in nature; in addition to establishing rules for human conduct, they perform functions foreign to the pre-modern state, such as distributing benefits and creating social welfare institutions. Their expanded scope and enormously increased numbers precludes any effort to treat them as a coherent body of rules. Rather, modern statutes emerge from a process of formulating and implementing social policy; the legislature engages in major (and sometimes minor) policy formation while administrative agencies are responsible for the remainder of the process. Under these circumstances, statutes are no longer declarations of norms, but efforts to produce identified effects on society.

I. THE CURRENT METHODOLOGY IN CONGRESS

In Congress, the process of enacting legislation begins when a member of Congress introduces a bill in his or her session of the legislature.²⁴ Any member can introduce a bill; there is no constraint on this part of the process.²⁵ House members literally drop their bills “into the hopper,” a mahogany box at the front of the chamber.²⁶ Ganesh Sitaraman has usefully catalogued the various origins of bills introduced into Congress. He identifies three basic categories: “(1) drafts by legislators and their staffs, (2) drafts through committee processes, and (3) drafts by individuals or groups outside the legislature.”²⁷ He then subdivides each category. The second includes drafts by committee staff from a single party, drafts by committee staff from both parties, drafts by the staffs of committees from both parties and both Houses, and drafts by staffs from multiple committees.²⁸ The third category consists of bills drafted by the administration and those drafted by private parties.²⁹

Whatever path the bill has previously traveled, the member introduces his or her bill as a completed piece of legislation, ready for enactment and incorporation into the United States Code. The Speaker of the House and the Presiding Officer of the Senate are officially responsible for the referral of proposed bills to committees. As a practical matter, however, the referrals are made by the parliamentarian of each House, a nonpartisan official appointed by the body who carries out a variety of functions, including the eponymous one of advising the Speaker or Presiding Officer about parlia-

²⁴ Although this Article’s proposal applies to state legislatures as well as Congress, it will be presented in terms of congressional procedures. This is primarily motivated by the obvious point that Congress is the most important American legislature, and secondarily because its importance has led state legislatures to regard it as a model for their own procedures. See ALAN ROSENTHAL, *HEAVY LIFTING: THE JOB OF THE AMERICAN LEGISLATURE* 57–82, 108–31 (2004); PEVERILL SQUIRE & GARY MONCRIEF, *STATE LEGISLATURES TODAY: POLITICS UNDER THE DOME* 103–68 (2d ed. 2015). Practices in state legislatures vary from congressional practice to some extent, but they vary on a state-to-state basis and any effort to account for them would encumber this discussion with excessive detail.

²⁵ See WALTER J. OLESZEK ET AL., *CONGRESSIONAL PROCEDURES AND THE POLICY PROCESS* 99 (10th ed. 2016); NELSON POLSBY, *CONGRESS AND THE PRESIDENCY* 138–39 (4th ed. 1986); EDWARD V. SCHNEIER & BERTRAM GROSS, *LEGISLATIVE STRATEGY: SHAPING PUBLIC POLICY* 94–95 (1993); BARBARA SINCLAIR, *UNORTHODOX LAWMAKING: NEW LEGISLATIVE PROCESSES IN THE U.S. CONGRESS* 43–44 (3d ed. 2007). The perfunctory description of this process given by Sinclair is particularly notable because her illuminating work focuses on the many ways in which contemporary legislative processes diverge from the traditional model. Apparently, however, she did not discover any changes in the way that bills are introduced.

²⁶ OLESZEK ET AL., *supra* note 25, at 99.

²⁷ Ganesh Sitaraman, *The Origins of Legislation*, 91 NOTRE DAME L. REV. 79, 84 (2015). For another categorization, see Nourse & Schacter, *supra* note 3 at 590–94 (dividing the drafting process into committee drafting, consensus drafting, drafting on the chamber floor, and drafting in conference committee).

²⁸ Sitaraman, *supra* note 27, at 96–103. Sitaraman also identifies reauthorizations as a separate component of this category, on the ground that they begin with an existing statute which is then modified, rather than a new bill. *Id.* at 101–02.

²⁹ *Id.* at 103–07.

mentary procedure.³⁰ The parliamentarians assign bills to committees on the basis of their subject matter; this principle is typically implemented by assigning the bill to the committee that oversees the agency that the bill itself identifies as being responsible for its ultimate implementation.³¹ Sometimes, the sponsors or the committee chairs engage in political maneuvering to steer a bill into a more amenable committee.³²

The committee, either by majority vote or, more commonly, by action of its chairperson, can kill the bill at this point by refusing to schedule hearings, and often does. In fact, this is the single most frequently used filter, or veto gate,³³ for legislative proposals.³⁴ Powerful sponsors, however, can generally force the committee chair to move forward with a bill, and the administration can nearly always do so.³⁵ Moving forward generally means that the committee, or one of its subcommittees,³⁶ holds hearings on the bill.³⁷ Hearings consist of testimony by witnesses and then questioning by the members

³⁰ OLESZEK ET AL., *supra* note 25, at 106–07; SINCLAIR, *supra* note 25, at 11–12, 44; CHARLES TIEFER, CONGRESSIONAL PRACTICE AND PROCEDURE: A REFERENCE, RESEARCH, AND LEGISLATIVE GUIDE 111–13 (1989). “The vast majority of referrals are routine . . . referrals generally are cut-and-dried decisions.” OLESZEK ET AL., *supra* note 25, at 111.

³¹ See OLESZEK ET AL., *supra* note 25, at 111; TIEFER, *supra* note 30, at 199–200.

³² See KELMAN, *supra* note 16, at 48–49; DAVID C. KING, TURF WARS: HOW CONGRESSIONAL COMMITTEES CLAIM JURISDICTION (1997); David C. King, *The Nature of Congressional Committee Jurisdictions*, 89 AM. POL. SCI. REV. 48 (1995); OLESZEK ET AL., *supra* note 25, at 107–10; POLSBY, *supra* note 25, at 139–41; SCHNEIER & GROSS, *supra* note 25, at 48–49; TIEFER, *supra* note 30, at 113–18. In some cases, committee chairs who are hostile to the bill might steer it into a less amenable committee.

³³ A veto gate is a point in the legislative process when a bill can be prevented from proceeding through the process and becoming a law. See generally William N. Eskridge, Jr., *Vetogates, Chevron, Preemption*, 83 NOTRE DAME L. REV. 1441 (2008); Matthew D. McCubbins, *Legislative Process and the Mirroring Principle*, in HANDBOOK OF NEW INSTITUTIONAL ECONOMICS 123 (Claude Menard & Mary M. Shirley eds., 2008). The main veto gates are the committee chair’s decision whether to hold hearings, the committee vote on the marked-up bill, the vote on the chamber floor and, of course, the President’s signature.

³⁴ See DEERING & SMITH, *supra* note 16, at 2–20; OLESZEK ET AL., *supra* note 25, at 116–18; TIEFER, *supra* note 30, at 137–40. Quite frequently, and more often in the House than the Senate, the committee’s power is exercised by its subcommittees, and the chair asserts his or her authority by staffing the subcommittees. See DEERING & SMITH, *supra* note 16, at 150–62; TIEFER, *supra* note 30, at 140–45. This makes the process more complex, of course, but does not affect its basic structure or the proposals suggested here.

³⁵ OLESZEK ET AL., *supra* note 25, at 119–21; see *id.* at 124 (“[S]ince at least the mid-1990s, committee chairs take more direction from assertive party leaders, particularly in the House.”).

³⁶ See generally OLESZEK ET AL., *supra* note 25, at 125–31; SCHNEIER & GROSS, *supra* note 25, at 160–75; TIEFER, *supra* note 30, at 149–63.

³⁷ In addition to hearings on legislation, the House and the Senate regularly hold oversight hearings of various kinds, and the Senate, of course, holds hearings on presidential appointments. See, e.g., JOEL D. ABERBACH, KEEPING A WATCHFUL EYE: THE POLITICS OF CONGRESSIONAL OVERSIGHT (1991); LAURA COHEN BELL, WARRING FACTIONS: INTEREST GROUPS, MONEY AND THE NEW POLITICS OF SENATE CONFIRMATION (2002); LANCE COLE & STANLEY M. BRAND, CONGRESSIONAL INVESTIGATIONS AND OVERSIGHT: CASE STUDIES AND ANALYSIS (2010); LEE EPSTEIN & JEFFREY A. SEGAL, ADVICE AND CONSENT: THE POLITICS OF JUDICIAL APPOINTMENTS 87–118 (2007); OLESZEK ET AL., *supra* note 25, at 126, 376–407. These are not necessarily irrelevant to the legislative process, but since they do not relate to it directly, they will be omitted from this Article’s discussion.

of the committee or subcommittee. Other members of Congress who want to testify are always invited to do so, as are administration officials.³⁸ They are followed by witnesses whom the committee or subcommittee members invite. The most commonly invited witnesses are representatives of major interest groups, both special and public, but various others, such as ordinary people who might be helped or harmed by the bill, celebrities, and experts from the academy might also be invited.³⁹ The witnesses typically file a written statement in advance, make an opening statement when testifying, and then respond to questions from the members that are typically written by their staffs or generated by the resulting colloquy.⁴⁰ Those members who disagree with the witness will tend to cross-examine and are often quite skillful in this art.⁴¹

At the conclusion of the hearing, the bill goes to markup, a session or series of sessions where committee members and staff review its language.⁴² This is the first time that the language is revised and often the time where the most extensive changes are made. Generally speaking, the markup process is heavily driven by the language of the original bill, even if extensive changes are being made.⁴³ In a typical markup session, the bill in question is read line-by-line, and the discussion focuses on the specific language that is being read.⁴⁴ When there are multiple sets of hearings, or hearings on the same legislation over different congressional sessions,⁴⁵ there will typically be multiple markups.⁴⁶

Once the bill has gone through markup, the committee or subcommittee will vote on it, and if the vote is favorable, the bill will go to the floor of the chamber. There, it will be debated, and amendments will often be proposed,

³⁸ POLSBY, *supra* note 25, at 137.

³⁹ OLESZEK ET AL., *supra* note 25, at 125.

⁴⁰ SCHNEIER & GROSS, *supra* note 25, at 172.

⁴¹ See SCHNEIER & GROSS, *supra* note 25, at 173–74; Rubin, *supra* note 16, at 274–77.

⁴² See generally OLESZEK ET AL., *supra* note 25, at 131–33; POLSBY, *supra* note 25, at 139–41; SCHNEIER & GROSS, *supra* note 25, at 175–80; TIEFER, *supra* note 30, at 167–70.

⁴³ If there are multiple versions of the bill under consideration by the committee or subcommittee, the chair can often exercise a powerful effect on the outcome by choosing which version will be the “mark” or “vehicle”—that is, will be the subject of consideration. OLESZEK ET AL., *supra* note 25, at 133–34; TIEFER, *supra* note 30, at 167–68. This illustrates the inordinate influence that the particular language of the original proposal can wield.

⁴⁴ OLESZEK ET AL., *supra* note 25, at 129–31; POLSBY, *supra* note 25, at 139; SCHNEIER & GROSS, *supra* note 25, at 176. Schneier and Gross describe the typical markup session as follows: Prompted by spur-of-the moment ideas, or carefully briefed by staffers or lobbyists, members suggest the striking of several lines, the change of key words, or the substitution of an entirely new section for the old. SCHNEIER & GROSS, *supra* note 25, at 176. On controversial bills, lobbyists crowd the committee room and adjacent corridors to offer last-minute hand signals or winks, or to pass suggested drafts to friendly members. *Id.* In other words, even if interested parties are strongly contesting the bill’s provisions, their objections tend to be channeled by the original bill’s language and structure.

⁴⁵ Because there is a new House of Representatives every two years, a new bill must be introduced if the consideration of proposed legislation is carried over to a new session.

⁴⁶ On major legislation, it is possible, particularly in the House, that a subcommittee will markup the bill and then the full committee will repeat the process. See TIEFER, *supra* note 30, at 169.

either to weaken the bill, to expand its group of supporters, to contract its group of supporters, or for some other strategic purpose.⁴⁷ The entire process must of course be repeated in the other House,⁴⁸ although there is sometimes agreement that one of the Houses will play a leading role. If the two bodies have passed different versions of a bill, as is quite common, particularly when there are floor amendments, those differences can be resolved by having one House defer to the other or by an exchange of amendments between the two.⁴⁹ If the differences are extensive and the bill is an important one, it will be referred to a House-Senate conference committee, which is charged with establishing a single text.⁵⁰

The natural assumption is that the conference committee provisions will be located in the middle ground between the House and Senate versions, but “middle” is more difficult to define for language than for numbers, and conference committees have been exercising a considerable amount of initiative in recent years.⁵¹ Once the conference has reached agreement, the bills must be returned to each House for enactment, a process that usually occurs without further modification or revision.⁵²

As might be expected, not all bills follow this path in each of its particulars. Barbara Sinclair observes that the so-called Regular Order has been increasingly varied and altered in recent years, perhaps as a result of Congress’s increasing polarization.⁵³ Committees to which the bill would ordinarily be assigned have been bypassed,⁵⁴ and bills have been revised by

⁴⁷ See OLESZEK ET AL., *supra* note 25, at 196–235, 277–331; POLSBY, *supra* note 25, at 152–55; SCHNEIER & GROSS, *supra* note 25, at 182–201; SINCLAIR, *supra* note 25, at 35–42, 61–72; TIEFER, *supra* note 30, at 339–462, 623–90. See generally GARY MUCCIARONI & PAUL J. QUIRK, *DELIBERATIVE CHOICES: DEBATING PUBLIC POLICY IN CONGRESS* (2006) (discussing the quality of the debate on the House and Senate floors).

⁴⁸ A major difference between the House and the Senate is that the House generally considers legislation on the basis of a rule passed by the Rules Committee. See OLESZEK ET AL., *supra* note 25, at 159–77; Bruce Oppenheimer, *The Rules Committee: The House Traffic Cop*, in *ENCYCLOPEDIA OF THE AMERICAN LEGISLATIVE SYSTEM* 1049 (Joel Silbey ed., 2d ed. 1994). By contrast, the Senate considers legislation by unanimous consent—the pragmatic alternative to the official motion to proceed. See OLESZEK ET AL., *supra* note 25, at 250–73; TIEFER, *supra* note 30, at 563–84. One of the major ways in which the standard legislative procedure has given way to “unorthodox lawmaking,” in Barbara Sinclair’s terms, is the proliferation of special rules. See SINCLAIR, *supra* note 25, at 25–32. The primary purpose of these special rules, however, is to “make it easier for the majority-party’s leadership to advance its members’ legislative goals.” *Id.* at 46. Sinclair adds: “The leadership now has more flexibility to shape the legislative process to suit the particular legislation at issue.” *Id.* This would appear to make the design of legislation at the initial stage, that is, the stage at which it is introduced or marked up in committee, even more important than it was before.

⁴⁹ OLESZEK ET AL., *supra* note 25, at 332–40. The exchange of amendments is called ping-pong.

⁵⁰ See *id.* at 340–58; SCHNEIER & GROSS, *supra* note 25, at 203–11; TIEFER, *supra* note 30, at 767–848.

⁵¹ See Kenneth A. Shepsle & Barry R. Weingast, *The Institutional Foundations of Committee Power*, 81 AM. POL. SCI. REV. 85, 97–98 (1987) (discussing power of conference committees in addition to standing committees).

⁵² OLESZEK ET AL., *supra* note 25, at 358–61.

⁵³ See SINCLAIR, *supra* note 25, at 73–90.

⁵⁴ See *id.* at 17–20, 47–49.

supporters after they are reported from committee,⁵⁵ brought to the floor by circumventing established procedures,⁵⁶ and extensively revised by conference committees.⁵⁷ These changes are significant,⁵⁸ but since they involve an even less systematic methodology than the standard model, and certainly do not represent any movement in the direction of the recommendations given below, they can be treated as additional reasons why those recommendations would be beneficial.⁵⁹

II. THE MODEL OF PUBLIC POLICY FORMATION

If one categorizes the statutory design process in the traditional manner—that is, “how a bill becomes a law,”⁶⁰—then the basic procedure that Congress employs seems to make sense. The bill is introduced, the members of Congress debate it in committees and on the House floors, reach agreement on some version of it, and send it to the President for signature. But this process only makes sense if one accepts the underlying premise that statutory design is an essentially political activity, as opposed to a process of rational design or planning. In fact, the procedure is premised on the idea that the legislature’s role consists of argument and compromise—that is, a competitive struggle among people with fixed positions. The creativity of the participants—their ability to solve problems and develop new ideas—is seen as being devoted to these efforts.

Suppose, however, that statutory design is viewed as a policymaking process, that is, an effort to use government authority and resources to im-

⁵⁵ *Id.* at 20–23, 49–51.

⁵⁶ *Id.* at 23–32, 51–54, 56–61.

⁵⁷ *Id.* at 89–91.

⁵⁸ Sinclair provides extensive accounts of these and other variations for the 2005 Energy Bill, *id.* at 139–60, and the Medicare/Prescription Drug Bill of 2003, *id.* at 16–85. The recent effort to replace the Affordable Care Act provides another, and particularly striking, example. See Burgess Everett & Seung Min Kim, *Obamacare Repeal Bill Plunges into New Uncertainty*, POLITICO (July 16, 2017, 12:51 PM), <http://www.politico.com/story/2017/07/16/gop-health-care-bill-will-it-pass-240606> [perma.cc/2HRU-EDVB]. This notable departure from the regular order may have been the basis of Senator John McCain’s crucial “no” vote on the bill. See Ron Elving, *What is the “Regular Order” John McCain Longs to Return To On Health Care*, NPR POL. (July 26, 2017, 5:00 AM), <http://www.npr.org/2017/07/26/539358654/what-is-the-regular-order-john-mccain-longs-to-return-to-on-health-care> [perma.cc/7PY2-TG9P]; Cyra Master, *McCain Calls for “Return to Regular Order” on ObamaCare Repeal*, HILL (July 17, 2017, 10:17 PM), <http://thehill.com/policy/healthcare/342452-mccain-calls-for-return-to-regular-order-on-obamacare-repeal> [perma.cc/G898-EA2W].

⁵⁹ The impact of these variations on the proposal advanced by this Article is discussed below. See *infra* text accompanying notes 124–135.

⁶⁰ This phrase is a staple of civics texts, see, e.g., THEODORE J. LOWI ET AL., *AMERICAN GOVERNMENT: POWER AND PURPOSE* 150 (13th ed. 2014); JAMES Q. WILSON ET AL., *AMERICAN GOVERNMENT: INSTITUTIONS AND POLICIES* 325 (14th ed. 2015), and of children’s literature, see, e.g., KYLA STEINKRAUS, *HOW A BILL BECOMES A LAW* (2015); NANCY ANN VAN WIE, *TRAVELS WITH MAX: HOW A BILL BECOMES A LAW* (1999); see also Disney Educational Productions, *Schoolhouse Rock: America - I’m Just a Bill*, YOUTUBE (Dec. 8, 2011), <https://www.youtube.com/watch?v=ffroMQIKiag> [perma.cc/XZ7E-RYUB] (offering a conventional account of the legislative process).

prove society. This is certainly a plausible way to regard legislation in a modern, administrative state.⁶¹ In that case, the procedure Congress employs does not make much sense at all. It seems to ignore the most basic feature of policymaking, which is the effort to determine the best means to achieve a given or identified end.⁶² It squanders the creativity of the participants on argument and compromise, while providing no opportunity for creative problem-solving about the underlying effort to improve society.⁶³

In his virtually unique discussion of modern legislation as policymaking, Hans Linde wrote: “An obligation that lawmakers design and evaluate every law as a means to an end beyond itself would demand of policymaking the rational procedures of policy implementation.”⁶⁴ In fact, the basic components of an optimal public policymaking process are well known and generally agreed upon. First, the decisionmaker should define the problem to be solved. The next step is to generate a range of possible alternatives that might potentially resolve that problem. Each alternative is then assessed for its potential effectiveness on the basis of the available information. Then the decisionmaker chooses the most promising alternative; the more information and analysis that can be brought to bear on the decision, the more likely it will be that the most effective alternative will be selected.⁶⁵ Once the choice is made, it must be implemented, typically by someone other than the policymaker.⁶⁶ The policymaker’s post-enactment role is to evaluate the result, and if necessary, revise the policy or begin the design process anew.

⁶¹ For a fuller explication of this argument, see RUBIN, *BEYOND CAMELOT*, *supra* note 23 at 191–226. See generally VEERMAN, *supra* note 11; Rubin, *supra* note 16. Veerman’s study treats legislation as policymaking, and its approach is quite similar to the one presented here. See VEERMAN, *supra* note 11, at 1–2. But because it is written in the context of the Netherlands and other European parliamentary systems, its normative recommendations are directed to the specialists in the government who draft legislation, not to the legislators themselves.

⁶² In fact, this policymaking aspect of legislation is so widely overlooked that its absence is not even apparent to academic observers who study the legislative process. See sources cited *supra* note 9. All these works discuss the arguments and compromises by which the statute was passed by Congress, but none describe the process by which the statute was originally designed.

⁶³ The same can be said, perhaps even more remarkably, for the rulemaking procedures prescribed for federal administrative agencies in the Administrative Procedure Act, 5 U.S.C. § 553 (2012). See Edward Rubin, *It’s Time to Make the Administrative Procedure Act Administrative*, 89 CORNELL L. REV. 95, 110–23 (2003). They are modeled, very roughly to be sure, on adjudicatory procedure, with the required notice being equivalent to due process notice, the receipt of comments being a sort of rudimentary hearing, and the statement of basis and purpose conceived as a reasoned decision on the basis of the evidence. There is nothing in the Act that suggests any requirement that the agency engage in policy analysis when making a rule.

⁶⁴ See Linde, *supra* note 17, at 227.

⁶⁵ For general descriptions of the policy process, see BARDACH, *supra* note 6, at 1–57; THOMAS A. BIRKLAND, *AN INTRODUCTION TO THE POLICY PROCESS: THEORIES, CONCEPTS, AND MODELS OF PUBLIC POLICY MAKING* 125–27, 157–80 (2005); JOHN FRIEDMAN, *PLANNING IN THE PUBLIC DOMAIN: FROM KNOWLEDGE TO ACTION* 137–56 (1987); STOKEY & ZEKHAUSER, *supra* note 6, at 5–6; DEBORAH STONE, *POLICY PARADOX: THE ART OF POLITICAL DECISION MAKING* 232–42 (2d ed. 2002).

⁶⁶ For general descriptions of implementation, see EUGENE BARDACH, *THE IMPLEMENTATION GAME: WHAT HAPPENS AFTER A BILL BECOMES A LAW* (1977); BIRKLAND, *supra* note 65, at 181–97; MICHAEL HILL & PETER HUPE, *IMPLEMENTING PUBLIC POLICY* (2d ed. 2009);

At this level of generality, the main controversy is not about the components of optimal policymaking, which are widely recognized, but about whether that process exceeds the capacities of most real-world decisionmakers. Perhaps the best known critique is Charles Lindblom's claim that policymakers have neither time nor resources to carry out this process in most situations, and "muddle through" instead.⁶⁷ In other words, they institute incremental changes to existing policy on the basis of a limited amount of information.⁶⁸ This critique is related to Herbert Simon's notion of bounded rationality.⁶⁹ According to Simon, most decisionmakers lack the time, resources, and analytic capacity to make a fully rational decision. Therefore, instead of maximizing, they "satisfice," settling for a decision-making process that is less than optimal but lies within their capabilities.⁷⁰

The absence of any of these methods of policy analysis from the legislative process does not necessarily mean that no policy analysis has occurred in connection with the bill. The more accurate statement is that such analysis is not part of the standard procedure for enacting legislation. It will occur, if at all, before this procedure begins, that is, before the bill is introduced by its sponsoring member or members. Since a member can introduce any bill at all, no standards or requirements apply to the design of the bill that is introduced. In many cases, although not necessarily all, the bill's origin is known, but in almost all cases, the way the bill has been designed remains unspecified. As a result, the decisions that shaped the bill's substance and language are unknown to the members who will be considering it. The obscurity is

JEFFREY L. PRESSMAN & AARON WILDAVSKY, IMPLEMENTATION: HOW GREAT EXPECTATIONS IN WASHINGTON ARE DASHED IN OAKLAND (3d ed. 1984); STONE, *supra* note 65, at 265-375.

⁶⁷ See Charles E. Lindblom, *Still Muddling, Not Yet Through*, 39 PUB. ADMIN. REV. 517 (1979). See generally BRAYBROOKE & LINDBLOM, *supra* note 18; CHARLES E. LINDBLOM, THE INTELLIGENCE OF DEMOCRACY (1965). In essence, Lindblom is contrasting incremental decisionmaking with synoptic decisionmaking, which, he argues, does not work because of its excessive information requirements. See CHARLES E. LINDBLOM, POLITICS AND MARKETS 325 (1977) (comparing market and centrally planned regimes). It is possible that his cautions are most directly relevant to the problem definition stage of the policy process, rather than the consideration of alternatives, and that his basic argument is against over-ambitious efforts to transform society. His proposed solution, which is to divide the decision among smaller, autonomous decisionmakers, see *id.* at 337-39, actually seems to fit the institutional structure of Congress fairly well, which divides general programs (e.g., the New Deal, the Great Society) into topic-specific bills considered by separate, specialized committees. But it also suggests variations on the standard policymaking model within each committee.

⁶⁸ See KINGDON, *supra* note 9, at 77-83 (arguing that American public policymaking is characterized by this muddling, or non-rational approach, but that it is spasmodic, rather than incremental).

⁶⁹ HERBERT SIMON, ADMINISTRATIVE BEHAVIOR 88, 118-22 (4th ed. 1997). Simon's argument is that people intend to maximize their personal welfare, just as classical economic theory supposes, but that they lack the "global omniscience" that would enable them to do so. *Id.* at 88. According to Simon, this brings questions of psychology back into the study of organizations, that is, it precludes us from building an organizational theory on the basis of economic analysis. Cf. Melvin A. Eisenberg, *The Limits of Cognition and the Limits of Contract*, 47 STAN. L. REV. 211 (1995) (applying this concept to legal doctrine).

⁷⁰ SIMON, *supra* note 69, at 119 ("Whereas economic man supposedly maximizes—selects the best alternative from those available to him—his cousin, the administrator, satisfices—looks for the course of action that is satisfactory, or 'good enough.'").

typically greatest when the bill is drafted by a private party,⁷¹ but the process used for a bill drafted by the administration may be equally unknown.⁷² Perhaps some conscientious attempt has been made to design the bill effectively, and perhaps not—there is no way for the members, their staffs, or the public to know.

Bills drafted by committee staff⁷³ are a partial exception to this general pattern that the bill's original drafting process is not known, or at least fully known, by the committee that considers it. Clearly, committee staff who have drafted the bill will know how it was designed, although the public typically will not. Even in this case, however, there is no specified process, nor even any informal understanding about the way decisions regarding the bill's substance and language should be made. Perhaps the staff has employed some systematic approach that was intended to make the bill an effective way to achieve its ends. On the other hand, perhaps their decisions were made in anticipation of political considerations—that is, the arguments and compromises needed to enact the bill in question.

In any application of the policymaking model, the caveats and cautions that Lindblom, Simon, and others have advanced must be taken seriously. But there is certainly some value to considering the optimal process for public policymaking as it has been developed over time. That process may need to be modified in particular circumstances, but it is difficult to institute modifications or adaptations unless one knows the starting point.

III. PROBLEMS WITH THE EXISTING METHODOLOGY FROM THE POLICYMAKING PERSPECTIVE

Identifying the policymaking model, as it has been developed by a range of scholars, and deployed in a range of settings, highlights the basic problem with the legislative process in Congress. This process only begins after the bill under consideration has already been designed. Consequently, Congress has largely opted out of the design effort and delegated the crucial

⁷¹ This is one of the two components of Sitaraman's third category of bills, that is, bills drafted outside the legislature, as opposed to those drafted by legislators' personal staff and those drafted by a committee of the legislature. See Sitaraman, *supra* note 27, at 84.

⁷² This is the other component of Professor Sitaraman's third category. See *id.* One of the best-regarded books about the legislative process is Eric Redman's first-person account of the enactment of the National Health Services Corps, Pub. L. No. 91-623, 84 Stat. 1868 (1970) (codified as amended at 42 U.S.C. § 254d (2010)). See generally REDMAN, *supra* note 9. According to Redman, the text of the bill was provided to him, as a member of Senator Warren Magnuson's staff, by Abe Bergman, a physician and "political activist" who served as an "unofficial advisor to Senator Magnuson." *Id.* at 27–28. In a visit to Magnuson's office, Bergman told Redman that "National Health Service Corps schemes were discussed increasingly in medical circles" as a solution to the shortage and maldistribution of doctors. *Id.* at 33. He gave Redman a "copy of a proposal developing this idea . . . written by Dr. Laurence Platt, a young commissioned officer of the PHS," and revised by Bergman to include necessary revisions to related statutes. *Id.* at 34. This is the entirety of Redman's account of the way that the bill was designed. The rest of his book is devoted to the political efforts to get it enacted.

⁷³ That is—Sitaraman's first two categories of legislation, *supra* note 27, at 84.

decisionmaking role to other parties of indeterminate identity and motivations.⁷⁴

To be sure, very few important bills go through Congress without major changes. As described above, there are at least three stages in the process where the language of the bill can be extensively revised. In chronological order, and perhaps descending order in terms of the number and extent of revisions, they are the markup sessions, the floor debate, and the conference committee.⁷⁵ The problem is that, at each of these stages, including the markup, the legislators and their staffs are working with an existing proposal that will largely define the scope of their deliberations. Their revisions are thus not statutory design but retro-design: attempts to modify or adjust something that has already been put in place.

The disadvantages of limiting the design process in this manner are apparent. First, beginning with an existing bill obscures the nature of the problem.⁷⁶ Instead of thinking about the way to formulate the issue that the members and the public are genuinely concerned about, the legislators have placed themselves in the position of considering Congresswoman X's bill. Even if they can separate their reactions to the bill from their personal relationship to Congresswoman X, which will be difficult, or their political relationship to Congresswoman X's party or faction, which will be nearly impossible,⁷⁷ they will have difficulty separating their grasp of the problem

⁷⁴ The extent to which Congress delegates authority to administrative agencies has been a matter of concern to some observers. *See, e.g.*, THEODORE LOWI, *THE END OF LIBERALISM: THE SECOND REPUBLIC OF THE UNITED STATES* 92–126 (2d ed. 1979); DAVID SCHOENBROD, *POWER WITHOUT RESPONSIBILITY: HOW CONGRESS ABUSES THE PEOPLE THROUGH DELEGATION* (1995); Gary Lawson, *The Rise and Rise of the Administrative State*, 107 HARV. L. REV. 1231 (1994). What is notable in the present context is that delegation of implementation authority to administrative agencies is much less serious, in terms of Congress's role and responsibility, than the delegation of drafting authority that the present methodology involves. When Congress delegates implementation authority, it is simply exercising the powers assigned to it, since it is supposed to rely on the executive for this purpose. *See* Edward Rubin, *Law and Legislation in the Administrative State*, 89 COLUM. L. REV. 369, 387–97 (1989). But when Congress delegates drafting authority to unidentified outsiders, it abandons its most essential function. Moreover, delegations of implementation authority emerge from Congress's affirmative decision to grant the agency authority or alternatively, as argued in *Chevron U.S.A., Inc. v. NRDC, Inc.*, 467 U.S. 837 (1984), to proceed with a vaguely worded bill. But delegations of drafting authority seem to occur by inadvertence. Congress never asserts that it does not want to design its own bills; it simply adopts a legislative methodology allowing that result.

⁷⁵ It is interesting to compare this list with the more familiar list of veto gates, or stages in the process where the bill can be defeated in its entirety, that is, the committee chair's decision to hold hearings, the committee vote, the floor vote, and the President's signature. The reason why only one of the veto gates, the floor vote, overlaps with the revision periods is that a veto is a categorical rejection, not a design process. If the bill fails, of course, there is no need to worry about whether it was well designed.

⁷⁶ *See* Linde, *supra* note 17, at 230–34 (arguing that statutes should state their purposes explicitly and clearly).

⁷⁷ *See* OLESZEK ET AL., *supra* note 25, at 125–31, 136–37; SCHNEIER & GROSS, *supra* note 25, at 148–51; John H. Aldrich & David W. Rhode, *Congressional Committees in a Continuing Partisan Era*, in CONGRESS RECONSIDERED 217 (Lawrence C. Dodd & Bruce I. Oppenheimer eds., 9th ed. 2009). The increasing polarization of Congress, *see* sources cited *supra* note 19, naturally amplifies this effect.

to be solved from the solution to the problem that the bill proposes. In other words, beginning with a definitive proposal obscures the underlying problem that the proposal addresses behind a screen of specificity. The true scope of the problem, its various ramifications, and its relationship to other problems will be difficult to consider, or even to discern.

Second, beginning with a fully drafted bill will almost inevitably limit the range of alternatives that Congress is able to consider in solving the problem.⁷⁸ The particular solution that the drafter, whoever that may be, has selected will be embodied in the bill. Reactions to the bill will naturally center on that chosen solution. This necessarily empowers the opponents, since every proposal will have weak points, and undermines those who agree with the need to solve the problem but might have preferred a different solution. In addition, it increases the difficulty of conceiving and developing alternative solutions. In part, this is because suggested alternatives are likely to be seen by the proponents of the bill as antagonistic to their basic effort, rather than suggestions for achieving the same result by different means.

Even more seriously, whatever undefined process resulted in choosing the solution embodied in the bill cannot be undone in the process by which the bill is considered. The solution is the starting point for the legislative process, and whatever thinking process led up to that solution is likely to be unrecorded or undisclosed unless the bill was drafted by committee staff. Markup comes closest to a comprehensive reconsideration, but as its name suggests, it involves revisions or adjustments of the existing bill, not consideration of differing approaches. Hearings are remote from the drafting and decisionmaking processes because the inevitable partisan divisions in the committee, combined with deeply embedded habits of our legal culture, tends to move them toward the model of a civil trial, with its pattern of direct testimony of witnesses and cross-examination. Cross-examination, a distinctive feature of committee hearings, seems particularly ill-suited to the task of designing legislation.⁷⁹ Since Biblical times at the latest, it has been recognized as a powerful way to test the veracity of a witness.⁸⁰ But wit-

⁷⁸ According to a leading study, economic elites exercise control over public policy by limiting the range of alternatives that are considered, rather than by dictating the result. Peter Bachrach & Morton S. Baratz, *Decisions and Nondecisions: An Analytic Framework*, 57 AM. POL. SCI. REV. 632, 641 (1963). For a more general exploration, see PETER BACHRACH & MORTON S. BARARTZ, *POWER AND POVERTY: THEORY AND PRACTICE* (1970). The conclusion that can be drawn from Bachrach and Baratz's work is that allowing special interest groups to introduce legislation, via a single sympathetic legislator, that is in final statutory form and thus states only one possible alternative, is a recipe for poor public policy.

⁷⁹ Rubin, *supra* note 16, at 274–77; SCHNEIER & GROSS, *supra* note 25, at 83–84.

⁸⁰ See *The History of Susanna*, in *THE APOCRYPHA OR NON-CANONICAL BOOKS OF THE BIBLE* 245 (Manuel Komroff ed., 1992). The story of Susanna is included, with *The History of the Destruction of Bel and the Dragon*, as Daniel 13 in Catholic Bibles, but is not included in Jewish or most Protestant versions. See *THE NEW AMERICAN BIBLE* (1970). See generally FRANCIS L. WELLMAN, *THE ART OF CROSS-EXAMINATION* (4th ed. 1997); Ronald L. Carlson, *Cross-Examination of the Accused*, 52 CORNELL L. REV. 705 (1967) (assessing the impact of different rules for cross-examination on the effectiveness of the technique).

nesses before a congressional committee are rarely lying. The real concern is that they have not accurately researched or analyzed the issue under consideration, or that their perceptions are distorted by their interests. These are not the sorts of defects that cross-examination is designed to discern. It may do so indirectly, by revealing flaws in the thinking that serves as the basis for the bill, but its direct effect is only to reveal flaws in the witness's ability to justify the bill before the committee, and it is distinctly not designed to discern issues that have been overlooked by the proponents of the bill, or to explore alternative solutions to the underlying problem.⁸¹

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

Fourth, the fact that the essential design decisions are made before the bill is introduced means that these decisions are almost carried out in obscurity, and often in secret. There is thus no opportunity for general criticism or participation by those with differing ideas. The problem is greatest when the drafters are private parties, such as businesses or trade organizations. When the bill is drafted by the administration or by committee staff, the drafters are appointees of elected officials; typically, however, they work in relative isolation, without the scrutiny or input that accompanies many other public functions. Thus, by the time the bill first appears in a form available to the public, all the crucial design decisions have been made. At that point, they can only be changed if the proposed provisions are specifically undone.

Beyond these specific and readily identified disadvantages of beginning the legislative design process with a drafted bill, there are several more general or structural ones that may be equally inimical to effective public policymaking. Disagreements about the best way to design the bill in question are likely to be common. If the process begins with a fully drafted bill, each disagreement needs to be resolved in final, statutory form before the process can proceed. The result is that the bill becomes encumbered with elaborately

⁸¹ The underlying reason is that cross-examination is a feature of adversarial process whose purpose is to resolve a dispute between two parties, not to determine information about the world. It was this consideration that led Kenneth Culp Davis to propose his famous distinction between adjudicative and legislative facts. *See* KENNETH CULP DAVIS, *ADMINISTRATIVE LAW TREATISE* 487-97 (1951).

crafted compromises that are strategically difficult to reconsider or undo.⁸² By being prematurely committed to final statutory form, the bill acquires a rigidity that precludes the open-minded evaluation and reevaluation that is crucial to effective policy design. It is as if the bill is proceeding through a dense, resistant medium, and becomes increasing indurated and encrusted in its effort to move forward.

Even more generally, beginning with a drafted bill, and thereby delegating the crucial design questions to some external source, will subtly transform Congress from a policymaker to a debating society. In effect, the members are surrendering to the excessively cynical, disparaging image of themselves that scholars have created. Alternatively, it might be said that Congress, the primary policymaker in a presidential democracy like our own, has relinquished its prerogatives and acquiesced to the subordinate position of the legislatures in parliamentary democracies, whose role is often limited to debating and then enacting government bills.⁸³ Of course, Congress also retains the power to reject. What it loses, for lack of an effective legislative methodology, is the creative role that it has been granted by the Constitution.

Another structural difficulty with the prevailing methodology, when viewed as policymaking, is its unsystematic, un-analytic treatment of empirical evidence. Information does enter the process; in fact, it is fair to say that it floods in.⁸⁴ In many cases, it comes from reliable sources.⁸⁵ Contrary to the popular image, lobbyists are not typically desk-thumping bullies who threaten legislators with the end of their political careers; the most effective ones devote most of their efforts to providing information to the legislators and their staffs.⁸⁶ Hearings often feature an impressive array of witnesses,

⁸² For a vivid account of this phenomenon, see ELVING, *supra* note 9, at 92–161.

⁸³ See JENNINGS, *supra* note 7, at 183–246; MALCOLMSON & MYERS, *supra* note 7, at 116–29; DIANA WOODHOUSE, *MINISTERS AND PARLIAMENT: ACCOUNTABILITY IN THEORY AND PRACTICE* 15–26 (1994); Paul Seaward, *The House of Commons Since 1949*, in *A SHORT HISTORY OF PARLIAMENT* 283 (Clyve Jones ed., 2009). See generally DELEGATION AND ACCOUNTABILITY IN PARLIAMENTARY DEMOCRACIES, *supra* note 7.

⁸⁴ See MUCCIARONI & QUIRK, *supra* note 47, at 161 (“Legislators rely most heavily on claims that have considerable empirical support. For claims at a given level of political force, they use the more sustainable, empirically supported claims more often.”); OLESZEK ET AL., *supra* note 25, at 120 (“[C]ommittee members and their staffs have a high degree of expertise on the subjects within their jurisdiction.”); TIEFER, *supra* note 30, at 156 (noting that one reason “Congress attaches great importance to the testimony of executive branch witnesses” is that they “may have the most information”).

⁸⁵ See Allen Schick, *Informed Legislation: Policy Research Versus Ordinary Knowledge*, in *KNOWLEDGE, POWER AND THE CONGRESS* 103 (William H. Robinson & Clay H. Wellborn eds., 1991) (stating that the flow of information to Congress has “been spurred by the entrance of thousands of professional researchers into government agencies, think tanks, and many other organizations that produce policy research”); SCHNEIER & GROSS, *supra* note 25, at 73–93 (same).

⁸⁶ See generally FRANK R. BAUMGARTNER ET AL., *LOBBYING AND POLICY CHANGE: WHO WINS, WHO LOSES, AND WHY* (2009); BERTRAM J. LEVINE, *THE ART OF LOBBYING: BUILDING TRUST AND SELLING POLICY* (2008); KINGDON, *supra* note 9, at 125–27; SCHNEIER & GROSS, *supra* note 25, at 84–89.

and each witness is free to append any information she deems relevant to her written statement or introduce such information in the course of her testimony.⁸⁷ Staff members spend a substantial amount of time gathering information as well, and the members are free to introduce further information during the floor debate.

There are at least two problems with the current approach to information, however, both the result of Congress's failure to focus on the issue of legislative design and conceive it as a form of policymaking. First, the information that inundates Congress for a given bill, a virtual tsunami if the bill is an important one, is not organized in any systematic way, but presents itself as a roiling, undifferentiated mass.⁸⁸ The policymaking process, in contrast, tends to bundle information into manageable batches. Certain types of information, such as surveys or theoretical analyses, are useful for defining the problem. Other types, often of a more speculative sort, will be relevant to generating alternative solutions. There will be a particular body of information relevant to the evaluation of each solution, sometimes using empirical data, or at other times relying on models or projections. As the range of alternatives is narrowed down, the type of additional information that will be the most relevant will become apparent. Because Congress adopts a fairly passive role toward information, allowing anyone to introduce anything in its misguided effort to seem open-minded, it cannot benefit from any of these organizing strategies.

The second problem is that the information Congress receives tends to be assimilated to the debate or battle model that legislators have allowed to dominate their deliberations. It is treated as support for one side or the other, ways of buttressing or undermining a particular argument.⁸⁹ By following this familiar, age-old strategy, Congress has denied itself the intellectual machinery of the modern era.⁹⁰ There is no stage in the process when the scientific or social science techniques that represent the best means we have for

⁸⁷ See OLESZEK ET AL., *supra* note 25, at 121–27; SCHNEIER & GROSS, *supra* note 25, at 172–73; TIEFER, *supra* note 30, at 155–56. Prior written testimony is required by the Legislative Reorganization Act of 1946, ch. 753, 60 Stat. 812. *But see* Roger Davidson, *The Legislative Reorganization Act of 1946*, 15 LEGIS. STUD. Q. 357, 366–67 (1990) (effort to reform committee procedure undermined by the growth of subcommittees).

⁸⁸ See KINGDON, *supra* note 9, at 90–105, 117–31. Kingdon refers to this situation as a “garbage can.” *Id.* at 84–86. In his view, the chaotic state of information acquisition in Congress is an inherent feature of the process. This is undoubtedly true to some extent, but he fails to demonstrate that the process cannot be improved, i.e., that information relevant to legislation cannot be gathered and organized in a more effective manner.

⁸⁹ Sinclair reports that committee consideration in the House, where members once strived to be nonpartisan, has become increasingly partisan in recent years. *See* SINCLAIR, *supra* note 25, at 17–18. Under these circumstances, starting with a fully drafted bill will have a still more distorting effect on information gathering, since it will be apparent from the outset whether a given datum supports or undercuts the solution embodied in the bill.

⁹⁰ *See* MUCCIARONI & QUIRK, *supra* note 47, at 156 (arguing that legislators prefer to rely on claims that reflect common understandings); *see also* Schick, *supra* note 85, at 108–15 (arguing that members of Congress take policy research seriously, but generally act on it only when it agrees with their prior knowledge).

grappling with the real world can be brought to bear on proposed legislation. Hearings, with their civil trial origins, are a singularly old-fashioned and inadequate means of gathering and evaluating information.⁹¹ Floor debate trades genuine inquiry for political oratory, which is an equally defective research strategy. In other words, the information may be available, but it is not being assessed or deployed in a systematic manner.

Examples of legislative failures that might illustrate these difficulties are readily available, but demonstrating that a different approach would have produced better results is necessarily speculative, since it involves counterfactuals. The uncertainty is aggravated by the scholarly lacuna described above. While there are a number of illuminating accounts of the political process by which various statutes have been enacted, there are virtually no detailed descriptions of the process by which the drafting decisions were made.⁹² One possible example of an identifiable design failure and possible alternative is the Truth-in-Lending Act, an early congressional foray into consumer protection.⁹³ The sponsor and proponent of the Act, Paul Douglas (D-Ill.)—a highly principled legislator—came into the Senate with a clear perception of the problem that the Act was designed to solve: a series of abuses in the consumer credit industry. But he also began with a clear conviction that the way to solve the problem was by required disclosure of information.⁹⁴ Through Herculean efforts by Douglas and his allies, this solution became law.⁹⁵ But the required disclosures turned out to be so complex that they were of limited value to consumers, who could not understand them, and unfair to creditors, who could not comply with them.⁹⁶ Within a relatively short time, the statute was revised, first by the Truth-in-Lending Simplification and Reform Act, which, among other measures, provided for promulgation of sample forms by the regulatory agency,⁹⁷ then by the Fair

⁹¹ The heavy reliance on hearings tends to favor anecdotal accounts and vivid examples, rather than systematically gathered evidence. In addition, the style of the hearings places excessive weight on the comportment and forensic skill of the witness. See TIEFER, *supra* note 30, at 149.

⁹² See generally KINGDON, *supra* note 9.

⁹³ Consumer Credit Protection Act, Pub. L. No. 90-321, 82 Stat. 146 (1968) (codified as amended at 15 U.S.C. §§ 1601-1667e (2012)).

⁹⁴ Rubin, *supra* note 16, at 242-43.

⁹⁵ *Id.* at 243-63. Douglas's most important ally was William Proxmire (D-Wis.), who shepherded the bill through Congress after Douglas failed to gain re-election.

⁹⁶ See, e.g., William K. Brandt & George S. Day, *Information Disclosure and Consumer Behavior: An Empirical Evaluation of Truth-in-Lending*, 7 U. MICH. J.L. REFORM 297 (1974); Robert P. Shay & Milton W. Schober, *Consumer Awareness of Annual Percentage Rates Charge in Consumer Installment Credit: Before and After Truth-in-Lending Became Effective*, in I NAT'L COMM'N ON CONSUMER FIN., TECH. STUDIES 7-8 (1973).

⁹⁷ Depository Institutions Deregulation and Monetary Control Act of 1980, Pub. L. No. 96-221, 94 Stat. 168 (1980) (codified as amended at 15 U.S.C. §§ 1601-1693(r) (2012)); see 15 U.S.C. § 1604(b) (2010) (sample form provision). In subsequent hearings, Proxmire admitted that "[t]he law, I think, was not properly drafted." *Simplify and Reform the Truth-in-Lending Act: Hearings on S. 1312, S. 1501, and S. 1653 Before the Subcomm. On Consumer Affairs of the S. Comm. on Banking, Housing, and Urban Affairs*, 95th Cong. 5 (1977) (Statement of Sen. William Proxmire).

Credit and Charge Card Disclosure Act, which provided for a summary of the disclosures in simplified tabular form.⁹⁸ But the use of devices such as these to aid both creditors and consumers, as well as any more general consideration of alternative and possibly more effective means of communicating information to consumers, were effectively precluded from Congress's consideration when the original act was passed because all discussion centered on the solution that the bill embodied.⁹⁹

The Occupational Safety and Health Act (OSHA) provides an additional example.¹⁰⁰ Its design as typical command and control regulation, with inspectors authorized to search worksites for potentially injurious conditions, led to a number of implementation problems, most notably that the implementing agency would never be granted sufficient resources to police the millions of worksites subject to the Act, and that the inspection process was inherently adversarial and often counterproductive as a result.¹⁰¹ The area director responsible for Maine developed a different and more effective solution, which required employers to develop their own safety plans in exchange for an exemption from regular inspections. This cooperative approach led to a dramatic decline in workplace injuries, while saving the agency's scarce resources that could then be devoted to inspecting non-compliant firms.¹⁰² It might have been considered at the time the statute was drafted, but the traditional, command and control approach was embedded in the draft presented to Congress. When the agency became aware of an apparently preferable alternative, and attempted to implement it nationally, the effort was struck down by the United States Court of Appeals for the District

⁹⁸ Fair Credit and Charge Card Disclosure Act of 1988, Pub. L. No. 100-583, 102 Stat. 2960 (1988) (codified as amended in scattered sections of 15 U.S.C.). These disclosures are set apart from the rest of the credit document, and known as a "Schumer Box" after the legislation's leading sponsor, Charles Schumer. Jeffrey Toobin, *The Senator and the Street*, NEW YORKER (August 2, 2010), <https://www.newyorker.com/magazine/2010/08/02/the-senator-and-the-street> [http://perma.cc/Z3F8-CBWR]; see 15 U.S.C. § 1637(c)(1)(A) (2000); 15 U.S.C. § 1632(c) (2000).

⁹⁹ For a subsequent empirical study of what might work, sponsored by the regulatory agency (the Federal Reserve), see MACRO INT', DESIGN AND TESTING OF EFFECTIVE TRUTH AND LENDING DISCLOSURES: FINDINGS FROM EXPERIMENTAL STUDY, (2008), <https://www.federalreserve.gov/newsevents/pressreleases/files/bcreg20081218a8.pdf> [perma.cc/9JHU-T9BP]. The question is why a study such as this was not conducted when the original legislation was being considered.

¹⁰⁰ Occupational Safety and Health Act of 1970, 29 U.S.C. §§ 651-678.

¹⁰¹ See ROBERT A. KAGAN, *ADVERSARIAL LEGALISM: THE AMERICAN WAY OF LAW* 181-205 (2001) (noting general tendency in the American legal system to rely on adversarial or oppositional solutions). See generally EUGENE BARDACH & ROBERT A. KAGAN, *GOING BY THE BOOK: THE PROBLEM OF REGULATORY UNREASONABLENESS* (1982); John Scholz, *Cooperation, Deterrence, and the Ecology of Regulatory Enforcement*, 18 *LAW & SOC. REV.* 179 (1984).

¹⁰² The 200 firms involved in the program, although representing only 1% of Maine employers, accounted for 30% of the employees and, significantly, 45% of the documented workplace injuries. *Maine Top 200 Experimental Targeting Program*, GOV'T INNOVATORS NETWORK, <https://www.innovations.harvard.edu/maine-top-200-experimental-targeting-program> [perma.cc/GAY5-CLFS].

of Columbia.¹⁰³ The opinion, written by Judge Douglas Ginsburg, was the unprincipled work of an anti-regulatory judge,¹⁰⁴ but illustrates the danger of failing to consider and authorize preferable alternatives in the authorizing statute.

IV. RECOMMENDATIONS FOR A NEW LEGISLATIVE METHODOLOGY

Congress can do better, as can other American legislatures that have not been the direct focus of this discussion. As the primary policymakers for their jurisdictions, they need to develop and employ a methodology for designing legislation that will increase the likelihood that the legislation they produce will be effective, that it will achieve its stated purposes, and benefit the people whom they serve. There is no reason why they should not be able to do so. The fact that their members are strongly influenced by political considerations, like the fact that executive policymakers are not always capable of following the optimal policymaking procedure, is no reason not to begin with the best methodology that can be devised. That methodology will not always prevail, but all human aspirations sometimes founder on the complexities of circumstance. It would thus be a mistake to be overly optimistic, but it is a more serious mistake not to try at all.

Of course, members of a legislature will disagree about what is good for the country. Legislatures are structured to debate those issues and then resolve them, not by reaching consensus, but by majority vote.¹⁰⁵ The minimum expectation for effective legislation, therefore, is that it will achieve the goals that the enacting majority of legislators have in mind when voting for the bill in question. It is possible, following a strictly pluralist model of democracy, that there is no other definition of the public good.¹⁰⁶ In that

¹⁰³ Chamber of Commerce v. U.S. Dep't of Labor, 174 F.3d 206 (D.C. Cir. 1999).

¹⁰⁴ Having reached out to assert jurisdiction on the ground that it was a "standard," not a regulation, the Court then struck down the "standard" because it was adopted without using the procedures applicable to certain types of regulations. *Id.* at 209–11.

¹⁰⁵ Legislatures that decide by unanimity, rather than consensus, are based on the idea that this gap can always be resolved by argument. That is a wonderful aspiration, and the basis for what is probably the most elaborate and thoughtful account of deliberative democracy. See generally JURGEN HABERMAS, BETWEEN FACTS AND NORMS: CONTRIBUTIONS TO A DISCOURSE THEORY OF LAW AND DEMOCRACY (Willam Rehg trans., 1996) (1992). Unfortunately, it turns out to be an unrealistic position. It generally leads to legislative stalemate, as in the case of the Articles of Confederation Congress. See generally MERRILL JENSEN, THE NEW NATION: A HISTORY OF THE UNITED STATES DURING THE CONFEDERATION 1781–1789 (1981); JACK RAKOVE, ORIGINAL MEANINGS: POLITICS AND IDEAS IN THE MAKING OF THE CONSTITUTION 46–48, 167–68 (1996); GORDON S. WOOD, THE CREATION OF THE AMERICAN REPUBLIC 1776–1787, at 354–63 (1969); see also FIONA MCGILLIVRAY ET AL., INTERNATIONAL TRADE AND POLITICAL INSTITUTIONS: INSTITUTING TRADE IN THE LONG NINETEENTH CENTURY 80–95 (2001) (describing problems regarding international trade relations); ADAM ZAMOYSKI, THE POLISH WAY 206–21 (1997) (describing pre-Partition Polish Seym).

¹⁰⁶ For pluralist accounts of democracy, see ROBERT DAHL, WHO GOVERNS? DEMOCRACY AND POWER IN AN AMERICAN CITY 223–69 (1961); ROBERT DAHL, POLYARCHY: PARTICIPATION AND OPPOSITION 1–32 (1971); CLAUS OFFE, DISORGANIZED CAPITALISM, 259–99 (1985);

case, we certainly want the legislation to achieve the goals that the majority of its elected members favor at any particular time.

It is also possible to argue, from a critical perspective, that there is an independent conception of the public good to which the majority does not necessarily adhere.¹⁰⁷ But that possibility does not counsel the critical observer to favor an ineffective legislative methodology. To do so would be to assume that the random consequences that an ineffective methodology produces are preferable to allowing one's opponents to achieve their goals. The first problem with this view is that it affects one's own side as well. Once the right people, from the critical observer's point of view, get into power, they will also be encumbered by the ineffective methodology that they inflicted on their opponents. The second problem in using ineffectiveness to frustrate one's opponents is that it is inconsistent with even a non-pluralist concept of democracy, which is that the critical observer should strive to move the group that represents her vision of the public good into the majority. During the time this group is out of power, the damage that its opponents can inflict, from the critical observer's perspective, is limited by the internal controls imposed by regular government procedures and by the independently enforced human rights that protect all members of the society, not by a defective legislative methodology.

The third problem with using legislative ineffectiveness to hobble one's opponents is that it conflicts with the reality of a functioning democracy as well as democratic theory. In the real world, as Robert Dahl pointed out, a democratic government simply cannot exist without some area of consensus about the public good.¹⁰⁸ Most Americans, for example, want the economy to prosper and the environment to be healthy, even if they disagree about the relative importance of these goals and the best means for achieving them. This suggests that an effective legislative methodology is more likely to bring the legislation that the majority produces closer to the concept of the public good than randomly ineffective legislation. It allows, moreover, for policy-based compromises that would decrease the disadvantages of the opponent's legislation from the critical perspective, while still enabling them to achieve their goals.¹⁰⁹ Thus, a nonpartisan methodology that improved the

DAVID B. TRUMAN, *THE GOVERNMENTAL PROCESS: POLITICAL INTERESTS AND PUBLIC OPINION* 501–35 (1955).

¹⁰⁷ For arguments that democracy can aspire to achieving a critically defined common good, rather than merely a resolution of disagreement, see THOMAS CHRISTIANO, *THE CONSTITUTION OF EQUALITY: DEMOCRATIC AUTHORITY AND ITS LIMITS* (2008); KELMAN, *supra* note 16, at 207–85; ALAIN TOURAINE, *WHAT IS DEMOCRACY* (David Macey trans., 1997); DONALD WITTMAN, *THE MYTH OF DEMOCRATIC FAILURE: WHY POLITICAL INSTITUTIONS ARE EFFICIENT* (1995).

¹⁰⁸ ROBERT DAHL, *DILEMMAS OF PLURALIST DEMOCRACY: AUTONOMY VS. CONTROL* 138–65 (1982). See generally ERNEST BARKER, *REFLECTIONS ON GOVERNMENT* (1958) (focusing on British democracy).

¹⁰⁹ A society where people are primarily motivated by the desire to frustrate their opponents, rather than achieve their own goals, is one that has essentially ceased to function.

effectiveness of legislation would be desirable, even if one does not adopt a pluralist conception of the public good.

A. *Begin with a Definition of the Problem*

The considerations in the preceding section suggest some basic principles for a more effective legislative strategy.¹¹⁰ The first proposal is that the process of enacting legislation of any significance should never begin with a completed bill. Rather, it should begin with a statement of the problem to be solved.¹¹¹ This statement should be written in expository language, not in statutory language, and should never be more than a few thousand words in length. The only operational provision it should include is the designation of the agency that is envisioned as implementing the bill if it is ultimately passed.¹¹²

Requiring that legislation be initiated by a problem statement still allows for a considerable amount of variability in the process of statutory design. Members of Congress can derive the problem statement from a wide variety of sources,¹¹³ introduce very broad statements or very narrow ones, and be motivated by either public-oriented or strategic considerations.¹¹⁴ Moreover, the way the problem is phrased might well exercise a significant effect on whatever legislation ultimately emerges from the process, as studies of agenda control suggest.¹¹⁵ The sponsor of the bill, and thus the political

¹¹⁰ It is worth noting that these recommendations can be recharacterized as a more effective positive law strategy, that is, one that applies to any government institution that makes rules or allocates resources in advance, rather than adjudicating disputes. In particular, it is applicable to administrative agencies whose rules, after all, have long been recognized as subsidiary legislation. See, e.g., DAVIS, *supra* note 81, at 184 (“Rule making is the part of the administrative process that resembles a legislature’s enactment of a statute.”); Ray A. Brown, *The Federal “Administrative Procedure Act,”* 1947 WIS. L. REV. 66, 70 (“[R]ule making is akin to legislation . . .”). For an elaboration of this point, see Rubin, *supra* note 63.

¹¹¹ See VEERMAN, *supra* note 11, at 23–24 (“The legislative process will start, at least often, with a problem in society which has to be solved. For its solution politicians have considered that governmental intervention is necessary . . .”). From Veerman’s policy-oriented perspective, this problem statement is a natural starting point.

¹¹² In noting that there are no constraints on the introduction of bills by members of Congress, Walter Oleszek and his co-authors add: “Various assumptions are associated with the introduction of many bills, such as that a problem exists and action is required by the national government to address it rather than leaving the matter to the states or private sector to resolve.” OLESZEK ET AL., *supra* note 25, at 99. The purpose of the present proposal is to bring these rather important assumptions into the open so that the proposed legislation can be evaluated and revised in light of them.

¹¹³ See KINGDON, *supra* note 9, at 71–77, 90–103 (arguing that ideas for new policy come from a wide variety of sources, and no one person or institution plays a dominant role); Hugh Hechlo, *Issue Networks and the Executive Establishment*, in THE NEW AMERICAN POLITICAL SYSTEM 87 (Anthony King ed., 1978) (arguing that ideas for new policy come from various sources, often without regard to their formal role in the governmental process).

¹¹⁴ OLESZEK ET AL., *supra* note 25, at 99 (“Woe to lawmakers who return to their district or state and cannot answer this question from voters: ‘So what have you done about energy costs?’ A disarming response: ‘I have introduced a bill on that very topic.’”).

¹¹⁵ See generally BACHRACH & BARATZ, *supra* note 78; FRANK R. BAUMGARTNER & BRYAN D. JONES, *AGENDAS AND INSTABILITY IN AMERICAN POLITICS* (2d ed. 2009); Joseph E.

motivation behind its introduction, will of course be as apparent to all legislators and legislative staff as it is at present. Thus, the requirement does not disable sponsoring legislators from exerting a considerable amount of influence over the legislative process. Its purpose, rather, is to prevent the excessive and potentially distorting influence that results from the practice of introducing potential legislation in the form of a final enactment.

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

B. *Generate Alternative Solutions*

The second element of the proposal is that the congressional committee to which it has been assigned should consider at least a few different alternatives for solving the stated problem.¹¹⁶ There are a number of ways by which this proposal could be implemented. One would be to provide that the committee chair, after receiving the bill, must estimate the total length of the hearings and markup sessions to be held on it and then schedule some mini-

Harrington, Jr., *The Power of the Proposal Maker in a Model of Endogenous Agenda Formation*, 64 PUB. CHOICE 1 (1990); Richard D. McKelvey, *A Theory of Optimal Agenda Design*, 27 MGMT. SCI. 303 (1981); Richard D. McKelvey, *Intransitives in Multidimensional Voting Models and Some Indications for Agenda Control*, 12 J. ECON. THEORY 472 (1976); Kenneth A. Shepsle, *Institutional Arrangements and Equilibrium in Multidimensional Voting Models*, 23 AM. J. POL. SCI. 27 (1979); Barry R. Weingast & William J. Marshall, *The Industrial Organization of Congress: or, Why Legislatures, Like Firms, Are Not Organized as Markets*, 96 J. POL. ECON. 132 (1988). There are also a number of more descriptive studies of agenda setting that provide valuable insights but abjure normative discourse on the basis of the typical assumption that such discourse cannot be addressed to Congress. See, e.g., ROGER W. COBB & CHARLES D. ELDER, PARTICIPATION IN AMERICAN POLITICS: THE DYNAMICS OF AGENDA-BUILDING (2d ed. 1983); KINGDON, *supra* note 9; E. E. SCHATTSCHNEIDER, THE SEMISOVEREIGN PEOPLE: A REALIST'S VIEW OF DEMOCRACY IN AMERICA (1975).

¹¹⁶ One might imagine that this task would be one that would require the expertise of specialists, and thus be difficult for a legislature to implement, or inconsistent with its prevailing norms. That might be true for state legislatures, which tend to be thinly staffed, see Squire & Moncrieff, *supra* note 24, at 75, 117–23, but not for Congress, where each standing committee has its own staff in addition to the personal staffs of the individual members. In fact—rather ironically—any legislature may be better positioned to generate alternatives than an executive agency. In offering advice about the way to carry out this task, Eugene Bardach advises that one “note the alternatives that key political actors are actively proposing or seem to have on their minds. These would include prominent people’s pet ideas, institutions’ inventories of “off-the-shelf” proposals that simply await a window of opportunity, and prepackaged proposals that political ideologues are perennially advocating.” BARDACH, *supra* note 6, at 15. He is addressing policy analysts, but the information sources he describes are ones that are likely—perhaps more likely—to make themselves available to legislators.

mum proportion of those hearings and sessions, a third let us say, to be held before any effort is made to develop statutory language. In other words, a prescribed proportion of the hearings would be held on the problem statement itself.¹¹⁷ This first set of hearings would necessarily discuss alternative solutions to the problem since it would be the problem, and only the problem, that was before the committee at that point. The first set of markup sessions would consider the suggested alternatives alongside the proposal presented at the hearings, since only the problem statement and the results of the first hearings would be in front of the legislators and staff when the markup began.

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

¹¹⁷ Something of this sort is in fact the current practice in Canada. After the First Reading of a bill in Parliament, in essence a recitation of the bill's provisions, there is a Second Reading, after which the general purposes of the bill are discussed. See MALCOLMSON & MYERS, *supra* note 7, at 123. The bill is sent to committee for more detailed analysis only after the Second Reading. To be sure, Canada has a parliamentary system, where the legislature is not primarily responsible for the design of legislation. Nonetheless, the Second Reading demonstrates the practicality of having legislators debate the general features of a bill, rather than analyzing the bill clause-by-clause.

While the proposal requires that a markup session be held after this first set of hearings, it does not prescribe any rules for the markup session itself. The most likely scenario is that the legislators and staff members at the session would choose an alternative and proceed to draft a preliminary version of the statutory language embodying that choice.¹¹⁸ At this point, they might accept language from the bill's congressional sponsor, from the administration, or from an outside group. The result of their deliberations would then be considered by the remaining hearings and the second set of markup sessions. It is possible, however, that once the markup session chooses the alternative, nothing of any great significance remains to be determined. In that case, the bill could be sent to legislative counsel, turned into statutory language as a pure staff function, and then voted on by the committee.¹¹⁹ The committee members would review the work of legislative counsel, and might revise it in various ways, but they might not need any further information or insights that would justify additional hearings. That is why the proposal states the required portion of the hearing to be held on the problem statement as a minimum, rather than a fixed amount.

In the modern era, the President has played a crucial role in initiating major legislative efforts,¹²⁰ in some cases by delivering fully drafted bills to Congress,¹²¹ but recognition of this role can be readily accommodated within the proposed methodology. Administration bills can be distinguished on their face from bills drafted by any other non-congressional entity because they come from a coordinate branch of the same government as Congress, and can be given special treatment on that basis. On the other hand, the

¹¹⁸ It is conceivable that proponents' intent on passing a particular bill might lie in wait until the first markup session and then present the session with a pre-drafted bill and insist on its passage. However, such an effort to circumvent the policymaking process that this Article's proposal is designed to implement would probably not work. At present, few outside groups can induce Congress to enact a bill without having the members evaluate and revise it. The proposed requirement that alternatives must be considered would increase the difficulty of doing so.

¹¹⁹ In contrast, as discussed above, the way the actual language of the bill is drafted is virtually never known to the public or even most insiders. See *supra* text accompanying notes 73–82. An indication of this process's opacity is that detailed studies of particular legislation virtually never explain how the bill's actual language was written. See sources cited *supra* note 9. Amy Black is once again an exception, since she herself drafted the language of the bill whose history she documents. BLACK, *supra* note 9, at 59–64. Much of her description, however, is cast in terms of general advice to drafters, rather than a detailed analysis of how the crucial decisions were made. The only other exception of which I am aware is my study of the Truth in Lending Act. Rubin, *supra* note 9. In tracing the way this bill was actually drafted, I interviewed the two members of Senator Douglas's (D-Ill.) staff, Howard Shuman and Milton Semer, who wrote the first drafts of the bill, read through the initial hearings, and examined the records of the markups from Douglas's subcommittee. *Id.* at 242–50. That type of investigation can be done for any non-trivial federal statute, and perhaps even important state statutes, but it rarely, if ever, seems to be carried out.

¹²⁰ See POLSBY, *supra* note 25, at 5 (detailing the President's need to find a legislative sponsor for bills the Executive drafts); *id.* at 18–22 (describing Franklin Roosevelt's legislative agenda); *id.* at 139 (referring to the "President's preeminence as legislative leader").

¹²¹ These bills must still be introduced by a member of each chamber, of course, but this never presents a problem.

President himself does not draft these bills, needless to say; they are drafted by members of his administration, either the relevant agency or members of his immediate staff such as the Office of Management and Budget (“OMB”) or White House counsel. These administrative agents are always subject to congressional supervision through the oversight process.¹²² Thus, even if Congress is inclined to give deference to an administration bill—which, clearly, is not always the case¹²³—there is no reason for it to abandon its decisionmaking role, and it generally does not do so. The way these cross-cutting considerations can be accommodated, within the context of the proposed methodology, is to treat an administration bill as a fully developed alternative at the first markup session. At that point the committee, having considered the problem, and held its first set of hearings, can evaluate the administration bill as a potentially favored alternative. In doing so, it could either assess the substantive features of the bill or request reassurance that the administrative agents followed a policymaking procedure that paralleled its own, that is, defined the problem, generated an array of alternatives, evaluated the most promising ones, and chose the one most likely, in their view, to achieve the bill’s stated purposes.

One feature of modern congressional practice that alters the traditional procedure for enacting legislation is the referral of introduced bills to multiple committees.¹²⁴ This practice is predictably more common in the House, which is more specialized and more hierarchical, than in the Senate. According to Barbara Sinclair, about one fifth of all bills, and one fourth of major legislation, has been referred to multiple committees by the House in recent years, while less than six percent of all legislation or major legislation is treated in this manner by the Senate.¹²⁵ Multiple referral complicates the pro-

¹²² The President might assert executive privilege regarding oversight of his personal staff, but it seems unlikely that he could assert this privilege against Congress with respect to decisions that lead to a proposal submitted to Congress for congressional enactment. Presidents have tended to assert that the privilege, in addition to covering foreign affairs, military affairs, and law enforcement matters, extends to the deliberative process leading to policymaking. See Memorandum to General Counsels’ Consultative Group Re: Congressional Requests for Confidential Executive Branch Information, 13 Op. O.L.C. 153, 157 (1989); Memorandum for the Attorney General Re: Confidentiality of the Attorney General’s Communications in Counseling the President, 6 Op. O.L.C. 481, 484–90 (1982). In the case of proposed legislation, it would be hard to argue that the deliberative process should be shielded from Congress since the point of the deliberations—the only possible point in the case of proposed legislation—is to frame a proposal for Congress to consider.

¹²³ The general view is that the President’s power is, as Richard Neustadt phrases it, the power to persuade, not the power to command. See RICHARD E. NEUSTADT, *PRESIDENTIAL POWER AND THE MODERN PRESIDENTS: THE POLITICS OF LEADERSHIP FROM ROOSEVELT TO REAGAN*, 29–49 (rev. ed. 1990); STEPHEN SKOWRONEK, *THE POLITICS PRESIDENTS MAKE: LEADERSHIP FROM JOHN ADAMS TO GEORGE BUSH 17–32* (rev. ed. 1997).

¹²⁴ See OLESZEK ET AL., *supra* note 25, at 111–16; SINCLAIR, *supra* note 25, at 116–18; TIEFER, *supra* note 30, at 118–33.

¹²⁵ See SINCLAIR, *supra* note 25, at 117; see also *id.* at 12–16, 44–45. The Senate has always been able to make multiple referrals by unanimous consent, but the practice was not authorized by the House until 1975, see Roger H. Davidson & Walter Oleszak, *From Monopoly to Management: Changing Patterns of Committee Deliberation*, in *THE POST-REFORM*

cess, of course, but does not alter the value of the proposed procedure. It means, in most cases, that the stated problem must be subdivided into subsidiary problems, a procedure which demands more coordination but also encourages more precisely defined alternatives. If the House subdivides and the Senate does not, it may be possible to obtain the advantages of both broad and focused problem definition when one House accepts the other's bill in place of its own or when the two bills are reconciled in conference.

A second variation on the traditional procedure is to bypass committee consideration entirely and take the bill directly to the floor.¹²⁶ This approach, which can be achieved by a variety of techniques,¹²⁷ is used as a response to emergencies,¹²⁸ to move a widely supported bill out of a hostile committee,¹²⁹ or to accelerate consideration of a bill that is strongly supported by the House or Senate leadership.¹³⁰ Clearly, this variation largely precludes the use of the proposed methodology, since it is difficult to imagine anything other than a fully-drafted bill being considered on the floor of the House or Senate.¹³¹ In other words, bypassing committee consideration would re-

CONGRESS (Roger H. Davidson ed., 1992); Roger H. Davidson, *Multiple Referral of Legislation in the U.S. Senate*, 1989 LEGIS. STUD. Q. 385 (1989). By 1990, the percentage of multiple referrals in the House had risen to the current 20% figure, where it has remained at least until 2004. See SINCLAIR, *supra* note 25, at 117 tbl.6.2. The Senate total for all legislation has never exceeded 5% and is commonly in the 1–2% percent range, at least until 2004. See *id.* The rates Sinclair reports for major legislation, as she defines it, are somewhat higher, but exceeded 6% in only two Congresses, the 95th (7.3%) and the 103d (14.5%, an outlier). See SINCLAIR, *supra* note 25, at 117.

¹²⁶ See SINCLAIR, *supra* note 25, at 17–19, 47–49; TIEFER, *supra* note 30, at 316–20, 584–601.

¹²⁷ Any member of the House can file a discharge petition; if signed by a majority of the members, the legislation in question is removed from the committee's jurisdiction. See POLSBY, *supra* note 25, at 142; TIEFER, *supra* note 30, at 314–26. Any Senator can object to a committee referral under Senate Rule XIV(3), in which case the legislation, in theory, is placed directly on the Calendar; however, as a practical matter, this can be done only with the majority leader's approval. TIEFER, *supra* note 30, at 593–98. In addition, Senators can introduce a bill directly to the floor as a non-germane amendment to some bill that has already reached the floor. See POLSBY, *supra* note 25, at 142; TIEFER, *supra* note 30, at 584–93 (although this device can be defeated by a point of order if germaneness or relevancy limits are in force, against an amendment to an appropriations bills, or on the basis of the Congressional Budget and Impoundment Act). A discharge procedure is also permitted by the Senate rules, but unlike the House discharge procedure, it is rarely used. *Id.* at 598–99.

¹²⁸ For example, the resolution to use force in response to the September 11, 2001 attack on the World Trade Center, Authorization for Use of Military Force, Pub. L. 107-40, 115 Stat. 224 (2001), was enacted without committee consideration. However, the Bush administration's draft of the legislation—which would have allowed the President to take military action against any terrorist anywhere in the world, whether or not connected with the World Trade Center attack—was amended by the Senate to grant the President more limited authority. See RICHARD F. GRIMMETT, CONG. RESEARCH SERV., RS22357, AUTHORIZATION FOR USE OF MILITARY FORCE IN RESPONSE TO THE 9/11 ATTACKS (P.L. 107-40): LEGISLATIVE HISTORY (2007).

¹²⁹ Most famously, the Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 241, could be enacted only once the Senate Judiciary Committee, chaired by James Eastland (D-Miss.), had been bypassed. See LEWIS A. FROMAN, THE CONGRESSIONAL PROCESS: STRATEGIES, RULES AND PROCEDURES 134–36 (1967); WHALEN & WHALEN, *supra* note 9, at 132–36.

¹³⁰ See SINCLAIR, *supra* note 25, at 19–20, 47–48.

¹³¹ There is, however, one important exception. In some cases, the House or Senate leadership resolves the problem of a recalcitrant committee, or an overlap of committee jurisdiction,

present a decision to dispense with the proposed methodology, just as it represents a decision to dispense with the standard methodology that presently prevails, which requires committee consideration. The need to take specific action to dispense with the proposed methodology, unlike the need to take such action to bypass committee consideration in general, could be partially avoided by recognizing standardized exclusions from the proposed methodology, a matter that will be discussed below.¹³² More generally, Congress, as a constitutionally authorized entity with no direct superior,¹³³ has the ability to alter its procedures, assuming a sufficient number of the members agree. The point of the proposed methodology is to establish a more effective standard practice, not to attempt to impose unalterable rules.

To some extent, the procedural variations just discussed reflect the underlying reality that Congress is a deeply divided institution these days, with relatively, and perhaps historically, high levels of partisanship.¹³⁴ The two proposals suggested here are essentially nonpartisan, however. Both the Democrats and the Republicans introduce legislation and both are presumably interested in increasing the chances that this legislation will serve the purposes for which it is intended. Each may accuse the other, from time to time, of using the legislative process for strategic purposes, such as embarrassing the other party,¹³⁵ but neither is likely to concede that about itself and, more importantly, neither is more likely than the other to rely on this technique. There may be some vague sense that recognizing law as social policymaking is more amenable to the Democrat's approach, but the effort to make sure that legislation serves its intended purposes, and does not regulate for the mere sake of regulating, aligns the proposals with the Republican view.

by organizing a task force of members from different committees. See SINCLAIR, *supra* note 25, at 188–95.

¹³² See *infra* text accompanying notes 153–164.

¹³³ See Edward L. Rubin, *Hyperdepoliticization*, 47 WAKE FOREST L. REV. 631, 634 (2012).

¹³⁴ See generally HIBBING & THEISS-MORSE, *supra* note 21, at 1–21; MANN & ORNSTEIN, *supra* note 21, at 3–80; SINCLAIR, *supra* note 25, at 108–38. The point should not be exaggerated, however; present conflicts often loom larger than those of the past, which have a tendency to seem quaint to modern commentators. The current level of partisanship certainly pales in comparison with the decades prior to the Civil War, which featured a physical assault by a pro-slavery Representative on a leading Republican Senator. DAVID H. DONALD, CHARLES SUMNER AND THE COMING OF THE CIVIL WAR 241–49 (rev. ed. 2009). See generally *id.* at 173–260; KENNETH M. STAMPP, AND THE WAR CAME: THE NORTH AND THE SECESSION CRISIS, 1860–1861, at 63–69 (1950).

¹³⁵ Perhaps the most famous example of this practice is Howard Smith's (D-Va.) addition of the word "sex" to the employment discrimination provisions of the Civil Rights Bill, H.R. 7152, 88th Cong. (1963), on the floor of the House of Representatives in February 1964. 110 CONG. REC. 2577 (1964). Smith, an implacable opponent of the Civil Rights Bill, thought that expanding its coverage in this manner would be fatal to its chances of enactment. WHALEN & WHALEN, *supra* note 9, at 115–18. He outsmarted himself, however, since the bill was enacted into law with its expanded coverage. *Id.*

C. Gather Evidence Regarding the Alternative

The third element of the proposal is that available empirical evidence should be methodically collected and made available to the legislators at a juncture where it can influence the bill's design. This could also be implemented rather readily. One of the nonpartisan congressional agencies that all the members currently rely on for a variety of purposes is the Congressional Research Service ("CRS").¹³⁶ Part of the Library of Congress, CRS consists of a research staff that answers over half a million annual requests from the members. The bulk of these requests involve information of one sort or another, often empirical in nature. CRS generally does not carry out its own studies, unlike the Congressional Budget Office ("CBO") or the Government Accountability Office ("GAO"); its primary role is to collect existing information. To provide empirical information for each bill that is being seriously considered, CRS could be instructed to compile a literature review of existing research in a delimited period of time¹³⁷—60 days for example—and then either locate or carry out a meta-analysis of that research, with a longer time allowed if no reputable meta-analysis was available.¹³⁸

None of this would be original or primary research.¹³⁹ Rather, it would identify and summarize existing research that is relevant to the problem on which the hearings were being held and organize this research in coherent form.¹⁴⁰ In a literature review, for example, all the studies indicating that the

¹³⁶ See generally BRUCE BIMBER, *THE POLITICS OF EXPERTISE IN CONGRESS: THE RISE AND FALL OF THE OFFICE OF TECHNOLOGY ASSESSMENT 79–83* (1996); CONG. RESEARCH SERV., *ANNUAL REPORT OF THE CONGRESSIONAL RESEARCH SERVICE FOR FISCAL YEAR 2015* 1 (2016); James A. Thurber, *Policy Analysis on Capitol Hill: Issues Facing the Four Analytic Support Agencies of Congress*, 6 POL'Y SCI. J. 101 (1977).

¹³⁷ There are, of course, various forms of literature reviews. They can "focus on research outcomes, research methods, theories and/or applications. Literature reviews can attempt (a) to integrate what others have done and said, (b) to criticize previous scholarly works, (c) to build bridges between related topics, and/or (d) to identify the central issues in a field." HARRIS COOPER, *RESEARCH SYNTHESIS AND META-ANALYSIS: A STEP-BY-STEP APPROACH* 4 (4th ed. 2010). For the purpose suggested here, the focus on research outcomes—integrating "what others have done and said"—seems most appropriate.

¹³⁸ Meta-analysis can be defined as "the statistical analysis of a large collection of analysis results from individual studies for the purpose of integrating the findings." Gene V. Glass, *Primary, Secondary and Meta-Analysis of Research*, 5 EDUC. RES. 3, 3 (1976). The author adds that this technique "connotes a rigorous alternative to the casual, narrative discussions of research studies which typify our attempts to make sense of the rapidly expanding research literature." *Id.* See generally MICHAEL BORENSTEIN ET AL., *INTRODUCTION TO META-ANALYSIS* (2009); COOPER, *supra* note 137, at 145–96; GENE V. GLASS ET AL., *META-ANALYSIS IN SOCIAL RESEARCH* (1981); JOHN E. HUNTER & FRANK L. SCHMIDT, *METHODS OF META-ANALYSIS: CORRECTING ERROR AND BIAS IN RESEARCH FINDINGS* (2d ed. 2004); MARK W. LIPSEY & DAVID B. WILSON, *PRACTICAL META-ANALYSIS* (2000).

¹³⁹ Primary research involves the collection and analysis of data. It can be distinguished from secondary research, which involves the re-analysis of data that has already been gathered. A meta-analysis consists of the re-analysis of both primary and secondary research. See GLASS, *supra* note 138, at 3.

¹⁴⁰ This is not to suggest that meta-analysis, or even a literature review, is intrinsically neutral or "objective." As Harris Cooper notes: "integrating separate research projects into a coherent whole involves inferences as central to the validity of knowledge as the inferences

stated problem was not particularly severe would be grouped together, all the critiques of those studies would follow, and all the defenses of the original studies would follow after that. A meta-analysis would involve the statistical analysis of comparable data from the studies that appeared in the review. Some increase in the CRS staff might be required to carry out this task, but the expense would be a modest one.¹⁴¹

It is possible that providing a comprehensive, organized account of existing research at an early point in the legislative process would encourage the members to request new research that was designed to investigate particular alternatives that the members were considering. It is also possible that it might encourage the members to adopt research orientation of their own, and enact at least some provisions of the statute on an experimental basis. Any such additional efforts would be beneficial. The various fields of empirical social science are now more than a century old and represent our society's best knowledge about the way various events and interventions impact the relevant parts of our society. These further efforts would involve significant expense, of course, but the cost is minor compared to the cost of an errant federal statute. For present purposes, however, the proposal is simply to make the existing empirical data available in systematic, readily usable form.¹⁴² The institution necessary to achieve this already exists, and the additional cost would be minor.

Like the first two elements of the proposal, this element is nonpartisan. The CRS already has a well-established reputation for nonpartisanship, which is not only appropriate for its role but also essential to its continued survival.¹⁴³ In fact, Congress has demonstrated a general ability to create

involved in drawing conclusions from primary data analysis." COOPER, *supra* note 137, at 3. See generally NELSON GOODMAN, *WAYS OF WORLDMAKING* 1–22 (Margaret A. Boden ed., 1978); PETER L. BERGER & THOMAS LUCKMANN, *THE SOCIAL CONSTRUCTION OF REALITY: A TREATISE IN THE SOCIOLOGY OF KNOWLEDGE* 129–83 (1966); Weber, "Objectivity," *supra* note 18. The sense of neutrality that is essential for this technique's acceptability must come from the institution performing the research, not from the nature of the research task. See *infra* text accompanying notes 143–150.

¹⁴¹ No state legislature has similar resources. California did at one time. See MUIR, *supra* note 16, at 130–33. But the currently parlous condition of state finances indicates that even large states are unlikely to possess this research capacity for the foreseeable future. Many states are much too small to ever be able to staff a research function for the legislation they enact. This problem is readily solved, however, because research, unlike decisionmaking, can be outsourced with no loss of state autonomy. A system could be set up where states buy research services from CRS, that is, allocate funds to CRS to provide a certain amount of research service to the state legislature each year. A more likely, and probably preferable alternative, is that Congress would fund CRS to provide a certain amount of research service to each state. In terms of benefit to the state's citizens, and in terms of supporting state autonomy, these could well be the most effective dollars that the federal government gives to the states for any purpose.

¹⁴² As Eugene Bardach succinctly notes in his advice to analysts on the policymaking process: "There hardly exists a problem on whose causes and solutions some academic discipline or professional association is not doing research." BARDACH, *supra* note 6, at 13.

¹⁴³ See BIMBER, *supra* note 136, at 81–83; MUCCIARONI & QUIRK, *supra* note 47, at 211.

acceptably nonpartisan agencies that carry out research.¹⁴⁴ The CBO and GAO, which might well be assigned to perform any new research that the members wanted to commission, have also been also regarded as nonpartisan,¹⁴⁵ although the CBO has recently fallen victim to the extreme partisanship displayed by opponents of the Affordable Care Act.¹⁴⁶ One other congressional agency, the Office of Technology Assessment (“OTA”), was accused by Republicans of favoring the Democrats when it was first created, and was ultimately abolished by the Contract with America Congress.¹⁴⁷ But as Bruce Bimber found, OTA quickly shifted to the nonpartisan stance of the other congressional agencies and was generally regarded as performing a valuable function.¹⁴⁸ By the time it was abolished, no one was criticizing it for partisanship.¹⁴⁹ It was abolished for a different reason, specifically a demonstration that the Contract with America Congress was willing to cut its own budget as well as the budgets of other federal institutions.¹⁵⁰ There is, moreover, one way to provide a convenient safety valve against charges of partisanship on specific issues; the rules could provide that any member of Congress who wanted to add to the list of relevant studies could do so, with CRS then providing the summary of the indicated study. Members who consistently demanded the addition of studies based on extremist politics or pseudo-science would presumably be disciplined by their colleagues’ scorn.

¹⁴⁴ See MUCCIARONI & QUIRK, *supra* note 47, at 211. The authors’ doubts about the willingness or ability of Congress to create a new agency that would monitor its own activities, such as the caliber of its floor debates, is one reason why this proposal relies on an existing, well-accepted congressional agency and limits that agency to a relatively modest and non-judgmental role.

¹⁴⁵ See *id.* at 211.

¹⁴⁶ See Amanda Backer, *Republicans in House Push for Congressional Budget Office Cuts*, REUTERS, July 24, 2017, <https://www.reutersusnews.com/article/us-usa-congress-cbo-news/republicans-in-house-push-for-congressional-budget-office-cuts-idUSKBN1A92KN> [perma.cc/9RLF-JAF7]; Steven Rattner, Opinion, *The Boring Little Budget Office That Trump Hates*, N.Y. TIMES (Aug. 22, 2017), <https://www.nytimes.com/2017/08/22/opinion/trump-cbo-republicans-hate.html> [perma.cc/6JNQ-NXUE].

¹⁴⁷ H.R. REP. NO. 104-212, at 2, 10 (1995) (Conf. Rep.); H.R. REP. NO. 104-141, at 10, 21 (1995).

¹⁴⁸ BIMBER, *supra* note 136, at 67–68; see generally Robert M. Margolis, *Losing Ground: The Demise of the Office of Technology Assessment and the Role of Experts in Congressional Decision-Making*, IEEE INT’L SYMP. ON TECH. & SOC.: TECH. EXPERTISE & PUB. DECISIONS, 36, 36–38 (1996).

¹⁴⁹ BIMBER, *supra* note 136, at 50–68. Nonetheless, its abolition resulted in a loss of the expertise available to Congress. See Margolis, *supra* note 148, at 43.

¹⁵⁰ BIMBER, *supra* note 136, at 69–77.

V. IMPLEMENTING THE METHODOLOGY

A. *Limitations on the Scope of the Proposal*

In the context of the U.S. Congress, these three proposals, and any other changes of this kind, could be adopted by simple resolution.¹⁵¹ As procedures internal to each House, they would not need the concurrence of the other House, nor would they need the President's signature.¹⁵² Since they affect only procedures, they could be adopted on a trial basis, either for a limited period of time or for a limited category of legislation, without raising serious questions of inequality or unfairness. At the absolute minimum, therefore, the argument for adopting them is that every institution should reconsider its procedures from time to time. It seems unlikely that the optimal procedures are necessarily the ones that the institution is currently employing, particularly if the institution's current procedures have been in place for a long time, as is true of the current methodology.

Although the proposed methodology is broadly applicable, it is neither advantageous nor appropriate for some of the bills that Congress enacts. In order to make this determination, it is necessary to distinguish between different types of legislation. In a leading study, Walter Oleszek and his co-authors identify three categories: bills lacking wide support, noncontroversial bills, and major legislation.¹⁵³ A purely political typology of this sort,

¹⁵¹ See U.S. CONST. art. I, § 5, cl. 2 ("Each House may determine the Rules of its Proceedings"). Resolutions can be enacted by majority vote. In the Senate, a resolution, like any other legislative measure, could be filibustered. By resolution, S. Res. 4, 94th Cong., (1975) (enacted), cloture can be voted on, according to Rule XXII, Standing Rules of the Senate, but debate on a resolution changing Senate rules can only be closed off by a two-thirds vote of the Senators present and voting, rather than the three-fifths of all Senators required for other matters. There are, however, other ways to alter Senate rules. See generally RICHARD S. BETH, CONG. RESEARCH SERV., R42929, PROCEDURES FOR CONSIDERING CHANGES IN SENATE RULES (2013).

¹⁵² See SCHNEIER & GROSS, *supra* note 25, at 124–25; Louis Fischer, *The Legislative Veto: Invalidated, It Survives*, 56 LAW & CONTEMP. PROBS. 273, 273–76 (1993); Robert Ginnane, *The Control of Federal Administration by Congressional Resolutions and Committees*, 66 HARV. L. REV. 569, 571–74 (1953). Alternatively, the same proposal could be adopted by both chambers as a concurrent resolution, again without presidential signature.

¹⁵³ OLESZEK ET AL., *supra* note 25, at 103–06. The authors define the first category solely in terms of the bill's political support and point out that introduction of such bills often has purely political motivations, e.g., "to satisfy individual constituents or interest groups from the member's district or state," or "to fend off criticism during political campaigns." *Id.* at 103. The problem with using such a category is that there is no way to assign a bill to it on the basis of its text, and probably no way to reach a subjective determination without being unacceptably disparaging to the bill's sponsor. The authors define noncontroversial legislation in a similar way, but give examples (bills authorizing construction of statues of public figures or that rename a national park) indicating that they are thinking about the types of bills that are described here as symbolic. *Id.* at 104. Their categorization of major legislation is again based on political support, such as being "prepared and drafted by key committee leaders, the political parties, executive agencies or major pressure groups," or "supported by the majority party leadership." *Id.* Again, such a categorization cannot be determined from the bill's text and necessarily involves invidious judgments (sorry sir, you are simply not an influential member of the House).

reflecting the standard view of Congress as exclusively political, provides no basis for making policy-based distinctions. For present purposes, we might distinguish among appropriation bills, authorization bills, foreign affairs bills, honorific bills, and substantive domestic bills, with the last category further divided into major and minor. Appropriation bills deal with the funding of government operations and authorization bills deal with the authority or jurisdiction of government officials and institutions.¹⁵⁴ Taken together, they can be regarded as belonging to H.L.A. Hart's jurisprudential category of secondary rules, that is, rules that "specify the ways in which the primary rules [rules regarding human conduct] may be conclusively ascertained, introduced, eliminated, varied, and the fact of their violation conclusively determined."¹⁵⁵ Foreign affairs bills are those that only have effects outside the nation's borders, but include the projection of military force. Honorific bills involve nomenclature (National Brotherhood Week, the Ava Gardner Post Office Building¹⁵⁶) or other standard forms of recognition (a statue, a fountain, a stamp). Substantive domestic bills are proposals to alter society in some fashion, with society being defined to include the physical environment within the society's borders, immigration, and economic relations with foreign nations.

The policy-based methodology suggested here—a problem statement, consideration of alternative solutions, and the provision of empirical evidence—is primarily applicable to substantive legislation.¹⁵⁷ It is designed to assess how some potential governmental action will interact with nature, that is, the physical, economic, and social circumstances of the jurisdiction that the legislature governs. The recommended procedure would be less effective, and sometimes unnecessarily elaborate, for secondary rules, such as an

¹⁵⁴ Appropriations affect substance of course, since the level of funding often determines the practical impact of a legislatively authorized initiative. At the drafting stage, however, the possibility that a particular enactment might not get funded would not affect the procedure used to design the legislation, although it certainly might be a factor taken into consideration in the course of the procedure. It is possible to include substantive provisions in an appropriations bill, but the two types of legislation remain conceptually distinct; the recommendation here is that substantive provisions, however packaged, be designed in a specific manner. It is also possible to add substantive provisions to an appropriations bill on the chamber floor, but there are procedural limits on this practice. See SINCLAIR, *supra* note 25, at 63.

¹⁵⁵ HART, *supra* note 23, at 92. Hart's definition of primary rules as rules designed to tell people in the society how to behave, *see id.* at 40–41, 89, is hopelessly out of date for the simple reason that he seems unaware of the administrative state. Modern statutes that establish benefits (e.g., Medicare, social security disability, unemployment compensation) or create institutions (airports, hospitals, wilderness areas) do not tell people how to behave but rather attempt to alter the economic, social or physical conditions of citizens' lives. See RUBIN, *supra* note 23, at 199–201; Edward L. Rubin, *Shocking News for Legislatures and Law Schools: Statutes are Law*, 27 VERENIGING VOOR WETGEVING EN WETGEVINGSBELEID 1, 7–8 (2001). Nonetheless, his distinction between primary and secondary rules applies in the modern context. It is not entirely accurate, but it is used here because of its familiarity.

¹⁵⁶ See SINCLAIR, *supra* note 25, at 24–25 (listing these examples).

¹⁵⁷ See, e.g., John R. Johannes, *Explaining Congressional Casework Styles*, 27 AM. J. POL. SCI. 530 (1983) (describing casework not designed to affect changes in policy).

appropriations bill,¹⁵⁸ a statute reorganizing an existing agency, or a statute granting an existing authority to a different agency. These provisions are internal to the government; they are intended to determine who is interacting with nature, but not the substance of the interaction. Emergency legislation can also be excluded from the recommended procedure, largely on the grounds that it is also a secondary rule. In effect, it authorizes the chief executive to act on his or her own, in a situation where another body's approval would otherwise be needed, because time is of the essence and the chief executive is trusted to make the right decision in these circumstances.¹⁵⁹ Foreign affairs bills cross the boundary between primary and secondary rules. A treaty might shift decisionmaking authority from a domestic to an international body, but a foreign aid bill might attempt to affect nature by reducing poverty or increasing production in some area outside the legislature's jurisdiction. Because the two functions are often intertwined, and because executive authority is generally regarded as more extensive in this area,¹⁶⁰ such bills might also be excluded from the proposed methodology.¹⁶¹ Honorific bills are similarly not intended to interact with nature in a signifi-

¹⁵⁸ See generally POLSBY, *supra* note 25, at 159–86; TIEFER, *supra* note 30, at 849–1010; AARON WILDAVSKY, *THE POLITICS OF THE BUDGETARY PROCESS* (4th ed. 1984).

¹⁵⁹ This concept of emergency is most closely associated with the legal philosopher Carl Schmitt. See generally CARL SCHMITT, *LEGALITY AND LEGITIMACY* 67–83 (Jeffrey Seitzer trans., 2004) (1932); Carl Schmitt, *POLITICAL THEOLOGY: FOUR CHAPTERS ON THE CONCEPT OF SOVEREIGNTY* 5–15 (George Schwab trans., 2005) (1922). Schmitt is a somewhat malodorous reference since he sided with the Nazi regime, but other political thinkers take a similar approach to the issue. See, e.g., CLINTON ROSSITER, *CONSTITUTIONAL DICTATORSHIP: CRISIS GOVERNMENT IN THE MODERN DEMOCRACIES* 156–70 (1948) (documenting emergency rule in Britain during World War I); *id.* at 223–39 (documenting emergency rule during Lincoln administration at the beginning of the Civil War). In fact, the transfer of authority to the executive is a principal way that emergency action has been understood over the course of American history. See EDWIN E. MOISE, *TONKIN GULF AND THE ESCALATION OF THE VIETNAM WAR* 225–35 (1996); MARK E. NEELY, JR., *THE FATE OF LIBERTY: ABRAHAM LINCOLN AND CIVIL LIBERTIES* 3–31 (1991); GEOFFREY R. STONE, *PERILOUS TIMES: FREE SPEECH IN WARTIME FROM THE SEDITION ACT OF 1798 TO THE WAR ON TERRORISM* 528–50 (2004) (describing the extent to which the Supreme Court has deferred to executive limits on free speech in wartime situations). The chief executive can also declare an emergency on his own. See, e.g., Proclamation No. 7463, 66 Fed. Reg. 48,199 (Sept. 14, 2001) (declaring a state of emergency following the World Trade Center attack). But such action is outside the scope of this Article. See also Kim Lane Scheppele, *Law in a Time of Emergency: States of Exception and the Temptations of 9/11*, 6 U. PA. J. CONST. L. 1001, 1004–22 (2004) (discussing Schmitt's theory).

¹⁶⁰ See *United States v. Curtis-Wright Corp.*, 299 U.S. 304, 315–22 (1936); see also, e.g., Sarah H. Cleveland, *Powers Inherent in Sovereignty: Indians, Aliens, Territories, and the Nineteenth Century Origins of Plenary Power Over Foreign Affairs*, 81 TEX. L. REV. 1 (2002); Harold Hongju Koh, *Why the President (Almost) Always Wins in Foreign Affairs: Lessons of the Iran-Contra Affair*, 97 YALE L.J. 1255 (1988); Saikrishna B. Prakash & Michael D. Ramsey, *The Executive Power Over Foreign Affairs*, 111 YALE L.J. 231 (2001).

¹⁶¹ But see Ingrid Wuertch & Ganesh Sitaraman, *The Normalization of Foreign Relations Law*, 128 HARV. L. REV. 1897, 1899 (2015) (arguing that courts have moved away from the doctrine of foreign affairs exceptionalism since the end of the Cold War, and are thus less likely to accede to assertions of executive privilege in this area). This normalization process might carry over to Congress, thereby suggesting, in the context of this Article, that bills involving foreign relations should be subject to the same policy analysis process as domestic bills.

cant way,¹⁶² and, in any case, are generally regarded as too minor to merit sustained consideration.¹⁶³ The same is true for some substantive legislation, specifically accommodations to particular constituents that can be regarded as an alternative form of legislative casework, that is, constituent service.¹⁶⁴

Most of these exclusions from the problem statement, alternative consideration, and empirical evidence requirements would be relatively easy to implement. At the time that the parliamentarians refer the bill to committee,¹⁶⁵ they could also determine whether a fully drafted bill would be accepted or whether the bill must be initiated by a problem statement.¹⁶⁶ The determination that a bill was an appropriations measure, an authorization measure, or a foreign affairs measure could be determined from the text of the bill. Emergency legislation would need to state its character as such explicitly, and other limitations are possible as well.¹⁶⁷ Only the status of a bill

¹⁶² They are not, however, secondary legislation. In fact, they are another example of the inaccuracy of Hart's categories because they are also not intended to affect people's behavior and they carry no particular sense of obligation that he regards as essential to the definition of primary rules. See HART, *supra* note 23, at 79–88. Even if Hart was determined to ignore the administrative state, he should have recognized that honorific legislation lies outside his categorization, since such legislation is as old as government itself.

¹⁶³ Both chambers currently have established procedures for dealing with bills of this nature. In the House, a member may request that a bill be placed on the Consent Calendar or the Private Calendar, two groups of bills that are separate from the principal, or Union calendar. Three members from each party review these bills to make sure that they are appropriate for such treatment. See TIEFER, *supra* note 30, at 326–32. The Senate uses a Clearance procedure, where staff members notify Senators of bills that seem appropriate for enactment without a roll call vote and record any exceptions. See *id.* at 569–73. Because of the Senate's small size, many bills are enacted by this mechanism, some of which would not qualify for exclusion from the recommended procedure on the basis of the exceptions noted in the text.

¹⁶⁴ See generally RICHARD F. FENNO, JR., HOME STYLE: HOUSE MEMBERS IN THEIR DISTRICTS (1978); FIORINA, REPRESENTATIVES, ROLL CALLS AND CONSTITUENCIES, *supra* note 15, at 93–101; MAYHEW, *supra* note 15, at 54–59, 108–10; OLESZEK ET AL., *supra* note 25, at 399; Johannes, *supra* note 157; John R. Johannes, *The Distribution of Casework in the U.S. Congress: An Uneven Burden*, 5 LEGIS. STUD. Q. 517 (1980).

¹⁶⁵ See sources cited *supra* note 30 (describing the role of the parliamentarian).

¹⁶⁶ The parliamentarians are sometimes pressured by members, and even by lobbyists, to direct legislation to a particular committee. See OLESZEK ET AL., *supra* note 25, at 107–110. This might also occur with respect to the exceptions to the proposed methodology.

¹⁶⁷ Two possible limits are that the bill would need to be based on an explicit request by the chief executive, and that the emergency exclusion would expire if no bill was enacted during a specified period of time, such as 60 days. The subject is obviously a controversial one. A number of observers have criticized chief executives for using claims of emergency to affect inordinate expansion of their authority. See Sanford Levinson, *Constitutional Norms in a State of Permanent Emergency*, 40 GA. L. REV. 699, 736–51 (2006); Scheppele, *supra* note 159, at 1068–83; Kim Lane Scheppele, *North American Emergencies: The Use of Emergency Powers in the United States and Canada*, 4 INT'L J. CONST. L. 213, 213–15 (2006); cf. Bruce Ackerman, *The Emergency Constitution*, 113 YALE L.J. 1029, 1041–56 (2004) (noting failure of courts to control the chief executive). In addition, legislation enacted on the basis of emergency has persisted for inordinate lengths of time. For example, the Tonkin Gulf Resolution, hurriedly enacted by Congress in 1964 in response to a (false) report of attacks on U.S. naval vessels, remained a basis for the Vietnam War until 1971. See MOÏSE, *supra* note 159, at 244–56. Canada's War Measures Act, adopted in 1914 in response to the crisis of World War I, remained operative until 1970. See generally Patricia Peppin, *Emergency Legislation and Rights in Canada: The War Measures Act and Civil Liberties*, 18 QUEEN'S L.J. 129 (1993). This Article does not attempt to articulate any limits on the legislature's authorization of emer-

as honorific or minor would create any difficult questions of judgment, and this problem could be resolved by using the same principle that the OMB uses for cost benefit analysis, namely, that a proposal is subject to the stated requirements only if it has “an annual effect on the economy of \$100 million or more.”¹⁶⁸ This is admittedly a bit under-inclusive, but has proven to be relatively easy to implement, since the OMB exclusion is determined by fairly low-level executive employees and is binding on heads of executive departments.¹⁶⁹

B. *The (Relatively) Modest Character of the Proposal*

Given these exclusions, the proposed methodology does not alter the existing legislative process in any dramatic or radical way. Major substantive legislation is already subject to sustained consideration by Congress before it can proceed. Moreover, once the problem has been debated, a markup held on the basis of that debate and empirical data presented in a comprehensive, systematic form during those deliberations, the process would continue in its current form. The primary effect of the proposal would be to bring the part of the statutory design process that currently precedes congressional consideration into Congress’s control. At present, Congress, while possessing full power to vote bills up or down, and substantial power to revise and amend the bill, has ceded the basic power to conceptualize the bill—to think about and analyze alternative approaches—to others. The proposed legislative methodology is thus a means for Congress to take control of its most essential and important task.

Would these proposals make legislation more difficult to enact? That is not necessarily a bad thing of course. While it is notoriously difficult to get a

gency powers with respect to either their scope or their duration. The suggested limits refer only to the legislature’s ability to act under the emergency exception to the requirement that the proposed methodology be followed.

¹⁶⁸ Exec. Order No. 12,866 § 3(f)(1), 3 C.F.R. § 638 (1993), *reprinted in* 5 U.S.C. § 601 app. at 802–806 (2012). The OMB exclusions are more narrowly stated. In addition to the \$100 million impact test, regulations are subject to the Order’s requirements if they:

adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or State, local, or tribal governments or communities; (2) Create a serious inconsistency or otherwise interfere with an action taken or planned by another agency; (3) Materially alter the budgetary impact of entitlements, grants, user fees, or loan programs or the rights and obligations of recipients thereof; or (4) Raise novel legal or policy issues arising out of legal mandates, the President’s priorities, or the principles set forth in this Executive order.

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

¹⁶⁹ OMB’s authority in this area is exercised by its sub-agency, the Office of Information and Regulatory Affairs (OIRA). *See id.* § 2(b).

bill through Congress,¹⁷⁰ there is no particular reason to avoid encumbering the enactment of ineffective or counterproductive legislation. Effective legislation might be somewhat more difficult to enact, but the compensating factor would be that the additional procedures would increase its effectiveness. There is also the possibility that the proposed methodology would make legislation easier to enact, as well as more effective, by facilitating the development of what is called, in common parlance, “win-win” alternatives.¹⁷¹ In many cases, a bill’s opponents are objecting to the inevitable costs that even effective legislation invariably imposes. As noted earlier, consideration of alternatives might reduce those costs without compromising the bill’s basic purpose or, more realistically, produce reductions in costs that more than counterbalance the decrease in benefits. A different means of protecting the environment might decrease the costs imposed on industry; a different restriction on tort actions might preserve the precautionary force of liability. Such beneficial trade-offs are central to existing legislative compromises, of course. One of the main goals of the proposed changes in legislative methodology is to create a setting where such trade-offs can be more readily devised.

VI. CONCLUSION

This Article proposes a delimited but potentially significant alternation in the methodology that American legislatures use to design the statutory enactments that now constitute the dominant mode of law making in our society, at both the federal and state levels. The proposed methodology recognizes that modern legislation in an administrative state is essentially a form of public policymaking. It is therefore based on the well-recognized procedure that other governmental actors are expected to use in the policymaking process. Rather than beginning with a fully drafted bill that already incorporates basic design decisions, the legislature would begin with a problem statement, a description of the goal to which the proposed legislation is directed. The committees that consider the bill would hold a first set of hearings on the problem itself, and generate alternative means for solving it. Information would be provided to the committee at this stage in a form that would facilitate the evaluation of the alternatives being discussed. Only then would statutory language be written or introduced. Once that occurred, the legislative process would proceed in its present form.

¹⁷⁰ This consideration does not necessarily apply to state legislatures.

¹⁷¹ For a discussion of win-win strategies in the policy context, see NAGEL, *supra* note 6. Nagel’s five basic steps for reaching a win-win solution are: (1) identify the major goals of the opposing parties; (2) identify the leading alternatives; (3) determine the relationship between the alternatives and the goals; (4) seek a new alternative that might achieve each side’s goal better than any existing alternative; (5) determine whether this alternative can overcome other hurdles to its adoption. *See id.* at 5. This procedure, which Nagel then expands upon, *see id.* at 5–6, clearly tracks the standard policy making process. The point is that it depends upon, and can only be implemented in the context of, that process.

This proposed methodology can be regarded as exemplary. There may be pragmatic reasons why it would be difficult to institute, and there may be other changes that would produce better results. The principal point of this Article is that such changes should be seriously discussed by academics, and seriously considered by Congress and every other American legislature. The prevailing belief that legislators are incapable of acting for the public good, that they are motivated exclusively by the desire to be re-elected, is empirically false. The further assumption that all decisions about legislation are controlled by this empirically false motivation does not even make sense. Legislators want to benefit the people they serve, even if they disagree about the way to do so. It is therefore possible to envision changes in legislative methodology that would increase the likelihood that legislation would be more effective in either achieving its members' policy goals or benefitting society in general.

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

