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# Congressional Government Rebooted: Randomized Committee Assignments and Legislative Capacity

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*Brian D. Feinstein\**

## INTRODUCTION

The contemporary U.S. Congress suffers from three related pathologies: a propensity to delegate broad policy-making functions to the executive branch, an increasingly partisan atmosphere that impedes its ability to address the nation's problems, and a lack of public confidence in the institution. These phenomena not only diminish the stature of Congress as a formally co-equal branch of government, but also reduce the quality of government policy. Moreover, if these trends continue unabated, they may lead to a potentially dangerous concentration of power in the hands of other political actors. To reverse this trajectory, this article presents a novel change to Congress's internal institutional design: replacing the current committee assignment system with one in which members are randomly assigned committee portfolios.

This article proceeds in six parts. Part I traces Congress's long decline in importance relative to the executive branch, along with an epiphenomenal decline in public confidence; notes the dangers that these trends present if left unchecked; and offers a reform to the committee assignment system as a partial corrective. Part II presents the basic contours of the proposed reform. Part III discusses the prospective effects of this proposal on Congress's internal functioning, emphasizing the reform's potential impact on party organizations, on committees as repositories of expertise and venues for deliberation, and on the roles that interest groups and political minorities play in the policy-making process. Next, Part IV examines the likely effects of this reform on legislative-executive dynamics, paying particular attention to committee oversight of the administrative state, and the continued, post-*Chadha* use of committee-based veto mechanisms. Part V turns to Congress-court interactions, arguing that the reform could encourage greater use of legislative history in statutory interpretation and promote a more deferential posture in assessing the constitutionality of statutes. Finally, Part VI addresses the feasibility of implementing this proposal.

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## I. CONGRESS IN WINTER

The persistent unpopularity of Congress, the supposed “popular branch” of government, is one of the great paradoxes of American politics.<sup>1</sup> Critiquing Congress is by no means a new phenomenon,<sup>2</sup> but, with public approval of Congress recently declining to approximately ten to thirteen percent, such critical voices appear to be building to a crescendo.<sup>3</sup> Alongside this long decline in public confidence in Congress, recent generations have seen a similar secular decline in Congress’s policy-making powers.<sup>4</sup> Over 120 years after the publication of *Congressional Government*, Woodrow Wilson’s thesis has been turned on its head; no longer does Congress, with its powerful committees as “little legislatures,” predominate over the other branches of government.<sup>5</sup>

As a response to these twin declines in congressional capacity and in public confidence in Congress, scholarly attention has turned to rethinking the institutional design of the legislative branch. In recent years, think tanks and law reviews have convened symposia to propose reforms for “the broken branch.”<sup>6</sup> One prominent public intellectual has even called for a constitutional convention, in large part to address perceived congressional pathologies.<sup>7</sup>

A. *Lawmaking and Delegation*

These concerns are justified. Congressional capacity—that is, the institution’s relative ability to influence the country’s legal landscape—has been

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<sup>1</sup> See Richard Fenno, *If, as Ralph Nader Says, Congress is “The Broken Branch,” How Come We Love Our Congressmen So Much?*, in CONGRESS IN CHANGE: EVOLUTION AND REFORM 277, 277 (Norman J. Ornstein ed., 1975).

<sup>2</sup> See, e.g., ALEXIS DE TOCQUEVILLE, DEMOCRACY IN AMERICA 200 (J.P. Mayer ed., George Lawrence trans., Doubleday 1969) (1835) (“When one enters the House of Representatives at Washington, one is struck by the vulgar demeanor of that great assembly.”).

<sup>3</sup> See *Congressional Job Approval*, REAL CLEAR POL., [http://www.realclearpolitics.com/epolls/other/congressional\\_job\\_approval-903.html](http://www.realclearpolitics.com/epolls/other/congressional_job_approval-903.html) (last visited Dec. 24, 2012) (reporting the results of public opinion surveys conducted during January and February 2012).

<sup>4</sup> See SEAN GAILMARD & JOHN W. PATTY, LEARNING WHILE GOVERNING: INFORMATION, ACCOUNTABILITY, AND EXECUTIVE BRANCH INSTITUTIONS 203 (2012) (noting that over the course of American history, “the broad sweep of power relations between the legislative and executive branches favors the latter to an increasing extent”).

<sup>5</sup> Compare WOODROW WILSON, CONGRESSIONAL GOVERNMENT: A STUDY IN AMERICAN POLITICS 103, 113 (15th ed. 1901), with THEODORE J. LOWI, THE END OF LIBERALISM: THE SECOND REPUBLIC OF THE UNITED STATES (2d ed. 1979).

<sup>6</sup> Symposium, *The Most Disparaged Branch: The Role of Congress in the Twenty-First Century*, 89 B.U. L. REV. 331 (2009); Symposium, *Congressional Power*, 1 HARV. L. & POL’Y REV. 3 (2007); Symposium, *One Year Later: Is Congress Still the Broken Branch?*, The Brookings Institution (Jan. 22, 2008).

<sup>7</sup> See generally LAWRENCE LESSIG, REPUBLIC, LOST: HOW MONEY CORRUPTS CONGRESS—AND A PLAN TO STOP IT (2011).

in a decades-long decline.<sup>8</sup> Beginning to a large extent in the New Deal era, Congress routinely enacts statutes delegating considerable policy-making discretion to administrative agencies. Charges that Congress has ceded significant policy-making ground to the White House became amplified in recent years.<sup>9</sup> Concerning a host of issues related to the War on Terror, Congress either gave the President *carte blanche* or, when it legislated, arguably did so merely as a rubber stamp, providing statutory cover for actions that the executive branch already had undertaken.<sup>10</sup>

In the face of this sustained transfer of policy-making authority from Congress to the executive branch, the judiciary mostly has remained silent. The deceptively titled nondelegation doctrine permits massive transfers of authority to the executive, provided solely that such transfers are guided by a bare-bones “intelligible principle.”<sup>11</sup> Remarkably, the Supreme Court has upheld every statutory delegation to the administrative state challenged on nondelegation grounds that it has considered since 1935.<sup>12</sup>

Furthermore, some scholars charge that the legislative branch not only has ceded much of its *ex ante* policy-making role to the executive branch but also that it neglects its *ex post* responsibility to monitor executive policy making.<sup>13</sup> Thomas Mann and Norman Ornstein decry the “disappearance” of congressional oversight;<sup>14</sup> they consider the infrequency of oversight hearings to be a key factor in their diagnosis of Congress as “the broken branch.”<sup>15</sup> Although it is important to note that this “congressional abdication” perspective is contested in the academic literature,<sup>16</sup> the very fact that

<sup>8</sup> See generally Josh Chafetz, *Congress’s Constitution*, 160 U. PA. L. REV. 715, 717 n.2 (2012) (providing an overview of “commentators . . . decry[ing] the growth in presidential power”).

<sup>9</sup> See THOMAS MANN & NORMAN ORNSTEIN, *THE BROKEN BRANCH: HOW CONGRESS IS FAILING AMERICA AND HOW TO GET IT BACK ON TRACK* 97 (2006).

<sup>10</sup> See Patricia Wald & Neil Kinkopf, *Putting Separation of Powers Into Practice: Reflections on Senator Schumer’s Essay*, 1 HARV. L. & POL’Y REV. 41, 68–69 (2007) (“Congress has enacted sweeping legislation [regarding enemy-combatant detention policy] that largely authorizes the President to do what he has been doing.”).

<sup>11</sup> *Whitman v. Am. Trucking Ass’ns*, 531 U.S. 457, 474 (2001).

<sup>12</sup> See JERRY L. MASHAW, *GREED, CHAOS, AND GOVERNANCE* 134 (1997) (“Since the *Schechter* case, the Supreme Court has not invalidated a single statute on the basis of excessive delegation.”).

<sup>13</sup> See Terry M. Moe, *The Presidency and the Bureaucracy: The Presidential Advantage*, in *THE PRESIDENCY AND THE POLITICAL SYSTEM* 425, 442 (Michael Nelson ed., 2003) (arguing that reelection-oriented legislators have scant incentive to participate in oversight activities); see also MORRIS S. OGUL, *CONGRESS OVERSEES THE BUREAUCRACY: STUDIES IN LEGISLATIVE SUPERVISION* 182 (1976) (finding that legislators devote little time to preparing for or participating in oversight hearings).

<sup>14</sup> MANN & ORNSTEIN, *supra* note 9, at 170.

<sup>15</sup> *Id.* at 215.

<sup>16</sup> Compare JOEL D. ABERBACH, *KEEPING A WATCHFUL EYE: THE POLITICS OF CONGRESSIONAL OVERSIGHT* 31 (1990) (reelection-oriented members of Congress have few incentives to oversee administrative agencies), and Seymour Scher, *Conditions for Legislative Control*, 25 J. POL. 525, 533–34 (1963) (close ties among agencies, subcommittees, and interest groups block vigorous oversight), with Mathew D. McCubbins & Thomas Schwartz, *Congressional Oversight Overlooked: Police Patrols Versus Fire Alarms*, 28 AM. J. POL. SCI. 165, 166, 176 (1984) (Congress designs agency procedures so that agencies will be responsive to individual citizens and interest groups, thereby requiring direct congressional oversight only in limited

congressional ex post control is the subject of such vigorous debate, when coupled with Congress's willingness to relinquish significant ex ante policy-making powers, suggests a branch in retreat.

With Congress in sustained withdrawal from its historic position at the helm of the policy-making process, the White House has more than filled the void. Recent presidents have developed a set of control mechanisms that are largely unchallenged by the courts and unmatched by Congress.<sup>17</sup> Most notably, the use of executive orders to set important administrative policies has been on the rise, in fits and starts, since the New Deal era.<sup>18</sup> The development in the 1980s and 1990s of a process by which the White House-directed Office of Information and Regulatory Affairs (OIRA) could reject proposed regulations that failed OIRA's cost-benefit analyses further strengthened presidential control of administration.<sup>19</sup> In summary, Congress's delegations of policy-making authority to the administrative state, its inconsistent ex post monitoring of those delegations, and the White House's inroads into these traditional Article I functions all raise serious concerns regarding whether Congress has relinquished its role as national lawmaker.

### B. Public Attitudes

As previously mentioned, popular perceptions of Congress are strongly negative.<sup>20</sup> Public trust in Congress is in the midst of a long-term decline, with only the occasional, temporary uptick.<sup>21</sup> Although public disapproval of Congress's job performance is by no means a contemporary development, recent polling concerning public confidence in the institution retains its ability to shock.<sup>22</sup> For instance, a national survey of likely voters conducted in August 2012 found that only eight percent of respondents rated Congress's

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circumstances), and Barry R. Weingast & Mark J. Moran, *Bureaucratic or Congressional Control? Regulatory Policymaking by the Federal Trade Commission*, 91 J. POL. ECON. 765, 769 (1983) (arguing that the budget and reauthorization processes provide subcommittees with the carrots and sticks needed for effective oversight).

<sup>17</sup> See generally ERIC A. POSNER & ADRIAN VERMEULE, *THE EXECUTIVE UNBOUND: AFTER THE MADISONIAN REPUBLIC* (2010); Bruce Ackerman, *The New Separation of Powers*, 113 HARV. L. REV. 633 (2000); Martin S. Flaherty, *The Most Dangerous Branch*, 105 YALE L.J. 1725 (1996); Elena Kagan, *Presidential Administration*, 114 HARV. L. REV. 2245 (2001).

<sup>18</sup> See Terry M. Moe & William G. Howell, *The Presidential Power of Unilateral Action*, 15 J.L. ECON. & ORG. 132, 133 (1999) (noting the increased use of executive orders as a policy-making device).

<sup>19</sup> See Kagan, *supra* note 17, at 2277–81, 2285–90.

<sup>20</sup> See JOHN R. HIBBING & ELIZABETH THEISS-MORSE, *CONGRESS AS PUBLIC ENEMY: PUBLIC ATTITUDES TOWARD AMERICAN POLITICAL INSTITUTIONS* (1995).

<sup>21</sup> See John R. Hibbing & Christopher W. Larimer, *What the American Public Wants Congress to Be*, in *CONGRESS RECONSIDERED* 45, 46–48 (Lawrence C. Dodd & Bruce I. Oppenheimer eds., 8th ed. 2005).

<sup>22</sup> Lydia Saad, *Congress Approval Remains Historically Low, Now 16%*, GALLUP POL. (July 13, 2012), <http://www.gallup.com/poll/155720/congress-approval-remains-historically-low.aspx> (contrasting a recent poll showing that thirteen percent of Americans approve of what Congress is doing, with a historical average of thirty-three percent since 1974).

performance as good or excellent, with sixty-four percent labeling it as poor.<sup>23</sup>

Yet, despite perennially low public approval of Congress as an institution, the overwhelming majority of incumbents are consistently reelected.<sup>24</sup> Political scientists have even determined that incumbents qua incumbents receive an electoral advantage of approximately seven to ten percentage points.<sup>25</sup> Coming full circle, many of these incumbents “run for Congress by running against Congress,” tapping into their constituents’ deep dislike of an institution to which these candidates seek to return.<sup>26</sup>

### C. *The Dangers of an Enfeebled Congress*

These dual declines in Congress’s institutional capacity and public approval are troubling. If left unchecked, they will severely diminish the legislative branch’s role in governance. This weakening of Congress, in turn, could have ripple effects, damaging both the efficacy and the democratic nature of American government.

For instance, a reduced congressional role in governance may be associated with later policy failures. In the short term, Congress’s refusal or inability to perform its prescribed role in lawmaking arguably leads to suboptimal outcomes. A set of Congress scholars at the Brookings Institution argues that Congress’s disinterest in the details of new policy proposals stymies pre-enactment cost-benefit analyses of major expenditures and that its lack of engagement in executive branch oversight is linked to recent missteps in Iraq and homeland security policies.<sup>27</sup> In the longer term, congressional pathologies may gradually bleed into other areas of public life. The institution’s hyperpartisan atmosphere may contribute to (as well as reflect) the increasingly rancorous tone of debates in the public square, and perceptions of its dysfunctional nature may affect public opinion concerning other institutions—a potentially dangerous dynamic in a democracy, where a certain degree of trust and engagement are needed for civil society to function.

If one expands the time horizon still further, a continued decline in Congress’s role in governance could put our separation-of-powers system at risk. With some significant judicial checks on the executive resting on the presence or absence of legislative action, congressional silence could trigger

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<sup>23</sup> 8% *Think Congress Is Doing A Good Job*, RASMUSSEN REP. (Aug. 27, 2012), [http://www.rasmussenreports.com/public\\_content/archive/mood\\_of\\_america\\_archive/congressional\\_performance/8\\_think\\_congress\\_is\\_doing\\_a\\_good\\_job](http://www.rasmussenreports.com/public_content/archive/mood_of_america_archive/congressional_performance/8_think_congress_is_doing_a_good_job).

<sup>24</sup> See GARY C. JACOBSON, *THE POLITICS OF CONGRESSIONAL ELECTIONS* 27 (7th ed. 2009).

<sup>25</sup> See Steven Ansolabehere, James Snyder & Charles Stewart III, *Old Voters, New Voters, and the Personal Vote: Using Redistricting to Measure the Incumbency Advantage*, 44 AM. J. POL. SCI. 17, 17 (2000).

<sup>26</sup> RICHARD F. FENNO, *HOME STYLE: HOUSE MEMBERS IN THEIR DISTRICTS* 168 (1978).

<sup>27</sup> Sarah A. Binder, Thomas E. Mann, Norman J. Ornstein & Molly Reynolds, *Assessing the 100th Congress, Anticipating the 111th*, BROOKINGS INSTITUTION (Jan. 8, 2009), [http://www.brookings.edu/papers/2009/0108\\_broken\\_branch\\_binder\\_mann.aspx](http://www.brookings.edu/papers/2009/0108_broken_branch_binder_mann.aspx).

a chain reaction, in which judicial or other checks on the executive branch are weakened as a direct effect of Congress's inaction.<sup>28</sup> Given the importance that separated institutions play as a bulwark against tyranny,<sup>29</sup> such a development would be troubling.

## II. A REFORM AGENDA

### A. *The Proposal*

To address these concerns, this article advocates a proposed change that may be stated in one sentence: replace the current House of Representatives committee assignment process, which involves elements of both party influence and member self-selection,<sup>30</sup> with a regime in which legislators are assigned to committees via a random draw.<sup>31</sup> Despite its simplicity, this proposal could lead to dramatic and highly positive changes in Congress's internal capacity and its relations with the other branches, as I will show in Parts III–V of this article.

Random assignment of committee portfolios is a new application of a very old idea: sortition, or the selection of policy makers via lottery. Aristotle endorsed “the appointment of magistrates by lot” as more “democratic” than direct elections.<sup>32</sup> Legislative and administrative bodies in ancient Athens were chosen via lottery-like processes.<sup>33</sup> In recent years, institutional design scholars concerned with interest group capture and other issues similar to those that animate my proposal have promoted sortition in additional governance contexts, from the use of random-sample polling to create policy,<sup>34</sup> to the use of a lottery model for legislative elections.<sup>35</sup>

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<sup>28</sup> See *Chevron U.S.A. v. Natural Res. Def. Council*, 467 U.S. 837, 842 (1984) (deferring to agencies’ “permissible” interpretations of the agencies’ organic statutes unless “Congress has directly spoken to the precise question at issue”); *Dames & Moore v. Regan*, 453 U.S. 654, 678–79 (1981) (permitting the President to suspend civil claims against a foreign state without statutory authorization, given the “history of congressional acquiescence in conduct of the sort engaged in by the President”); *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 637 (1952) (Jackson, J., concurring) (basing the constitutionality of presidential action on the extent to which Congress expressly condones or condemns the action, or remains silent).

<sup>29</sup> See 2 WILLIAM BLACKSTONE, COMMENTARIES \*149 (“The total union of [governmental functions] . . . would be productive of tyranny.”); THE FEDERALIST NO. 51 (James Madison) (arguing that the Constitution’s institutional design provides an “auxiliary precaution[ ]” that “oblige[s] . . . [the government] to control itself”).

<sup>30</sup> See *infra* Part III.

<sup>31</sup> This proposal focuses on the House of Representatives. Although many of the contentions in this article to some degree could apply to the Senate, my emphasis is on the House for purposes of analytic simplicity.

<sup>32</sup> ARISTOTLE, THE POLITICS 94–95 (Stephen Everson ed., Cambridge Univ. Press 1988).

<sup>33</sup> See JAMES WYCLIFFE HEADLAM, ELECTION BY LOT AT ATHENS 173 (2d ed. 1933).

<sup>34</sup> See generally JAMES FISHKIN, WHEN THE PEOPLE SPEAK: DELIBERATIVE DEMOCRACY AND PUBLIC CONSULTATION (2009).

<sup>35</sup> See Akhil Reed Amar, *Lottery Voting: A Thought Experiment*, 1995 U. CHI. LEGAL F. 193, 194–95 (1995) (describing a lottery model for legislative elections).

One could imagine a “pure” version of this proposal, in which committee portfolios are both random and temporary, involving biennial reassignments, for instance. Short-term assignments could augment some of the proposal’s positive effects, particularly concerning deliberation and second-order diversity. On the other hand, frequent reassignments could prevent legislators from gaining mastery over any one issue area, wiping away committees’ institutional memories every two years and potentially increasing Congress’s reliance on outside interest groups as an alternative source of expertise. While this article does not take a position regarding the optimal length of committee assignments, one must note that any temporal limit selected will carry with it attendant costs and benefits.

### B. Assumptions

Before discussing the prospective effects of this proposal, I note several assumptions. Most significantly, I assume that legislators who are randomly assigned a given committee portfolio would tend to invest their lawmaking efforts in their committees’ issue areas. The basic logic undergirding much of this article holds that since committees enjoy some degree of property rights concerning bills within their jurisdictions,<sup>36</sup> if legislators are to have any influence at all over lawmaking, they will channel the bulk of their legislative efforts into committee work. This assumption can be unpacked into three component parts: (1) members of Congress are interested in legislating; (2) much of Congress’s legislative activity occurs in committee; and (3) if Congress were to implement a random assignment system, (1) and (2) would still hold. With the validity of this logical chain being central to my argument, I address each of these components in greater detail.

First, given the dysfunction within Congress and public cynicism regarding the institution, it is understandable that the basic, seemingly tautological statement that “legislators are interested in legislating” is controversial. There is little room for legislative work, after all, in David Mayhew’s conception of legislators as “single-minded seekers of reelection,” who concentrate on advertising, position-taking, and credit-claiming functions to achieve this goal.<sup>37</sup> Yet in pursuing their reelection imperative, members may find legislative work to be a necessary means to this end. Even if low-information voters do not directly follow their representative’s legislative efforts, organized groups—e.g., unions, churches, etc.—with connections to those voters closely monitor Hill activities, and their statements and endorsements provide signals to aligned voters.<sup>38</sup> Moreover, the need for campaign contributions may compel reelection-oriented members to pur-

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<sup>36</sup> See 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, 157 (1988).

<sup>37</sup> See DAVID R. MAYHEW, *CONGRESS: THE ELECTORAL CONNECTION* 5 (1974).

<sup>38</sup> See R. DOUGLAS ARNOLD, *THE LOGIC OF CONGRESSIONAL ACTION* 66 (1990); JOHN W. KINGDON, *CONGRESSMEN’S VOTING DECISIONS* 155 (2d ed. 1981).



sue at least *some* legislative work, as politically sophisticated donors may not be fooled by substance-free posturing, instead choosing to support those lawmakers whom they determine are effective at advancing donors' legislative agendas. Moving beyond this reelection goal, other scholars note that a desire for power and the achievement of policy goals also motivate legislators.<sup>39</sup> These additional goals are closely connected to lawmaking functions.<sup>40</sup>

Second, the claim that committees play a central role in much of Congress's legislative activity is well-documented.<sup>41</sup> As an initial matter, committee members serve as agenda-setters, determining to a significant degree which issues Congress will consider.<sup>42</sup> Once an issue is placed on the agenda, committee members expend time and resources drafting bills in markup sessions.<sup>43</sup> After a bill is sent to the floor, the Rules Committee may impose special rules restricting further changes, which ensures that the final version closely resembles the committee-produced version.<sup>44</sup> Finally, committee members often dominate conference committees, providing committees with an effective *ex post* veto on disfavored floor changes.<sup>45</sup>

Third, the final premise states that, should this proposed switch to a random assignment system be enacted, members would continue to find it in their interest to pursue their legislative goals through the committee system. Following such a switch, many legislators would find themselves on committees that lie far from their substantive interests. These legislators would be faced with a choice: either pursue their legislative goals through their committee assignments or have virtually no influence on the content of committee-produced bills. Between the Scylla of legislative influence on an issue area that is, in expectation, less relevant to district interests and the Charybdis of no direct influence at all over lawmaking, I assume that most legislators would prefer the former.

The experience of former Rep. Shirley Chisholm (D-NY) provides an example of the rationale behind this third premise. When Chisholm was first elected to Congress, she was assigned to the Agriculture Committee and its Forestry Subcommittee. Given that she represented a district in Brooklyn,

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<sup>39</sup> See generally RICHARD F. FENNO, JR., *CONGRESSMEN IN COMMITTEES* 1 (1973); ERIC SCHICKLER, *DISJOINTED PLURALISM: INSTITUTIONAL INNOVATION AND THE DEVELOPMENT OF THE U.S. CONGRESS* (2001).

<sup>40</sup> Cf. GREGORY WAWRO, *LEGISLATIVE ENTREPRENEURSHIP IN THE U.S. HOUSE OF REPRESENTATIVES* (2000) (providing numerous examples of legislators, with these motivations, investing significant time and energy into large-scale, highly consequential legislation).

<sup>41</sup> See RICHARD L. HALL, *PARTICIPATION IN CONGRESS* 21 (1996).

<sup>42</sup> See Kenneth A. Shepsle & Barry R. Weingast, *The Institutional Foundations of Committee Power*, 81 *AM. POL. SCI. REV.* 85, 85 (1987).

<sup>43</sup> See HALL, *supra* note 41, at 27.

<sup>44</sup> See Douglas Dion & John D. Huber, *Procedural Choice and the House Committee on Rules*, 58 *J. POL.* 25, 25 (1996).

<sup>45</sup> See Shepsle & Weingast, *supra* note 42, at 86.

she was understandably unhappy with this assignment.<sup>46</sup> With no better option available—until her successful transfer to another committee in a later Congress—she decided to devote her energies to lawmaking within the Agriculture Committee’s jurisdiction.<sup>47</sup> According to her colleague Rep. Patsy Mink (D-HI):

It was with great dismay that she felt she was being . . . relegated [to] a position on a committee which was of no interest to her. She took it well, castigated the leadership on her side for having made this appointment, and then proceeded to take charge of that committee . . . [Chisholm] soon found out that food stamps was in the . . . [Committee’s jurisdiction] and just sort of revolutionized the whole approach of helping poor people with the food stamp program.<sup>48</sup>

Essentially, this third premise generalizes from Chisholm’s experience. Although legislators may devote less attention to lawmaking under this system—as legislative achievements in an area that is less relevant to one’s district offer lower returns—I presume that they will still engage in some significant amount of lawmaking activity, as did Chisholm, because such activity would continue to serve the electoral, power, and policy goals described above.

In drawing inferences from Chisholm’s experience, one must proceed with caution. Her experience receiving such a disfavored assignment is highly unusual, and her reaction to it may say more about her than the typical member of Congress.<sup>49</sup> In the longer term, though, one could imagine that a random assignment system could alter the composition of Congress, with less civic-minded, more pork barrel-oriented politicians being discouraged from running for an office with no guarantees regarding specific committee assignments. In this way, the proposal’s effectiveness not only depends on, but also influences, the characteristics of members of Congress. Still, I caution that, in the absence of other evidence, claims regarding the amount of effort that legislators would put into their randomly assigned committee portfolios are speculative.

It is important to acknowledge that if one does not agree with any of these three premises, one will find many of the arguments in this article less convincing. Although (1) and (2) are informed by well-recognized scholarly literature, and (3) has a firm logical basis, these three statements are assumptions, not uncontested facts. Thus, as with many positive and normative

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<sup>46</sup> SHIRLEY CHISHOLM, *UNBOUGHT AND UNBOSSSED* 84 (1970) (“[I]t would be hard to imagine an assignment that is less relevant to my background or to the needs of the . . . people who elected me.”).

<sup>47</sup> See 147 CONG. REC. 10,344 (2001).

<sup>48</sup> *Id.*

<sup>49</sup> See James Barron, *Shirley Chisholm, ‘Unbossed’ Pioneer in Congress, Is Dead at 80*, N.Y. TIMES, Jan. 3, 2005, at A1 (obituary noting Chisholm’s achievements).

claims, the arguments presented here rest in part on a set of arguably unfalsifiable assumptions.

### III. COMMITTEE REFORM AND CONGRESSIONAL CAPACITY

Having described the basic contours of my proposal, I turn to examining the proposal's potential impact on Congress. Random assignment of legislators to committees could enhance Congress's lawmaking capacity, thereby mitigating or reversing some of the troubling trends described above. This part shows how this reform could advance five significant, positive changes in Congress. These potential benefits involve (a) decreasing the power that party leaders have over their rank-and-file members, (b) providing for committees that are both expert and representative, (c) mitigating interest group capture, (d) promoting deliberation, and (e) providing a greater voice for minority viewpoints. A final subpart (f) discusses the possibility that this reform will lead to higher legislative enactment costs.

#### A. *Democratic Responsiveness and Partisan Polarization*

Currently, party leaders play a prominent role in doling out committee assignments to their rank-and-file members.<sup>50</sup> Given the benefits associated with a seat on a favored committee,<sup>51</sup> this influence over the assignment process provides party leaders with a sizable inducement to encourage members' loyalty on roll call votes.<sup>52</sup> Consequently, party influence over committee assignments distorts legislative outcomes away from what one might expect in a legislature conforming to the democratic ideal, where all members' views are assigned equal weight.<sup>53</sup> Hence, a reform that reduces party leaders' power could increase Congress's democratic responsiveness.

Currently, two party-led organs, the Democratic Caucus Steering & Policy Committee and the Republican Conference Steering Committee, exercise substantial control over the committee seat assignment process, with both organizations valuing party loyalty—sometimes above all else<sup>54</sup>—in

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<sup>50</sup> See GARY W. COX & MATHEW D. McCUBBINS, *LEGISLATIVE LEVIATHAN: PARTY GOVERNMENT IN THE HOUSE* 164 (1993).

<sup>51</sup> For example: being able to serve district-specific interests, collect donations from groups affected by programs within the committee's turf, or pursue one's own policy goals.

<sup>52</sup> See COX & McCUBBINS, *supra* note 50, at 174.

<sup>53</sup> This statement assumes that party leaders' preferences deviate from those of the rank and file. See, e.g., Steven Ansolabehere, James Snyder, Jr. & Charles Stewart III, *The Effects of Party and Preferences on Congressional Roll-Call Voting*, 26 *LEG. STUD. Q.* 533, 552 (2001).

<sup>54</sup> See, e.g., John H. Aldrich & David W. Rohde, *The Republican Revolution and the House Appropriations Committee*, 62 *J. POL.* 1, 4–12 (2000) (detailing how Speaker Newt Gingrich (R-GA) awarded the chairmanship of the powerful Ways & Means Committee to a long-time loyalist, bypassing the four most senior committee members, and appointed an unusually large contingent of newly elected, ideologically driven Republicans to the committee as a reward for their pledged loyalty to Gingrich's agenda).

doling out plum assignments.<sup>55</sup> Party leaders' ability to assign committee portfolios and chair or ranking-member positions to their fellow partisans is a significant carrot that party leaders use to induce loyalty from their rank-and-file members.<sup>56</sup>

Party leaders' use of the committee assignment process for partisan aggrandizement distorts the democratic responsiveness of Congress in two ways. First, since parties take into account member fundraising when determining committee assignments, the current assignment system helps solidify the role of money in congressional politics. "With the demise of seniority," Thomas Mann and Norman Ornstein write, "aspiring committee and subcommittee chairs were obliged to raise large sums of campaign funds just to be considered for the posts they sought."<sup>57</sup> Eleanor Powell has shown that member-to-member giving is correlated with the advancement of legislators' careers, including assignments and leadership positions on sought-after committees.<sup>58</sup> A 2007 memo from the Democratic Congressional Campaign Committee to Democratic representatives all but announced the quid pro quo nature of the connection between party fundraising and the retention of committee leadership positions.<sup>59</sup> The memo stated that "dues" of up to \$500,000 would be collected from Democratic representatives holding committee or party leadership positions.<sup>60</sup> Similarly, the National Republican Congressional Committee encourages Republican committee leaders to sign "commitment contracts," where the dollar amount varies based on the desirability of one's committee assignments and any committee leadership positions that one holds.<sup>61</sup> If one believes that money corrupts congressional politics,<sup>62</sup> breaking the connection between fundraising and committee assignments would be a step in the right direction.

Second, the current, party-led committee assignment system pulls members away from their district or personal preferences and towards those of party leaders. Given the intense competition for the most desired committee portfolios,<sup>63</sup> party leaders controlling the assignment process enjoy a significant source of leverage over rank-and-file members. To the extent that party leaders use this leverage to pressure members to vote the party line, party influence over the committee system may contribute to partisan polar-

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<sup>55</sup> See generally DAVID W. ROHDE, *PARTIES AND LEADERS IN THE POSTREFORM HOUSE* (1991).

<sup>56</sup> See COX & McCUBBINS, *supra* note 50, at 166.

<sup>57</sup> MANN & ORNSTEIN, *supra* note 9, at 180.

<sup>58</sup> Eleanor Powell, *Partisan Entrepreneurship and Career Advancement in Congress 14* (2009) (unpublished Ph.D. dissertation, Harvard University) (on file with Pusey Library, Harvard University).

<sup>59</sup> See MARIAN CURRINDER, *MONEY IN THE HOUSE: CAMPAIGN FUNDS AND CONGRESSIONAL PARTY POLITICS* 36–38 (2008).

<sup>60</sup> *Id.* at 37.

<sup>61</sup> *Id.*

<sup>62</sup> See generally LESSIG, *supra* note 7.

<sup>63</sup> See Weingast & Marshall, *supra* note 36.

zation.<sup>64</sup> Thus, freeing the committee assignment process from party influence could decrease polarization in the chamber and relax some of the pressure on moderate legislators to place party interests above district or personal preferences.<sup>65</sup>

Critics of my proposal may argue that partisan pressure on rank-and-file legislators is actually a normative good and that, by vitiating congressional parties, my proposal would decrease officeholder accountability. This critique is rooted in a theory labeled “responsible party government,” which holds that strong parties and clear lines of authority allow low-information voters to accurately reward or punish officeholders for policy outcomes by using officeholders’ party identifications as cues.<sup>66</sup> By placing committee assignments partially in the hands of party leaders, the current system increases party control of the often unwieldy legislative branch, facilitating both centralized, party-led governance and citizens’ ability to reward or sanction the majority party for outcomes. In this way, a system in which the majority party influences the committee assignment process enables voters to exercise some degree of indirect control over committee work product. By severing this link, this critique continues, random assignment may make it more difficult for voters to assign responsibility for policy outcomes.<sup>67</sup>

This potential drawback to random assignment deserves consideration. To evaluate its importance, one must examine both the desirability of responsible party government—a normative goal that many readers may not share—and its feasibility absent my proposal. On this latter consideration, I do not believe that my proposal would impose much of an additional impediment to the development of responsible party government. Given the historically local nature of House elections,<sup>68</sup> voters’ propensity to select divided party government,<sup>69</sup> and the structural barriers that bicameralism and separation of powers present to the implementation of responsible party government, this proposal is unlikely to appreciably reduce the likelihood of a responsible party government system developing.<sup>70</sup>

A balancing of this potential negative consequence against the aforementioned likely positive consequences favors enacting the proposal. On

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<sup>64</sup> For an overview of partisan polarization and its ill effects in Congress, see 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* 3–106 (2012).

<sup>65</sup> See Ansolabehere, Snyder & Stewart, *supra* note 53.

<sup>66</sup> See GARY W. COX & MATHEW D. MCCUBBINS, *SETTING THE AGENDA: RESPONSIBLE PARTY GOVERNMENT IN THE U.S. HOUSE OF REPRESENTATIVES* 1–2 (2005); V.O. KEY, JR., *POLITICS, PARTIES AND PRESSURE GROUPS* 199–227 (5th ed. 1964); E. E. SCHATTSCHEIDER, *PARTY GOVERNMENT* 65–98 (1942).

<sup>67</sup> Cf. Jacob E. Gersen, *Unbundled Powers*, 96 VA. L. REV. 301, 328 (2010) (noting the connection between centralization of responsibility and democratic accountability).

<sup>68</sup> See generally Richard F. Fenno, Jr., *U.S. House Members in Their Constituencies: An Exploration*, 71 AM. POL. SCI. REV. 883 (1977).

<sup>69</sup> See generally BARRY C. BURDEN & DAVID C. KIMBALL, *WHY AMERICANS SPLIT THEIR TICKETS: CAMPAIGNS, COMPETITION, AND DIVIDED GOVERNMENT* (2004).

<sup>70</sup> See James L. Sundquist, *Needed: A Political Theory for the New Era of Coalition Government in the United States*, 103 POL. SCI. Q. 613, 614 (1988) (discussing the persistent inapplicability of responsible party government theory to American politics).

one side of the ledger is the argument that weakening congressional parties may move American politics a step farther from some observers' goal of responsible party government—an as-yet-unattained objective that, despite over one hundred years of elite promotion, voters have consistently rejected.<sup>71</sup> Placed on the other side are more concrete, likely effects concerning the removal of a source of pressure for legislators to vote with their party, rather than, for example, their conscience or district preferences, and the cession of the pay-for-play practice of legislators being assessed party “dues” based on the value of their committee assignments and leadership positions. Given this balance, I argue that the proposal's likely positive effects outweigh its potential to add another barrier to the future establishment of responsible party government.

### B. *The Expertise-Representativeness Tradeoff*

Congress scholars have long recognized a tradeoff between committees that have expertise in their jurisdictions and those that are representative of the larger chamber.<sup>72</sup> Committees need some incentive—e.g., “jurisdictional property rights,” or the near-exclusive ability to propose legislation within a specified issue area—to exert effort to gain the subject-matter expertise needed to produce high-quality information for the chamber.<sup>73</sup> But those legislators for whom property rights are most valuable—and those who are most interested in joining a given committee—likely will hold views on issues within that committee's purview that differ markedly from those of the median legislator.<sup>74</sup> For instance, legislators from districts with military bases are more likely to be interested in serving on the Armed Services Committee,<sup>75</sup> arguably leading to the drafting of defense bills that are unrepresentative of the floor. Thus, institutional designers face a dilemma

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<sup>71</sup> See BURDEN & KIMBALL, *supra* note 69; Sundquist, *supra* note 70.

<sup>72</sup> See, e.g., Thomas W. Gilligan & Keith Krehbiel, *Organization of Informative Committees by a Rational Legislature*, 34 AM. J. POL. SCI. 531 (1990).

<sup>73</sup> See KEITH KREHBIEL, INFORMATION AND LEGISLATIVE ORGANIZATION 61–103 (1991).

<sup>74</sup> See Barry S. Rundquist & John A. Ferejohn, *Observations on a Distributive Theory of Policy-Making: Two American Expenditure Programs Compared*, in COMPARATIVE PUBLIC POLICY: ISSUES, THEORIES AND METHODS 87, 88 (Craig Liske, William Loehr & John McCamant eds., 1975) (“[C]ongressmen are motivated to serve the economic interests of their constituencies, . . . [which they are best able to do] if they are members of standing committees with jurisdiction over government activities that affect their constituencies.”). As a result, some committees are comprised of “homogenous high-demanders” of the policies within those committees' jurisdictions. *Id.*

In some limited instances, one could conceive of committees comprised of expert legislators that are not unrepresentative of the floor, for example, former lawyers are overrepresented on the Judiciary Committee, but there is little reason to expect a priori that this form of expertise would be associated with unrepresentative preferences.

<sup>75</sup> E. Scott Adler & John S. Lapinski, *Demand-Side Theory and Congressional Committee Composition: A Constituency Characteristics Approach*, 41 AM. J. POL. SCI. 895, 901 (1997).

between maximizing committee expertise and maximizing committee representativeness.<sup>76</sup>

Random assignment of members to committees could help optimize this balance. With this reform, the ideological composition of any given committee's membership would, in expectation, accurately mirror that of the floor. Since members' primary means of influencing legislation is through their committee assignments, members would be compelled to focus their efforts on the areas of their assignments, if they are to have influence in the chamber at all.

How prevalent are unrepresentative committees? Gary Cox and Mathew McCubbins have suggested that only a select number of committees focus on policies with geographically concentrated benefits and costs.<sup>77</sup> To continue with the previous example, this critique notes that many committees address policies with less concentrated benefits than does the Armed Services Committee and therefore may be expected to attract a broader cross-section of lawmakers. Phrased another way, if most legislators' districts have roughly equal "demand" for tax policy or appropriations, for example, then there is little reason to expect appreciable differences among those members that self-select onto, respectively, the Ways & Means and Appropriations committees.<sup>78</sup> If accurate, this contention would cast doubt on the magnitude of the expertise-representativeness tradeoff discussed above, and the aforementioned benefits of random assignment to mitigating the expertise-representativeness tradeoff would be illusory.

Empirical evidence of the extent to which committees are unrepresentative is mixed. On the one hand, analysis of members' roll call voting behavior and seat assignments demonstrates that, concerning the most consequential committees—i.e., Ways & Means, Appropriations, and Rules—party loyalty better explains seat assignments than does distributive theory, the political science theory that is most closely associated with the notion that committees are comprised of homogenous high-demanders of committee-related policies.<sup>79</sup> On the other hand, research connecting the demographic profiles of congressional districts with their legislators' seat assignments reveals a persistent connection between district characteristics and committee portfolios for eight committees, as well an occasional connection for another two committees.<sup>80</sup>

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<sup>76</sup> See generally Richard L. Hall, *Empiricism and Progress in Positive Theories of Legislative Institutions*, in POSITIVE THEORIES OF CONGRESSIONAL INSTITUTIONS 286, 295–96 (Kenneth A. Shepsle & Barry R. Weingast eds., 1995).

<sup>77</sup> See COX & MCCUBBINS, *supra* note 50, at 224.

<sup>78</sup> See *id.* at 203–19 (noting that the Democratic members of committees with more uniform externalities tend to be more representative of Democratic floor preferences than are the Democratic members of committees with targeted externalities).

<sup>79</sup> See KREHBIEL, *supra* note 73, at 150.

<sup>80</sup> See Adler & Lapinski, *supra* note 75, at 913. These eight are Agriculture; Armed Services; Banking, Finance & Urban Affairs; Education & Labor; Foreign Affairs; Interior & Insular Affairs; Merchant Marine & Fisheries; and Public Works. The two committees for which the authors found a less-consistent link are the Energy & Commerce and Judiciary

For the purposes of this article, it is not necessary to assess the validity of these competing distributive and party-cartel perspectives on committee organization, as random assignment would improve the functioning of committees under both theories. For those committees currently comprised of homogenous high-demanders, a transition to random assignment would mitigate the expertise-representativeness tradeoff discussed above. For committees whose members are chosen primarily on the basis of party loyalty, switching to a random assignment system would engender the advantages discussed in Part III.A, *supra*. Finally, those committees that currently are organized via a mix of self- and party-selection—leading to dual forms of bias, with the effects of each being diluted—may enjoy both benefits.

### C. Interest Group Capture

A random assignment system may discourage interest group capture of discrete policy areas, in which an entrenched “iron triangle” consisting of special interest groups, agencies, and legislators on the relevant subcommittees exercise outsized influence over a given issue area. The current committee assignment system makes committees particularly susceptible to interest group capture.<sup>81</sup> As previously detailed, legislators currently have considerable discretion in selecting their committee portfolios, with party organizations also playing a significant role. This partial self-selection—and consequent overrepresentation of “high-demanders” on certain committees<sup>82</sup>—can exacerbate interest group capture.<sup>83</sup>

To see how committee self-selection facilitates interest group capture, consider the following hypothetical. The median member of Congress wishes to spend \$1 billion on a new weapons system; the median legislator representing a district with a sizable military or defense-industry presence, with constituents who tend to be more hawkish, wishes to spend \$2 billion; and the defense contractor is lobbying Congress to spend \$3 billion on the project. The most cost-effective lobbying strategy for the contractor may be to focus its resources on these more hawkish legislators, since the “cost” of moving them from their ideal point to the contractor’s preferred outcome is lower than that for other legislators. With self-selection onto committees, these hawkish legislators will gravitate towards the Armed Services Committee. The result is a tighter committee–interest group nexus than would be

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committees. *Id.* Note that some of these committees have altered their names or jurisdictions, or have been disbanded entirely, since the period under study.

<sup>81</sup> See Steven G. Calabresi, *Some Normative Arguments for the Unitary Executive*, 48 ARK. L. REV. 23, 84 (1995).

<sup>82</sup> See Adler & Lapinski, *supra* note 75, at 913 (demonstrating that legislators hailing from districts with a high demand for a given policy tend to be overrepresented on committees with jurisdiction over those policies).

<sup>83</sup> See Einer R. Elhauge, *Does Interest Group Theory Justify More Intrusive Judicial Review?*, 101 YALE L.J. 31, 42 (1991) (“Because, compared to other legislators, committee members have more influence over legislation germane to their committees, the committee structure can help an interest group with political dominance in a single district extend its influence across the entire . . . nation.”).



the case with random assignment. Thus, to the extent that interest group priorities are aligned with district-specific interests, self-selection of a relatively homogenous group of legislators onto committees lowers the costs to certain interest groups of capturing congressional policy in a given committee's domain.

Random assignment of members to committees would end the practice of "high-demanders" self-selecting onto committees with jurisdiction over their favored issue area. This change, in turn, would raise the costs to interest groups of influencing committees, which, in expectation, would be comprised of a mix of sympathetic and unsympathetic members, mirroring the views of the parent chamber. In this way, random assignment would discourage interest group capture.

#### D. Deliberation

The prevailing wisdom holds that the legislative branch is moving further away from the deliberative ideal.<sup>84</sup> Among Congress-watchers, anecdotes suggesting a growing incivility in Congress abound.<sup>85</sup> According to one recent study, twenty-seven percent of congressional press releases include partisan "taunting."<sup>86</sup> With Congress's freedom of speech or debate being a key element of the institution's "soft," persuasive powers, the dysfunctional nature of congressional speech may inhibit the branch's ability to engage with and persuade the public.<sup>87</sup>

Could random assignment to committees encourage greater deliberation? Possibly. Proponents of deliberation contend that interactions between ideologically dissimilar individuals can lead to compromise and the reexamination of more extreme views.<sup>88</sup> Random assignment would compel legislators with different views and backgrounds to interact with each other and, if they are to achieve anything, work together. One can contrast this possibility with the status quo, in which members from similar districts and personal backgrounds cluster on similar committees, and the potential gains from deliberation are not realized.

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<sup>84</sup> See, e.g., MANN & ORNSTEIN, *supra* note 9, at 216.

<sup>85</sup> See, e.g., Alan K. Ota, Liriel Higa & Siobhan Hughes, *Fracas in Ways and Means Overshadows Approval of Pension Overhaul Measure*, CQ WKLY., July 19, 2003, at 1822, 1822 (reporting that Rep. Pete Stark (D-CA) called a Republican colleague a "wimp" and a "little fruitcake" during a committee hearing); Patrick Reis, *Witness to Rep. Young: 'I Pay Your Salary'*, POLITICO (Nov. 18, 2011, 7:00 PM), <http://www.politico.com/news/stories/1111/68725.html> (reporting that Rep. Don Young (R-AK) referred to historian Douglas Brinkley's witness testimony as "garbage" while questioning Brinkley during a committee hearing).

<sup>86</sup> Justin Grimmer & Gary King, *General Purpose Computer-Assisted Clustering and Conceptualization*, 108 PROC. NAT'L ACAD. SCI. 2643, 2649 (2011).

<sup>87</sup> See Chafetz, *supra* note 8, at 722.

<sup>88</sup> See Cass R. Sunstein, *Deliberative Trouble? Why Groups Go to Extremes*, 110 YALE L.J. 71, 103-04 (2000) ("If Republicans are speaking mostly with Republicans, and if Democrats are speaking mostly with Democrats, one should expect a hardening of views toward the more extreme points.").

*E. Minority Viewpoints*

Random assignment may also provide a greater voice to currently underrepresented political minorities in Congress. In assessing this proposal's potential effect on promoting minority views, it is helpful to adopt Heather Gerken's dual forms of diversity, which she terms first- and second-order diversity.<sup>89</sup> First-order diversity involves greater statistical parity, in which the composition of samples more closely reflects that of the larger population.<sup>90</sup> Second-order diversity involves a variety of samples, which, according to Gerken, "do not mirror the underlying population, but instead encompass a wide range of compositions."<sup>91</sup>

Concerning first-order diversity, the potential effects of this proposal are fairly straightforward. The proposal would end the practice of skewing partisan ratios on committees in favor of the majority party.<sup>92</sup> These skewed ratios are an intentional violation of first-order diversity principles, potentially censoring the views heard in committee hearings and bill markups to the detriment of the minority party.

While this proposal would block committee packing by the majority party by tending to align committee and chamber preferences, these preferences would be identical only in expectation. In practice, one is still likely to see nontrivial divergence between committee and chamber views. Although, in expectation, the proposal would lead to committees that perfectly mirror the floor's preferences, there is obviously variance in the frequency distribution associated with a series of random draws. Democrats would be overrepresented on some committees, Republicans on others; female legislators would enjoy disproportionate influence on some committees, male legislators on others; and so on. Under the current assignment system, the influence of parties in the assignment process provides a backstop against the possibility of extreme divergence, as party leaders may take action to ensure that committee skewness is kept within some acceptable bounds. Under my random draw proposal, however, no such backstop would exist. Therefore, my proposal might lead to some committees for which committee-floor preference divergence is greater than it would have been under the current system.

This divergence—the natural consequence of a random draw, rather than a deliberate distortion by party leaders or self-selecting legislators—would foster a form of second-order diversity. Specifically, a system in which political minorities are privileged on some committees and underrepresented on others could lead to a beneficial form of interorganizational

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<sup>89</sup> See Heather K. Gerken, *Second-Order Diversity*, 118 HARV. L. REV. 1099 (2005).

<sup>90</sup> *Id.* at 1102.

<sup>91</sup> *Id.*

<sup>92</sup> See generally LORRAINE H. TONG, CONG. RESEARCH SERV., R 40478, HOUSE COMMITTEE PARTY RATIOS: 98TH–111TH CONGRESSES (2009) (showing a consistent practice of the majority party maintaining stronger majorities in committees than in the chamber as a whole).

diversity.<sup>93</sup> This second-order diversity could lead to many of the same benefits in Congress that Gerken contends would stem from greater second-order diversity within larger, societal-level institutions.<sup>94</sup>

Whether one favors providing greater voice to political minorities often depends, however, on *which* political minorities one believes have been unduly excluded from the process—and which minority views one believes ought to be marginalized. For instance, would a more eclectic set of oversight-and-investigations subcommittee memberships be a net positive if it also increases the likelihood that a future Joseph McCarthy would rise to prominence on one of these bodies?<sup>95</sup> Consider that, under the current assignment process, parties may at least exert some amount of influence to relegate such persons to the sidelines. By contrast, my proposal would allow no such role for parties.

In evaluating whether the empowerment of political minorities under this proposal is a net positive or negative, one must consider whether the risk of potentially placing a small number (in expectation) of key policy areas under the jurisdiction of ideologically unrepresentative legislators outweighs the aforementioned advantages. For all of the reasons discussed above, I believe that the benefits to this proposal are worth this added political risk.

#### F. *Legislative Enactment Costs*

Random assignment also raises the possibility of higher legislative enactment costs. Committee members' autonomy from their colleagues under this proposal suggests that the parent chamber or party caucus would be unable to control a wayward committee. With random assignment, some committees likely would be comprised of members that are neither representative of, nor responsive to, the preferences of the overall legislative branch. In this way, the proposal could weaken the principal-agent relationship between chamber and committee.

In these instances, random assignment could lead to adverse consequences concerning both of the two primary functions that committees perform: gathering information and drafting legislation. First, an unrepresentative committee could strategically withhold information when it believes that its legislative principal would use this information in a manner

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<sup>93</sup> See Gerken, *supra* note 89, at 1102–03.

<sup>94</sup> See *id.* at 1104–05.

<sup>95</sup> More generally, consider the possibility that a random draw will empower ideological outliers that a party-influenced assignment process would have taken steps to marginalize. The leptokurtic distribution of committee preferences under a random assignment system suggests that much of the variance under this proposal would be due to extreme—but infrequent—deviations, whereas much of the variance under the status quo would be attributable to more moderate—but more frequent—deviations. Essentially, one can view this proposal as involving a mean-variance tradeoff: more representative committees in expectation, along with empowering political minorities in certain instances.

that the committee opposes.<sup>96</sup> While this strategic censoring should be a concern regardless of the mechanism by which committee members are selected,<sup>97</sup> it may be that committee members who do not depend on their House colleagues for their positions—as in this proposal—might be more brazen about censoring information from their nominal principals.

Second, committees with preferences that diverge from those of the floor may be able to move bills towards their own preferences and away from those of the parent chamber to a greater extent than under the status quo. To see why this might be the case, note that, under the current regime, other members of Congress retain some influence over the assignment process. This influence enables them to maintain some degree of leverage over committee legislative products. A switch to random selection would deprive extracommittee actors of this source of leverage, potentially encouraging committee members to use their power for countermajoritarian purposes.

Nonetheless, committees would not be truly autonomous under this proposal because the discharge petition gives an outlet to floor majorities in such situations, and thereby may provide a check on committees as independent agents.<sup>98</sup> Successfully marshaling support for discharge petitions involves incurring substantial costs,<sup>99</sup> however, which may limit their use. Given these costs involved in bypassing committee gatekeepers, one may say that, while random assignment would not leave committees completely untethered from their nominal principal, the proposal would raise the costs of lawmaking around recalcitrant committees.<sup>100</sup>

In addition, there are other mechanisms—albeit costly ones—that Congress could use to perform the aforementioned information dissemination function should a randomly selected committee truly misuse its more autonomous position. Legislative support agencies, including the Government Accountability Office, Congressional Research Service, and Congressional Budget Office can provide a backup source of expertise for legislators.<sup>101</sup>

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<sup>96</sup> See generally Sean Gailmard & John W. Patty, *Stovepiping* (July 12, 2011) (unpublished manuscript), available at <http://dl.dropbox.com/u/3919370/stovepiping12.pdf> (discussing the strategic withholding of information by an expert agent from his or her principal).

<sup>97</sup> See Brian D. Feinstein, *Oversight, Despite the Odds: Assessing Congressional Committee Hearings as a Means of Control Over the Federal Bureaucracy* 34–74 (2009) (unpublished Ph.D. dissertation, Harvard University) (on file with Pusey Library, Harvard University) (describing how subcommittees are less likely to hold oversight hearings when committee-chamber preference divergence is high, and positing that this reluctance is rooted in a concern that the parent chamber may use information derived from oversight hearings in a manner in which the committee that held the hearing opposes).

<sup>98</sup> See SARAH A. BINDER, *MINORITY RIGHTS, MAJORITY RULE: PARTISANSHIP AND THE DEVELOPMENT OF CONGRESS* 157–66 (1997).

<sup>99</sup> See David Epstein, *An Informational Rationale for Committee Gatekeeping Power*, 91 PUB. CHOICE 271, 275 (1997).

<sup>100</sup> If these potential costs are deemed too high for committees whose proper functioning is considered absolutely essential to Congress's business—for example, the Rules and Budget committees—then perhaps these committees could be excluded from this proposal.

<sup>101</sup> See J.R. DeShazo & Jody Freeman, *The Congressional Competition to Control Delegated Power*, 81 TEX. L. REV. 1443, 1491 (2003) (including “shifting drafting obligations to party task forces . . . [and] bypassing the committee and using the GAO or CBO to conduct

Indeed, a regime in which the floor has the option of utilizing randomly assigned committees, but is not required to do so, may be optimal in some respects. In such a system, the floor's decision to use committee channels for information gathering and bill drafting—rather than resorting to the aforementioned majoritarian bypasses—would provide a costly signal regarding its motives.<sup>102</sup>

This silver lining notwithstanding, it seems clear that this proposal, by weakening the principal-agent relationship between Congress and its committees, could create an additional impediment to the passage of chamber-supported legislation. Thus, the proposal could be expected to increase legislative enactment costs. While this potential consequence must be acknowledged, I believe that, in the aggregate, the potential benefits of my proposal outweigh the two aforementioned potential negative effects—i.e., a decreased likelihood of the development of responsible party government and higher legislative enactment costs.

#### IV. COMMITTEE REFORM AND LEGISLATIVE-EXECUTIVE RELATIONS

Random assignment also would strengthen Congress's role in the administrative state. Current scholarship regarding greater political control over the bureaucracy tends to focus on presidential control,<sup>103</sup> seeing congressional committees as imperfect agents for advancing congressional or popular will.<sup>104</sup> Making committees more representative would provide a rationale for reshifting the balance of power away from the President and towards Congress. If more democratically accountable institutions ought to have greater control over the bureaucracy, then making the congressional committee system more reflective of democratic preferences provides a justification for such a shift.<sup>105</sup> Given the drastic growth in presidential in-

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agency investigations" in a list of the "ways that Congress might rein in committees that deviate from the majority's views").

<sup>102</sup> Cf. Jide Nzelibe & Matthew C. Stephenson, *Complementary Constraints: Separation of Powers, Rational Voting, and Constitutional Design*, 123 HARV. L. REV. 617, 620–22 (2010) (suggesting that agreement amongst government branches when one branch could act unilaterally is interpreted by the electorate as a proxy for motives).

<sup>103</sup> See, e.g., MASHAW, *supra* note 12, at 152–53; James Blumstein, *Regulatory Review by the Executive Office of the President: An Overview and Policy Analysis of Current Issues*, 51 DUKE L.J. 851, 887 (2001); Calabresi, *supra* note 81, at 67; Philip Harter, *Executive Oversight of Rulemaking: The President is No Stranger*, 36 AM. U. L. REV. 557, 568 (1987); Kagan, *supra* note 17, at 2384; Peter Strauss & Cass R. Sunstein, *The Role of the President and OMB in Informal Rulemaking*, 38 ADMIN. L. REV. 181, 183, 190 (1986).

<sup>104</sup> See, e.g., Kagan, *supra* note 17, at 2336 (stating that congressional committees have a "far more tenuous connection to national majoritarian preferences" than does the President).

<sup>105</sup> *But see* Matthew C. Stephenson, *Optimal Political Control of the Bureaucracy*, 107 MICH. L. REV. 53, 65 (2008) (challenging the assumption that "increasing the relative influence of the most politically accountable entities over the bureaucracy will increase the majoritarian responsiveness of bureaucratic policy").

volvement in bureaucratic decision making in recent decades, such a recalibration is needed.<sup>106</sup>

This part addresses two potential ways in which this proposed reform could strengthen Congress's hand vis-à-vis the executive branch. First, I explain how random assignment could encourage greater congressional oversight of the administrative state, since those legislators that are assigned to oversight-specific subunits—which are generally disfavored seat assignments—would be compelled to choose between involvement in oversight activities or having no influence in committee-based work whatsoever. Second, I argue that my proposal could strengthen the precarious position of the committee-based legislative veto. Despite the fact that the *Chadha* Court declared the chamber-level legislative veto to be unconstitutional,<sup>107</sup> legislative vetoes persist in practice, with over four hundred new veto provisions enacted since *Chadha*.<sup>108</sup>

### A. Committee Oversight

Congressional oversight of the administrative state is a vital function of the legislative branch.<sup>109</sup> Yet, as with Congress's lawmaking function, oversight work often falls by the wayside.<sup>110</sup> Random committee assignments could serve as a corrective, compelling legislators to participate in monitoring the administrative state.

Given the massive delegation of policymaking authority to the executive branch in many areas,<sup>111</sup> ex post oversight is arguably the most powerful way in which Congress can exercise at least some degree of control over policy outcomes.<sup>112</sup> Contrary to their reputation as mere venues for position taking, oversight hearings can be remarkably effective in altering executive

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<sup>106</sup> See *supra* Part I.

<sup>107</sup> *INS v. Chadha*, 462 U.S. 919 (1983). Although *Chadha* addressed the constitutionality of the one-chamber legislative veto, its logic extends to the committee-based legislative veto.

<sup>108</sup> LOUIS FISHER, CONG. RESEARCH SERV., RS 22132, LEGISLATIVE VEToes AFTER CHADHA 5 (2005).

<sup>109</sup> See JOHN STUART MILL, CONSIDERATIONS ON REPRESENTATIVE GOVERNMENT 69 (Serenity Publishers 2008) (1861) (asserting that “the proper office of a representative assembly is to watch and control the government; to throw the light of publicity on its acts; to compel a full exposition and justification of all of them which any one considers questionable”).

<sup>110</sup> See MANN & ORNSTEIN, *supra* note 9, at 170.

<sup>111</sup> See LOWI, *supra* note 5, at 92–126.

<sup>112</sup> *But see* Mathew D. McCubbins, Roger G. Noll & Barry R. Weingast, *Administrative Procedures as Instruments of Political Control*, 3 J.L. ECON. & ORG. 243, 244, 255 (1987) [hereinafter McNollgast] (positing that the ex ante design of administrative procedures provides a favored mechanism for maintaining congressional control over administration). McNollgast's theory is not without its critics, however. See Glen O. Robinson, *Administrative Arrangements and the Political Control of Agencies: Political Uses of Structure and Process*, 75 VA. L. REV. 483, 488 (1989) (noting that, contra McNollgast's theory, interagency procedural uniformity suggests that Congress does not devote much attention to varying procedures to promote agency responsiveness to favored groups).

branch behavior.<sup>113</sup> Oversight hearings can also influence public attitudes, impacting the success or failure of a presidency.<sup>114</sup>

Despite the theoretical importance and demonstrated efficacy of oversight, Congress appears relatively uninterested in performing its oversight function. Oversight-focused subcommittees tend to be disproportionately populated by less powerful legislators, with senior legislators, party leaders, and full committee chairs and ranking members rarely serving on subcommittees devoted to oversight and investigatory work.<sup>115</sup> My research on subcommittee transfers as a window into legislators' revealed preferences shows a strong disinclination to serve on these oversight-focused subunits.<sup>116</sup> Expanding the analysis to encompass all congressional subcommittees with the ability to hold oversight hearings, I found that those subcommittees that most actively pursue oversight tend to be populated by legislators who are more junior and less effective in advancing their bills, which further suggests that oversight is pursued by legislators lacking better options.<sup>117</sup>

Taken together, these two sets of findings offer at least a sliver of optimism. On the one hand, Congress as an institution appears relatively uninterested in conducting oversight of the executive branch. On the other hand, when oversight hearings do occur, they can be remarkably effective, significantly altering bureaucratic behavior and public perceptions of the executive branch. When considered in combination, these two statements suggest that congressional involvement in policy outcomes could be enhanced if Congress were to place greater emphasis on oversight.

Once again, random committee assignment could provide a partial solution, facilitating greater congressional attention to oversight. Legislators that are randomly assigned to oversight-focused subcommittees would have no choice but to pursue oversight if they want to have any influence over governance during the length of their assignment. Since oversight has been demonstrated to be effective when it does occur, an increase in oversight activity—as well as in the extent to which powerful legislators pursue oversight—could lead to greater congressional control over bureaucratic behavior.

The expectation that random assignment would lead to some oversight-focused subunits where the majority party is overrepresented, and some subunits in which the minority party is overrepresented, is also worth noting

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<sup>113</sup> See Feinstein, *supra* note 97, at 18 (demonstrating that bureaucratic infractions that are the subject of oversight hearings are approximately twenty-two percent less likely to recur than similar infractions for which Congress declines to hold hearings).

<sup>114</sup> See Douglas Kriner & Eric Schickler, *Investigating the President: Committee Probes and Presidential Approval, 1953–2006*, at 12–17 (2011) (unpublished manuscript), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1900886](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1900886) (showing that high-profile congressional investigations are associated with decreased public support for the President, which can “severely weaken” the White House’s agenda).

<sup>115</sup> See Feinstein, *supra* note 97, at 106–20.

<sup>116</sup> See Brian D. Feinstein, *Avoiding Oversight: Legislator Preferences & Congressional Monitoring of the Administrative State*, 8 J.L. ECON. & POL'Y 23, 41 (2011).

<sup>117</sup> See Feinstein, *supra* note 97, at 121–54.

in the context of oversight. Currently, the partisan ratios on oversight-focused committees and subcommittees—like those for most congressional subunits—are skewed in favor of the majority party.<sup>118</sup> With random assignment, this dynamic could change dramatically. With eighteen House committees with some oversight turf concerning the executive branch, and given the fact that the majority party has held between fifty-one to sixty-two percent of the chamber in all Congresses since 1985,<sup>119</sup> it is likely that random assignment would lead to some nontrivial number of committees in which the minority party controls the gavel.

Minority party control of some committees—a likely outcome with random assignment—would help ensure that at least some congressional subunits engage in monitoring the executive branch when the chamber and White House are controlled by the same party.<sup>120</sup> Even considering that Congress is unlikely to be receptive to legislation and committee reports produced by minority party–led oversight committees, the ability of oversight hearings to capture media attention and sway public opinion may spark congressional action.<sup>121</sup>

To be sure, a situation in which the minority party controls a randomly selected group of oversight subunits, leading to vigorous oversight of an essentially random set of issue areas and more lackadaisical efforts elsewhere, is not ideal. Nonetheless, I believe that it compares favorably to the current system, under which oversight of the executive branch decreases significantly during periods of unified government, when committees have strong partisan incentives not to criticize executive branch action.<sup>122</sup>

This relative lack of attention to oversight during unified government is concerning. According to Bruce Ackerman, a Congress that is dominated by the President’s co-partisans may be unwilling to provide a needed check on executive branch extralegal action in times of national emergency.<sup>123</sup> Congressional silence during an emergency could allow presidential action that, although it may be seen as necessary in the critical moment, seems excessive in hindsight<sup>124</sup> and even could provide a fatal blow to the separation-of-powers system. A committee system with a heterogeneous mix of partisan ratios could militate against this prospect. With some committees controlled by

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<sup>118</sup> See TONG, *supra* note 92, at 6–20.

<sup>119</sup> See *id.* This figure includes the Permanent Select Committee on Intelligence and all House standing committees, except for the Ethics, House Administration, and Rules committees.

<sup>120</sup> Cf. U.S. GOV’T PRINTING OFFICE, BUSINESS MEETINGS ON CONGRESSIONAL REFORM LEGISLATION: MEETINGS OF THE JOINT COMMITTEE ON THE ORGANIZATION OF CONGRESS, ONE HUNDRED THIRD CONGRESS, FIRST SESSION, MARKUP OF CONGRESSIONAL REFORM LEGISLATION 206 (1993) (proposing to prohibit the President’s party from controlling the committee now labeled Oversight & Government Reform).

<sup>121</sup> See Kriner & Schickler, *supra* note 114, at 6.

<sup>122</sup> See Douglas Kriner & Liam Schwartz, *Divided Government and Congressional Investigations*, 33 LEGIS. STUD. Q. 295 (2008) (showing a statistically significant, positive correlation between unified government and oversight activity).

<sup>123</sup> BRUCE ACKERMAN, BEFORE THE NEXT ATTACK 85, 190 n.9 (2006).

<sup>124</sup> See, e.g., *Korematsu v. United States*, 323 U.S. 214 (1944).



the opposition party, the probability that at least some congressional organs will be willing to challenge presidential action may increase significantly.<sup>125</sup> While the prospect of increased congressional monitoring of the executive is beneficial under normal circumstances, it may be vital in preserving our system of government in times of crisis.

### B. *The Legislative Veto*

In the wake of twin Supreme Court decisions striking down the one- and two-chamber legislative vetoes,<sup>126</sup> mechanisms for committees to exercise control over agency decisions persist, including both formal committee veto provisions inserted into statutes and informal understandings between committees and agencies.<sup>127</sup> Whether formal or informal, these veto mechanisms have the same effect: they prevent administrative agencies from taking certain actions without the prior approval of a specified committee or committees.<sup>128</sup>

While these mechanisms arguably are a practical necessity, without which Congress may be less willing to delegate policy-making power to agencies in the first place,<sup>129</sup> they rest on constitutionally shaky ground.<sup>130</sup> Apart from the standard formalist separation-of-powers critique, scholars have advanced functional reasons for opposing the ability of congressional subunits to veto bureaucracy decisions.<sup>131</sup> For instance, Cass Sunstein and Adrian Vermeule argue that the legislative veto may “aggravate[] the power of self-interested private groups over processes of lawmaking,” which is at odds with the functional purpose of the Presentment Clause and

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<sup>125</sup> Cf. ACKERMAN, *supra* note 123, at 85 (proposing that in times of national emergency, “members of the opposition political parties should be guaranteed the majority of seats on oversight committees,” to prevent the President’s co-partisans in Congress from giving the White House carte blanche); William E. Scheuerman, *Emergency Powers*, 2 ANN. REV. L. & SOC. SCI. 257, 273 (2006) (“[O]ther countries have experimented with minority control of legislative committees; some empirical evidence implies that it works well as a device for preventing committees from becoming mere lapdogs for the executive.”).

<sup>126</sup> U.S. Senate v. FTC, 463 U.S. 1216 (1983) (two-chamber veto); INS v. Chadha, 462 U.S. 919 (1983) (one-chamber veto).

<sup>127</sup> See FISHER, *supra* note 108, at 3.

<sup>128</sup> See *id.* at 5–6. For instance, norms have developed around certain committee-agency relationships which effectively prevent the agency from transferring funds from one program to another without the committee’s preapproval. See *id.*

<sup>129</sup> See, e.g., *City of New Haven v. United States*, 809 F.2d 900 (D.C. Cir. 1987).

<sup>130</sup> Although the Supreme Court has not directly addressed the constitutionality of these committee-based mechanisms, the D.C. Circuit has objected to some informal, postenactment involvement in agency decisions by the chairs of those congressional committees with jurisdiction over the agency. See *Sierra Club v. Costle*, 657 F.2d 298, 408–10 (D.C. Cir. 1981) (noting, in dicta, that there are limits on permissible congressional communications with agencies); *D.C. Fed’n of Civic Ass’ns v. Volpe*, 459 F.2d 1231, 1246 (D.C. Cir. 1971) (holding that an administrative decision “would be invalid if based in whole or in part on the pressures emanating from [a member of Congress]” that were not relevant to the applicable statute).

<sup>131</sup> See Cass R. Sunstein & Adrian Vermeule, *Interpretation and Institutions*, 101 MICH. L. REV. 885 (2003).

bicameralism principles.<sup>132</sup> To the extent that random assignment reduces the likelihood of interest group capture of committees, as argued in Part III.C, this functional argument against committee-based legislative vetoes loses much of its rhetorical force. In this way, random committee assignments could buttress the constitutional case for committee-based legislative vetoes.

In addition to addressing this theoretical objection to the legislative veto, random assignment could lead to an expansion of the legislative branch's de facto ability to block some administrative action. The threat of statutory or budgetary penalties for an agency that disobeys Congress can provide an effective deterrent to some bureaucratic actions.<sup>133</sup> Essentially, these mechanisms can serve as soft law's version of the legislative veto.<sup>134</sup> Agencies may alter their behavior based on the disapproval of bicameral majorities, near-majorities in one chamber, or even a single legislator.<sup>135</sup> Under my proposal, committee disapproval of proposed agency action could have an even stronger deterrent effect. Expressions of disapproval emanating from a committee that is representative of the parent chamber's preferences—which, once again, would be the case in expectation under my proposal—could provide a strong signal to agencies of the overall legislative branch's likely preferences, thereby strengthening the informal mechanisms available to Congress to exercise de facto influence over the administrative state.

## V. COMMITTEE REFORM AND LEGISLATIVE-JUDICIAL RELATIONS

Apart from the potential effects of random assignment on Congress's internal functioning, this proposal also could alter the posture that the judiciary adopts in considering legislative outputs. For cases involving statutory interpretation, this reform could increase the value of committee documents in determining legislative intent. In the narrower set of cases involving assessments of the constitutionality of legislation, this proposal could weaken the theoretical foundations of public choice-based arguments for stringent judicial review, which are based on pessimistic assumptions regarding the legislative process. In ways both direct and subtle, this dramatic change to the committee system could alter the perspectives that judges hold regarding congressional action.

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<sup>132</sup> *Id.* at 943.

<sup>133</sup> See Feinstein, *supra* note 97, at 156–61.

<sup>134</sup> See Jacob E. Gersen & Eric A. Posner, *Soft Law: Lessons from Congressional Practice*, 61 STAN. L. REV. 573, 606 (2008).

<sup>135</sup> See *id.* at 606–07 (providing examples of concurrent resolutions that served to alter agency policy); *id.* at 606 (recounting how the FTC reversed course on proposed changes to its “Made in U.S.A.” labeling requirements following the introduction—but not passage—of a House resolution cosponsored by over two hundred legislators). See generally MORRIS P. FIORINA, CONGRESS: KEYSTONE OF THE WASHINGTON ESTABLISHMENT (2d ed. 1989) (describing legislator intervention in bureaucratic actions on behalf of constituents as a central function of legislators).

### A. *The Use of Legislative History in Statutory Interpretation*

By leading to committees that are representative of the floor in expectation, random assignment has the potential to strengthen the connection between committee-produced legislative history and Congress-level legislative intent. This change, in turn, could increase the informative value of legislative history in statutory interpretation. With legislative documents that more accurately reflect Congress's purposes in enacting a given statute, judges may be more willing to inquire into legislative purpose, thereby altering the congressional-judicial relationship in a manner that shifts the balance of power towards Congress.

As explained in Part III, *supra*, the current assignment process, in which committee members are chosen via a combination of self-initiative and party selection, leads to committee membership rosters that often are unrepresentative of the floor—or, more relevant to this part, that tend to be unrepresentative of the enacting coalition for any given bill. Given the role of committee documents in forming a bill's legislative history, the current committee selection process may lead to distorted committee documents as a supposed record of Congress's views. This distortion casts doubt on claims that legislative history accurately reflects congressional intent.<sup>136</sup>

#### 1. *Committees as a Proxy for the Enacting Coalition*

Random assignment can help assuage these concerns. For theories of statutory interpretation that involve judges estimating the views of a statute's enacting coalition, representative committees enhance the value of floor speeches and committee documents in judges' assessments of legislative history. Committee members are often highly engaged in floor discussion of their discharged bills,<sup>137</sup> and committee-produced documents may play a prominent role in convincing legislators to vote for bills.<sup>138</sup> Therefore, to the extent that these communications are representative of the views of the chamber, their value in statutory interpretation increases.

#### 2. *Committees as a Proxy for Current Enactable Preferences*

Representative committees also could provide support for theories of dynamic statutory interpretation that involve judges estimating the "enactable preferences" of the current Congress, i.e., the hypothetical statute on the subject in question that the current Congress *would* enact, were it to consider

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<sup>136</sup> See Neal Devins, *Congressional Factfinding and the Scope of Judicial Review: A Preliminary Analysis*, 50 DUKE L.J. 1169, 1183–84 (2001).

<sup>137</sup> See George Costello, *Average Voting Members and Other "Benign Fictions": The Relative Reliability of Committee Reports, Floor Debates, and Other Sources of Legislative History*, 1990 DUKE L.J. 39, 52.

<sup>138</sup> See WILLIAM N. ESKRIDGE, JR., PHILIP P. FRICKLEY & ELIZABETH GARRETT, *LEGISLATION AND STATUTORY INTERPRETATION* 72 (2000).

the topic.<sup>139</sup> Committees periodically hold hearings, some of which are mandated by law, on a variety of current government programs.<sup>140</sup> As a result, for any particular program or agency, it is far easier for a judicial observer to estimate the views of the congressional committee with jurisdiction over that program or agency than it is to estimate the views of Congress overall. With representative committees, these views are identical in expectation.

Consideration of current committee preferences in statutory interpretation is controversial.<sup>141</sup> The use of contemporary committee documents to interpret statutes passed by prior Congresses both substitutes inquiry into the motives of a past Congress for that of the current body and assumes, *pars pro toto*, that the judgment of a committee reflects that of all actors in the lawmaking process. Whether misguided or not, the practice nonetheless does exist, with the Supreme Court occasionally relying on legislative history produced by postenactment Congresses as interpretative authority in evaluating the meaning of statutes enacted by prior Congresses.<sup>142</sup> For those judges who believe that inquiry into current enactable preferences is a legitimate judicial function, a random committee assignment system could improve the quality of the signal sent by committee documents in determining enactable preferences.

### 3. Restoring Congress's "Final Say" Advantage in the Creation of Legislative History

A tighter connection between committee preferences and those of the enacting coalition could serve as a check on the White House's role in creating "legislative" history. Committees that in expectation are representative of the floor are well-positioned to respond to the increased use of presidential signing statements, which threaten to intrude on the position of Congress-generated legislative history as the primary extrastatutory means of determining the intent of the enacting coalition.<sup>143</sup> Signing statements may be used as an executive branch analogue to legislative history, creating a

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<sup>139</sup> See EINER ELHAUGE, *STATUTORY DEFAULT RULES* 9 (2008).

<sup>140</sup> See generally Jeffrey Talbert, Bryan Jones & Frank Baumgartner, *Nonlegislative Hearings and Policy Change in Congress*, 39 AM. J. POL. SCI. 383 (1995).

<sup>141</sup> See, e.g., *Sullivan v. Finkelstein*, 496 U.S. 617, 631 (1990) (Scalia, J., concurring in part) (disagreeing with a statutory interpretation that considers "what committees of the 99th and 95th Congresses thought the 76th Congress intended").

<sup>142</sup> See, e.g., *id.* at 628 n.8 (majority opinion); *Andrus v. Shell Oil Co.*, 446 U.S. 657, 666 n.8 (1980); *Seatrains Shipbuilding Corp. v. Shell Oil Co.*, 444 U.S. 572, 596 (1980); see also Nicholas Q. Rosenkranz, *Federal Rules of Statutory Interpretation*, 115 HARV. L. REV. 2085, 2135 (2002) (noting, with disapproval, "the Court's current practice of giving some interpretative authority to subsequent legislative history"); cf. *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120 (2000) (analyzing statutes enacted by subsequent Congresses to divine an earlier Congress's intended meaning of the word "drug" in the Food, Drug, and Cosmetic Act of 1938).

<sup>143</sup> While presidents vary in their issuance of signing statements, the overall trend has been an increased use of these statements to challenge particular statutory provisions. See TODD GARVEY, CONG. RESEARCH SERV., *RL 33667, PRESIDENTIAL SIGNING STATEMENTS: CONSTITUTIONAL AND INSTITUTIONAL IMPLICATIONS* 2–10 (2012).

postpassage record of presidential intent regarding the bill.<sup>144</sup> The fact that the President is typically the final actor to comment on the meaning of a statute in such a formal capacity may provide an advantage to the executive in shaping the legislative history on which future courts may rely.

The presence of randomly assigned committees, which are representative of the floor in expectation, would provide a counterweight to this presidential “final say” advantage. Since committee action involves lower resource costs than chamber or congressional action, it is generally less costly for committees, as opposed to either the parent chamber or Congress, to counter postenactment “executive history” that conflicts with congressional intent. With committees that are representative of the floor in expectation, these subunits’ postenactment statements might carry more weight with courts. While such postenactment documents cannot be said to have the approval of the parent chamber, courts could at least be secure in the knowledge that postenactment committee documents are not the product of either homogenous high-demanders or party elites’ influence.

### B. *Committee Documents as Soft Law*

Random assignment also could enhance the interpretive value that judges assign to committee documents produced after the passage of the relevant bill. Judges’ use of postenactment committee documents for guidance regarding current congressional preferences and intentions can be seen as analogous to the use of “soft law” in other fields.<sup>145</sup> In a variety of areas, documents without the formal force of law influence the behavior of political actors by establishing or strengthening norms or providing a window into the relevant bodies’ potential future litigating positions.<sup>146</sup> These documents with law-like effects include presidential signing statements, nonbinding declarations by international bodies, and agency policy manuals.

Jacob Gersen and Eric Posner believe that legislative documents, with similar attributes as the above instruments, should be treated similarly. Gersen and Posner propose that congressional resolutions be treated as a form of legislative soft law,<sup>147</sup> arguing that a resolution both “communicates congressional intentions more accurately and cheaply than does a regular statute . . . and communicates the views of a chamber or the Congress more accu-

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<sup>144</sup> On the strategic use of signing statements for a prospective judicial audience, see Memorandum from Samuel A. Alito, Jr., Deputy Assistant Attorney Gen., to the Litig. Strategy Working Grp., Office of Legal Counsel, U.S. Dep’t of Justice 1–2 (Feb. 5, 1986) (on file with the National Archives and Records Administration) (“Congress churns out great masses of legislative history bearing on its intent. . . . Presidents have traditionally created nothing comparable. . . . [T]he issuance of interpretative signing statements would have two chief advantages. First, it would increase the power of the Executive to shape the law. Second, by forcing some rethinking by courts . . . , it may help curb some of the prevalent abuses of legislative history.”).

<sup>145</sup> See Gersen & Posner, *supra* note 134, at 610–12; see also Chafetz, *supra* note 8, at 742–68 (describing other sources of congressional soft power).

<sup>146</sup> See Gersen & Posner, *supra* note 134, at 576.

<sup>147</sup> See *id.* at 577–78.

rately than do statements of individual legislators, whose views will often diverge from that of the majority.”<sup>148</sup> As such, these congressional documents can influence the policy-making processes of other institutions crafting hard law—i.e., courts and agencies—that may “take legislative views as an input.”<sup>149</sup> A recent *Harvard Law Review* student note extends this idea, proposing that courts apply *Chevron* deference to congressional resolutions “that adopt[ ] a reasonable interpretation of an ambiguous statute.”<sup>150</sup>

Despite the potentially useful soft-law function of these resolutions, the House passes only a few resolutions that deal with substantive issues per year.<sup>151</sup> Committee documents could supplement these relatively rare House resolutions as an advisory source of soft law. Of course, a document produced by a congressional subunit offers less clear guidance than a resolution adopted by the chamber. Random assignment, however, could give committee documents some soft law–like characteristics. As previously detailed, ending the dual influences of self-selection and party-selection on committee assignments will ensure that committees, in expectation, are representative of the floor. As such, courts—as well as agencies seeking to determine congressional preferences for interpretative or policy-making purposes—could assign some “soft law” weight to committee documents. Such committee instruments naturally would provide less persuasive authority than chamber or congressional resolutions. Rather, a legal positivist might place committee documents somewhere in the middle of the soft-law continuum, situated between bicameral resolutions—arguably the quintessential form of legislative soft law<sup>152</sup>—and statements by individual legislators—which rarely have law-like elements.<sup>153</sup>

### C. Judicial Deference on Constitutional Questions

Random committee assignment also could encourage more deferential judicial review. To see why, I again note the heightened probability of interest group capture under the current system.<sup>154</sup> Responding to interest group capture of the committee-based legislative process, a group of prominent scholars advocates heightened judicial scrutiny of the constitutionality of legislation, particularly for bills that may be deemed “private regarding” or otherwise benefiting discrete interests.<sup>155</sup> Legal theorist Bernard Siegan

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<sup>148</sup> *Id.* at 578.

<sup>149</sup> *Id.* at 579.

<sup>150</sup> Note, *A Chevron for the House and Senate: Deferring to Post-Enactment Congressional Resolutions That Interpret Ambiguous Statutes*, 124 HARV. L. REV. 1507, 1508–09 (2011).

<sup>151</sup> See Gersen & Posner, *supra* note 134, at 581.

<sup>152</sup> See *id.* at 580–81.

<sup>153</sup> See *id.* at 584.

<sup>154</sup> See *supra* Part III.C.

<sup>155</sup> See, e.g., Erwin Chemerinsky, *The Vanishing Constitution*, 103 HARV. L. REV. 43, 46–47, 80–81 (1989); Jerry L. Mashaw, *Constitutional Deregulation: Notes Toward a Public, Public Law*, 54 TUL. L. REV. 849, 874–75 (1980); Cass R. Sunstein, *Interest Groups in Ameri-*

would prescribe even stronger medicine: *Lochner*-style substantive due process review for economic regulatory laws as a partial corrective for a captured legislative process.<sup>156</sup>

Random committee assignments could temper these calls for heightened constitutional review. To the extent that random assignment reduces capture,<sup>157</sup> the theoretical foundation for these interventionist interpretative theories is weakened. Indeed, any movement towards more representative committee outputs—and, hence, more majoritarian legislative outcomes—buttresses the case for an alternative, restrained approach, based on a desire to respect laws that are presumed to be the product of majoritarian processes.<sup>158</sup>

## VI. FEASIBILITY

I have argued that this proposal is desirable; but is it feasible? At first glance, it may seem Pollyannaish to presume that Congress is interested in bolstering its institutional capacity. After all, it is not obvious how altering the chamber's internal rules directly furthers any of the goals that scholars believe motivate congressional action.<sup>159</sup> More broadly, one may question whether Congress has the ability to consider such a proposal, which can promise mostly abstract, later-stage potential benefits.<sup>160</sup>

There are a few potential responses to these concerns. As an initial matter, I note that past Congresses have demonstrated an interest in, and aptitude for, designing complex bureaucratic institutions and procedures to further congressional goals.<sup>161</sup> As with my proposal, the effects of these bureaucratic structures are indirect and accrue over a somewhat long-term horizon.<sup>162</sup> Given the similarities between legislative and administrative

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*can Public Law*, 38 STAN. L. REV. 29, 71–73 (1985); Cass R. Sunstein, *Naked Preferences and the Constitution*, 84 COLUM. L. REV. 1689, 1731 (1984).

<sup>156</sup> BERNARD H. SIEGAN, *ECONOMIC LIBERTIES AND THE CONSTITUTION* 265–303 (1980).

<sup>157</sup> See *supra* Part III.C.

<sup>158</sup> See generally JOHN HART ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* (1980).

<sup>159</sup> See MAYHEW, *supra* note 37 (theorizing that reelection is the most central goal); Fenno, *supra* note 1 (listing reelection, power in Washington, and public policy goals as legislators' primary objectives).

<sup>160</sup> See ARNOLD, *supra* note 38, at 27 (discussing Congress's disinclination to consider measures with complex, long-term, "collective reward" characteristics).

<sup>161</sup> See, e.g., DAVID E. LEWIS, *PRESIDENTS AND THE POLITICS OF AGENCY DESIGN* 21–38 (2003) (on Congress's role in agency design); Jacob E. Gersen & Eric A. Posner, *Timing Rules and Legal Institutions*, 121 HARV. L. REV. 543, 551–52 (2007) (on statutory-timing rules); McNollgast, *supra* note 112 (on the design of administrative procedures).

<sup>162</sup> See Murray Horn & Kenneth A. Shepsle, *Administrative Arrangements and the Political Control of Agencies*, 75 VA. L. REV. 499 (1989) (positing that legislators design administrative structures with an eye toward minimizing the effects on agency policy of "coalitional drift" in future Congresses).

institutional design,<sup>163</sup> it may not be unreasonable for legislators to balance similar considerations in overhauling their internal institutions.

Moreover, members of Congress possess an electoral incentive to alter their branch's own structures under certain circumstances.<sup>164</sup> For instance, anticorruption sentiments among voters during the mid-1970s helped elect a new crop of liberal Democrats.<sup>165</sup> These so-called "Watergate babies" allied with backbench Republicans to push for reforms—over the objections of most majority-party Democrats and the Democratic leadership.<sup>166</sup> Eventually, more senior legislators sensed the electoral value of a reform agenda and passed measures weakening the seniority system.<sup>167</sup> With anti-Congress sentiment particularly high in recent years,<sup>168</sup> legislators may be convinced of the electoral utility of institutional reform.

A stronger critique of the feasibility of this proposal highlights the costs that such a drastic reform would impose on those who benefit from the status quo. These beneficiaries could be expected to vigorously oppose any change to their privileged positions. The most obvious members of this group include legislators with seats on generally popular committees. Perhaps more importantly, the proposal arguably would make *most* legislators worse off in the short term. Assuming that many legislators have particularized committee preference orderings, the status quo regime of partial self-selection likely offers a better set of assignments for the average legislator than would a random assignment system. Given these concerns, one may question whether Congress would enact such a proposed change.

These are high hurdles, but they are not insurmountable. In a comprehensive survey of institutional changes in Congress, Eric Schickler shows that successful institutional reformers are able to tap into more than one of legislators' multiple motivations, which he labels (1) reelection for all incumbents; (2) congressional capacity, power, or prestige; (3) institutional power bases (e.g., low-ranking members versus senior legislators); (4) partisan interests; and (5) policy interests.<sup>169</sup> To succeed, "policy entrepreneurs" must devise reforms that serve as a "common carrier" for some of these interests, and overcome opposition from legislators who are motivated by those interests that will be harmed by the change.<sup>170</sup>

On the one hand, there are a few significant ways in which random assignment would benefit self-interested legislators. As detailed throughout

<sup>163</sup> Cf. Neal Kumar Katyal, *Internal Separation of Powers: Checking Today's Most Dangerous Branch From Within*, 115 *YALE L.J.* 2314 (2006) (noting the similarities between inter-branch design features and intra-executive branch features).

<sup>164</sup> See SCHICKLER, *supra* note 39, at 186.

<sup>165</sup> See NELSON POLSBY, *HOW CONGRESS EVOLVES* 65–72 (2004).

<sup>166</sup> See Eric Schickler, Eric McGhee & John Sides, *Remaking the House and Senate: Personal Power, Ideology, and the 1970s Reforms*, 28 *LEGIS. STUD. Q.* 297, 311–12 (2003).

<sup>167</sup> See SCHICKLER, *supra* note 39, at 190.

<sup>168</sup> See *supra* Part I.B.

<sup>169</sup> See SCHICKLER, *supra* note 39, at 11.

<sup>170</sup> *Id.* at 250.



this article, this proposal is squarely aimed at increasing Congress's lawmaking capacity, its position vis-à-vis the executive branch, and, relatedly, its institutional prestige.<sup>171</sup> It also arguably serves institutional power-base interests if more junior members can be convinced that a pay-for-play system for desirable committee seats and leadership positions disadvantages greener legislators, who typically have fewer connections to—and less to offer—potential donors. On the other hand, by weakening parties, the proposal clearly is at odds with partisan interests. Moreover, the proposal also runs contrary to legislators' reelection interests, as it prevents legislators from self-selecting onto those committees that are most closely tied to their constituents' interests.

There are good reasons to believe that this former set of interests may overcome the forces favoring the status quo. It does not seem to be much of a stretch, for instance, to assume that legislators desire membership in a functioning and respected institution. This desire is arguably the foundational motive of many politicians—even more fundamental than reelection, since, aside from the salary, membership in an institution with *no* lawmaking capacity or popular prestige serves little purpose. In addition, some legislators surely could be convinced that a diminished Congress hinders their ability to achieve goals beyond simply being reelected, for example, public-policy or personal-status objectives. Such arguments likely would have particular resonance with those at the bottom of the congressional hierarchy, chafing under a system that may be stacked against them. If framed properly, therefore, I believe that these interests could compel a critical mass of legislators to support this proposal.

Although overcoming these electoral and partisan interests with appeals to institutional capacity may be challenging, doing so is conceivable. Historically, reforms aimed at increasing congressional power tend to be most effective when they follow periods of presidential aggrandizement.<sup>172</sup> Given recent shifts in the balance of power between Congress and the White House, particularly during the post-9/11 wars, such appeals may be particularly salient now.<sup>173</sup> Indeed, the Legislative Reorganization Act of 1946—arguably the most comprehensive, disruptive structural reform since the establishment of committees in the First Congress—passed under similar circumstances; institutional capacity arguments, coming on the heels of President Franklin Roosevelt's dominance of policy making during World War II, helped drive its enactment.<sup>174</sup>

Under the right circumstances, these institutional-capacity and power-base concerns could become so acute that they overwhelm resistance based on the belief that the new regime would be welfare-reducing for many legis-

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<sup>171</sup> See *supra* Part II.

<sup>172</sup> See SCHICKLER, *supra* note 39, at 263.

<sup>173</sup> See *supra* Part I.C.

<sup>174</sup> See SCHICKLER, *supra* note 39, at 24.

lators in the short term. In this way, my proposal bears a resemblance to framework legislation that provides long-term solutions to legislators' collective action problems, at the expense of their more immediate, individualized interests in exerting influence over district-specific concerns.<sup>175</sup> The passage of such framework legislation demonstrates Congress's willingness to tie its own hands, achieving outcomes that maximize collective welfare while foregoing particularized benefits, for example, tariff protections for a district-specific industry or preservation of a military base within the district—or, in this case, maintenance of a seat on a committee that serves district interests.<sup>176</sup>

## CONCLUSION

This article offers a novel change to a bedrock congressional institution. Although this proposal does not require much more than one sentence to describe, its descriptive simplicity is deceiving. The article outlines the many changes to Congress's internal capacity and its relations with the other branches that would stem from this reform. These changes, in the aggregate, would be overwhelmingly positive. Prospective intrabranched benefits include fostering a more democratically responsive and less polarized Congress; enhancing the institution's ability to develop credible, diverse sources of expertise in its own members; discouraging interest group capture; and facilitating deliberation and the consideration of minority views. This reform also would enhance Congress's position vis-à-vis the other branches: facilitating congressional monitoring of the administrative state; strengthening the theoretical foundations for the legislative veto and other unilateral committee actions with soft-law effects; encouraging judges to place greater weight on legislative history in statutory interpretation; and offering a response to arguments in favor of strict judicial review of legislative enactments based on interest group capture of the lawmaking process.

There is no shortage of reform proposals aimed, at least in part, at impacting Congress. From the left, a nascent movement to amend the Constitution to overturn *Citizens United* appears to be gathering support;<sup>177</sup> from the right, a loose affiliation of Tea Party groups has set its sights on repealing the 17th Amendment;<sup>178</sup> and an ideologically diverse coalition of groups ad-

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<sup>175</sup> Cf. Elizabeth Garrett, *Conditions for Framework Legislation* 3 (USC Law & Econ., Research Paper No. 04-23; USC CLEO, Research Paper No. C04-20, 2004), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=588901](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=588901) (noting that "solving collective action problems" is one purpose of framework laws).

<sup>176</sup> See Defense Base Closure and Realignment Act of 1990, Pub. L. No. 100-526, (codified as amended at 10 U.S.C. § 2687 (1990)); Omnibus Trade and Competitiveness Act of 1988, Pub. L. No. 100-418 (codified as amended at 19 U.S.C. §§ 2411–20 (1988)).

<sup>177</sup> See Sam Favate, *Obama Supports Constitutional Amendment on Campaign Finance "If Necessary,"* WALL ST. J. (Feb. 7, 2012, 12:09 PM), <http://blogs.wsj.com/law/2012/02/07/obama-supports-constitutional-amendment-on-campaign-finance-if-necessary/>.

<sup>178</sup> See Editorial, *Original Deconstruction*, L.A. TIMES (Oct. 21, 2010), <http://articles.latimes.com/2010/oct/21/opinion/la-ed-amendment-20101021>.

vocates a constitutional convention, in substantial part to “fix Congress first.”<sup>179</sup> In contrast to these constitutional or extraconstitutional proposals, implementing random committee assignments would require merely a simple, one-chamber resolution. Given the magnitude of the problems facing Congress, the actual and potential spillover effects of these problems, the prospective benefits of this proposal, and the relatively low costs associated with it, institutional designers would be well-served by turning their attention to congressional committees.

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<sup>179</sup> See CONFERENCE ON THE CONSTITUTIONAL CONVENTION, <http://conconcon.org> (last visited Dec. 26, 2012); see also Lawrence Lessig & Mark McKinnon, *How to Sober up Washington*, DAILY BEAST (Apr. 6, 2010), <http://www.thedailybeast.com/articles/2010/04/06/how-to-tell-dc-politicians-to-go-to-hell.html>.