Conditions for Framework Legislation

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Congress structures some of its deliberation and decision making through framework legislation. Framework laws establish internal procedures and rules that will shape legislative deliberation and voting with respect to a specific subset of laws or decisions in the future. They are laws about lawmaking in a particular arena.[1] They are related to the standing rules of the House or Senate, but unlike most of these rules, they are passed in statutes rather than through concurrent or simple resolutions. Some parts of the standing rules have also been passed initially as statutes, most notably, in the Legislative Reorganization Acts of 1946 and 1970. These legislative reorganization laws are similar to framework laws in that they were first enacted in statutory form, but, unlike framework laws, their provisions changed congressional procedures and structures generally, not only for a subset of decisions.[2] Framework laws, by contrast, supplement, and sometimes supplant, ordinary rules of procedure only for a defined set of future decisions. Although framework laws are passed in statutory form, requiring concurrence of both houses and presentment to the President, the portions of the laws that set out internal frameworks are usually identified as exercises of the two houses' constitutional rulemaking powers, and the right of either house to change the framework unilaterally is, in most cases, explicitly reserved.[3]

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[1] They are thus a paradigmatic example of secondary rules as defined by Hart. See H.L.A. Hart, The Concept of Law Chapter 5 (1961).

[2] Bruhl calls the larger group of rules, including the Legislative Reorganization Acts, "statutized rules." See Aaron-Andrew P. Bruhl, *Using Statutes to Set Legislative Rules: Entrenchment, Separation of Powers, and the Rules of Proceedings Clause*, 19 J.L. & Pol. 345, 346 (2003).). Some congressional analyses identify framework laws as "rulemaking statutes." See, e.g., Memorandum from Richard S. Beth, Congressional Research Service Specialist in the Legislative Process, *Statutory Procedures Limiting Debate*, June 3, 2003.

[3] See, e.g., Budget Enforcement Act of 1990, 101 H.R. 5835, § 13305; Omnibus Trade and Competitiveness Act of 1988, P.L. 100-418, § 1103(d). Congress has taken the position that reserve clauses are unnecessary because they "simply confirm what is the case" under the Constitution's rules of

Framework laws are familiar, although little scholarly attention has been paid to them as a related legislative phenomenon in the United States. The congressional budget process is the most influential framework, and it has been amended with additional framework laws such as the Unfunded Mandates Reform Act. Some trade implementing agreements are considered under a framework process called fast track, and this expedited process was based on an earlier framework tied to delegation of executive branch reorganization authority to the President. Congress uses a slightly different framework law to consider proposals to close or realign military bases sent to it by the President after he approves a package of recommendations from an independent base closure commission. Some foreign policy decisions are tied to framework laws; perhaps the most well-known of these is set up in the War Powers Resolution, but other arms sales laws and emergency legislation are also accompanied by internal congressional frameworks.[4]

In other work on framework laws,[5] I identified and described five purposes that framework legislation could serve. Framework laws serve five purposes that could not be achieved as easily or in the same way without special rules: enacting a symbolic response to a problem salient with voters; providing neutral rules for future decision making; solving collective action problems in areas where they are particularly acute; entrenching certain macro-objectives so that future decisions are more likely to align with them; and changing the internal balance of power in Congress. A particular framework is likely to serve more than one of these purposes. Although the purposes may not be unique to framework laws, these rulemaking statutes address the objectives in different ways than substantive laws can. For example, a procedural framework can symbolize that Congress is changing the way it does business in a certain area or can serve to link decisions made over time to one over-riding objective. In some cases, only a framework can solve a particular problem, such as, for example, collective action challenges.

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proceedings clause. See, e.g., S. Rept. No. 107-139, at 54 (2002) (in context of trade fast track bill); S. Rept. No. 104-2, at 15 (1995) (in context of Unfunded Mandates Reform Act).

[4] For a relatively comprehensive listing of framework laws, see Constitution, Jefferson's Manual, and Rules of the House of Representatives, 107th Cong., 2d Sess., H. Doc. No. 107-284, at 1045-1200 (providing list and text of "Congressional Disapproval" provisions enacted by statute and provisions that apply in the House). For a list of some familiar and important framework laws, see, infra, at Table 1.

[5] Elizabeth Garrett, *The Purposes of Framework Legislation*, 14 J. Contemp. Legal Issues __ (forthcoming 2005).

Because a framework law is not a necessary response to a certain kind of problem, the question arises: Why does Congress choose the tool of a framework rather than adopt a law that more directly pursues the desired objective? Or to use Hart's formulation, why use secondary rules rather than primary rules in a particular instance? For example, if lawmakers wish to reduce federal spending, they can change the content of appropriations bills using the regular congressional rules. So why the use of budgetary framework laws? Even when a problem demands a framework solution – such as reducing collective action problems and facilitating the passage of certain legislation – why does Congress adopt special rules in some areas and rely on the ordinary rules of procedure in others? In short, under what conditions will Congress choose to use framework laws?

In this essay, I begin to answer these questions by undertaking to specify some of the conditions that are necessary for the adoption of framework laws.[6] It is a preliminary analysis which will require further empirical research to test some of the hypotheses. Furthermore, it is a partial analysis because the conditions discussed here are those that are required before it is possible for Congress to consider enacting framework laws as a response to a problem. There will be different and additional conditions that lead Congress to prefer secondary to primary rules in particular instances, and those conditions are likely to differ according to the kind of framework under consideration. Because frameworks serve different purposes – for example, some facilitate enactment of certain laws, some entrench particular objectives, and some set out relatively neutral rules for decision making[7] – the conditions under which they are enacted are likely to be different as well. Isolating the larger context in which frameworks are an option for Congress will lay the groundwork for further analysis of additional conditions specific to the different types of frameworks.

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[6] This article does not identify and analyze the reasons that particular members of Congress might vote for statutory frameworks or support retaining them once enacted. Such an inquiry requires a separate analysis of the varied and overlapping motivations of lawmakers in a system aptly described by Schickler as characterized by "disjointed pluralism." Eric Schickler, Disjointed Pluralism: Institutional Innovation and the Development of the U.S. Congress (2001).

[7] In earlier work, I discussed conditions for the latter type of framework that establishes relatively neutral rules of decision. Elizabeth Garrett, *The Impact of Bush v. Gore on Future Democratic Politics*, *in* The Future of American Democratic Politics: Principles and Practices 141 (G. M. Pomper & M. D. Weiner eds., 2003) (outlining conditions in the context of the Electoral Count Act).

Accordingly, in Part I, I present two necessary conditions that make it possible for Congress to use a framework law to deal with a set of particular decisions defined in the framework. Even when these conditions are present Congress may decline to use the option of a framework, but without the two conditions, a framework is not an option for lawmakers. First, Congress must be able to identify a concrete problem and describe it with specificity so that the framework can be triggered in appropriate circumstances. Second, the partisan configuration of Congress is significant in several ways to the adoption of framework laws, although further empirical work focused on each of the two houses is required to specify this condition more fully. Party cohesion plays a role in the decision to use this device, and the relative power of the majority and minority parties makes a difference in Congress' ability to enact frameworks that limit minority rights. I provide some hypotheses here with respect to the role of partisan configuration in enactment of frameworks and link it to related literature studying parties and congressional procedures. More work is required to test these hypotheses.

A second set of conditions relates to Congress's decision to enact frameworks as statutes, rather than as concurrent or simple resolutions, which do not require concurrence of the President. There is no discussion in the political science and legal literature of reasons that impel Congress to use a statute to enact internal legislative rule changes. This silence in the literature is mystifying because two of the most important sweeping procedural changes in the modern Congress were adopted as statutes – the Legislative Reorganization Acts of 1946 and 1970.[8] Yet, none of the discussions of these rule changes includes analysis of the congressional decision to use a statute to effect internal procedural reform.[9] The puzzle of the choice of form used to enact new procedures is posed clearly by the study of framework laws because all these special procedures are

[8] Although the Legislative Reorganization Acts are the most sweeping statutized rules, Bruhl writes that the first rulemaking statute was passed in 1789 when the first Congress enacted a statute regulating the order of business at the start of a new session. See Aaron-Andrew P. Bruhl, supra note 2, at 346.

[9] See, e.g., David C. King, Turf Wars: How Congressional Committees Claim Jurisdiction 35 (1997) (noting that detailed committee jurisdictions first appeared in a statute, the 1946 Legislation Reorganization Act, and then "statutory jurisdictions" were changed through resolutions, but not commenting on the significance, if any, of the form of the original enactment and of subsequent changes). Of course, scholars are aware that statutes are the source of some congressional rules, see, e.g., Walter J. Oleszek, Congressional Procedures and the Policy Process 6-7 (6th ed. 2004), but there is no discussion that I have found about why Congress may choose the statutory route rather than the more typical – and superficially more appropriate – routes of concurrent or simple resolutions, caucus rules, or committee rules and norms.

enacted as part of statutes rather than through purely internal processes. The conclusions drawn with respect to framework laws will shed light on the broader phenomenon of statutized legislative rules.

In Part II, I assess three conditions that could explain why Congress has chosen the statutory path with respect to framework laws. First, Congress may use a statute to signal that it is making a significant change in the way it does business and that it perceives the change as more durable than other rule changes. Second, and most importantly, Congress will use a statute when the internal procedural change is an integral part of a larger package that must be adopted simultaneously and contains some parts that must be enacted with legal effect. In many cases, the framework is part of a larger "inter-branch treaty" that affects both houses of Congress and the executive branch, often with provisions delegating authority to the President. Because some of the package must be enacted as a statute, all parts are enacted in the same statutory vehicle. Finally, path dependency and institutional learning play a role, so that when an area like budgeting or trade begins to be characterized by rulemaking statutes, then future changes also tend to be adopted by statute.

Although they are developed and examined in the context of framework laws, these conditions, particularly the second one, have broader significance, explaining why Congress would adopt any kind of internal rules and procedures in statutes. My hypothesis is that the second condition – the need to enact an interbranch treaty or other integrated proposal with some legislative parts – is necessary for Congress to enact a framework law. The third factor of path dependency is a plausibility condition, not a necessary one, in that it only makes it more likely that Congress will choose the framework response. Finally, the signaling story has little explanatory power, although further testing is required to discard it entirely. None of these is a sufficient condition, however, because we observe arenas of congressional action which fit one or the other of these conditions, as well as both the conditions specified in Part I, and yet there is no framework to structure deliberation.

Put together with a better understanding of the purposes of framework laws and enhanced by further work on specific conditions that give rise to particular kinds of frameworks, this analysis can suggest when Congress is likely to consider adopting a

framework. It provides a better sense of what is special about this "unorthodox" feature of the United States legislative landscape.[10] Furthermore, it draws attention to a largely overlooked aspect of legislative rulemaking: that the form in which rules are adopted – whether by statute, simple or concurrent resolution, or other internal vehicle – is not a matter of chance but a product of a deliberate choice by political actors.

I. Necessary Conditions for Congress to Have the Option of a Framework Law

Although frameworks serve different purposes and thus the different types may be used under different conditions, the similarities among frameworks are sufficient to allow for the identification of some common conditions. First, Congress must be able to describe a problem with relative specificity so that the framework can be triggered in appropriate circumstances. That requires a relatively concrete problem. Second, certain partisan configurations may be necessary for lawmakers to adopt frameworks. Relatively strong party cohesion is likely a condition for enactment of many frameworks that transfer power to centralizing entities like party leaders and organizations. Also, to the extent that a framework affects minority rights (by, for example, eliminating the filibuster), then the relative strength of the minority and majority parties is relevant.

A. A Concrete, Well-Defined Problem

The concreteness of a problem is always relevant in lawmaking because it shapes the issue environment and the willingness of lawmakers to spend time addressing a problem. In discussing factors that affect issue definition, Cobb and Elder identify the dimension of "specificity" as relevant to the ability of policymakers to define an issue and shape the arena of conflict. By that term they focus on how concrete or abstract a problem is.[11] Concreteness is especially important in the framework context: framework laws must

[10] Barbara Sinclair, Unorthodox Lawmaking: New Legislative Processes in the U.S. Congress (2d ed. 2000) (considering framework laws as part of unorthodox lawmaking).
[11] Roger W. Cobb & Charles D. Elder, Participation in American Politics: The Dynamics of Agenda-Building 96 (1983).

include as part of their design a definition of the subset of decisions to which they will apply, and this specification is driven by the problems that the framework laws are intended to resolve. In order to specify the proposals that will trigger application of a framework law and limit the law's scope appropriately, the drafters must have a relatively clear idea of the problem they are addressing.

In some cases, a framework law's scope is primarily limited by its duration. The 1988 Omnibus Trade and Competitiveness Act allowed the application of fast track procedures to implementing legislation for multilateral and bilateral trade agreements reducing tariff and nontariff barriers entered into before a certain date. The President had to consult with Congress during negotiations and notify lawmakers of his desire to use the fast track procedures for particular legislation; but the set of bills eligible for the trade promotion fast track was defined primarily by a general subject matter and a time period.[12] Thus, the concrete problem was the need to empower the President to negotiate trade deals that all policymakers knew were likely in the near term and that addressed both tariff and nontariff barriers. The set of laws that would be eligible for fast track became better defined as the process went forward and the President gave Congress notice of his intent to use fast track. Congress then had another chance to consider whether to allow the use of the expedited procedures.

Many budget rules are triggered by the effect of provisions. For example, proposals that have certain effects on spending or revenues are subject to budget points of order. The scope of the budget process has been driven by the problem Congress sought to address after the mid-1980s: the worsening deficit and seemingly uncontrollable federal spending. The budget process also defines its scope by the type of bill considered by Congress, focusing on bills that affect spending and revenues. Therefore, appropriations bills are within the universe of proposals shaped by spending targets, and budget reconciliation bills, which typically deal with entitlement and tax changes, receive special treatment. Reconciliation vehicles are allowed expedited treatment in both Houses, particularly the Senate, because they are the legislative vehicles that can most forcefully and comprehensively redefine spending and tax laws. The budget rules also limit what kinds of provisions can appear on a reconciliation bill so that they remain targeted to the

[12] See, e.g., Omnibus Trade and Competitiveness Act of 1988, P.L. 100-418, § 1103(b).

concrete problem of deficits and federal spending. For example, an "extraneous" amendment that is not allowed on a reconciliation bill is one that does not change revenues or outlays nor affect current or future deficits[13]; again, the scope of the budget rules are defined in terms of their effect on the concrete problem.

The more abstract the problem attacked by the framework law, the more difficult the job of defining its scope. This can result in narrowing the law's objective to a more easily defined subset of the larger problem. Take the Unfunded Mandates Reform Act (UMRA). UMRA purports to protect values of federalism, which are contested, poorly specified, and relatively abstract.[14] Accordingly, Congress decided to focus on one particular area of federal-state-local interaction: unfunded federal mandates that impose obligations on states or localities without providing federal resources to defray associated costs. Arguably, such mandates endanger federalism more than other laws because they may occur more frequently. Unfunded mandates are particularly tempting to federal legislators who can take the credit for popular programs but who can avoid the blame for the tax increases or service reductions required to pay for the programs.[15] So the limited focus of UMRA on a relatively concrete problem allowed for more precise specification – the problem of unfunded mandates is a more concrete one than the general problem of federal interventions that implicate the values of federalism.

One option for drafters struggling with definitions and coverage is to allow future Congresses to choose whether to use the framework law once a particular proposal is actually before a committee or a full house. The Line Item Veto Act (LIVA) used this technique with regard to targeted tax provisions, which were those that benefited 100 or fewer taxpayers. The definition of targeted tax provisions reflected lawmakers' belief that giveaways to small special interest groups were more likely to be undesirable "pork." But because that concept is not particularly concrete (one person's pork is another's

[13] For a fuller specification of this rule, often called the Byrd Rule after its author, see Allen Schick, The Federal Budget: Politics, Policy, Process 128 (rev. ed. 2000).

[14] See Elizabeth Garrett, *Enhancing the Political Safeguards of Federalism? The Unfunded Mandates Reform Act of 1995*, 45 U. Kan. L. Rev. 1113, 1128-31 (1997) (discussing various ways values of federalism could be understood).

[15] See Evan H. Caminker, *State Sovereignty and Subordinacy: May Congress Commandeer State Officers to Implement Federal Law?*, 95 Colum. L. Rev. 1001, 1065 (1995) (calling this "liability shifting); see also Edward A. Zelinsky, *The Unsolved Problem of the Unfunded Mandate*, 23 Ohio N.U. L. Rev. 741 (1997) (also discussing this problem of accountability). But see David A. Dana, *The Case for Unfunded Environmental Mandates*, 69 S. Cal. L. Rev. 1, 18-21 (1995) (disputing the intractability of the problem).

worthwhile project), the definition was both under- and over-inclusive. To further refine the Act's scope and also to limit the power delegated to the President, LIVA empowered the Joint Tax Committee to list all such targeted tax provisions subject to presidential cancellation contemporaneously with consideration of a revenue bill. The Joint Tax Committee limited its own discretion by promulgating guidance about how it would classify tax provisions as targeted and therefore susceptible to inclusion on the list subject to cancellation.[16]

Similarly, framework laws of short duration, such as some trade fast track laws or the base closure commission procedures, have a more definite scope because all participants are fairly sure about the precise laws that will be affected. Because such frameworks are drafted and adopted with nearly complete information about which bills will fall within their scope, these bills operate much like those which allow Congress or other political actors to trigger coverage, as in LIVA's tax provisions. Moreover, in frameworks like trade fast track, further actions by the President or Congress can deny specific bills the advantage of the process. It is problematic to leave specification to the future when the problem may be more concrete or when Congress will have a better idea of the content of specific proposals and can better link them to abstract problems. The greater the knowledge of the proposals that will be considered under special procedures, the greater the chance for self-interested parties to use frameworks strategically, a prospect that many framework laws seek to minimize. At the least, there is often a tension between developing sufficient information to allow precise definition of the framework law's scope, and leaving enough uncertainty about the framework's future application to minimize that ability of strategic political actors to undermine the framework's objectives and to pursue their narrow self-interest.[17]

B. Congressional Parties and Framework Laws

[16] See Elizabeth Garrett, *Accountability and Restraint: The Federal Budget Process and the Line Item Veto Act*, 20 Cardozo L. Rev. 871, 906 (1998) (discussing this process).

[17] This implicated the information-neutrality tradeoff most relevant to the formulation of neutral frameworks. See Elizabeth Garrett, supra note 5, at __ (discussing issue in context of framework laws); Adrian Vermeule, *Veil of Ignorance Rules in Constitutional Law*, 111 Yale L.J. 399, 428-29 (2001) (discussing in context of constitutional frameworks).

The partisan configuration in Congress is relevant to framework laws in at least two ways. First, many aspects of frameworks tend to transfer power to party leaders and organizations, so members are likely to support such laws when they think their interests will be aligned with the congressional parties. In other words, the level of party cohesion is important. This analysis relates to literature in political science, most notably recent scholarship of Cox and McCubbins, that identifies agenda control as the most important power wielded by the majority party in Congress and that assesses the circumstances under which the agenda power will be largely negative, blocking disliked proposals, or largely positive, enabling passage of favored proposals.[18] Framework laws are mainly concerned with shaping the legislative agenda and changing the transaction costs of legislating, both of which are crucial aspects of the main tools that party leaders wield to influence policy.

Second, frameworks often affect the balance of power between majority and minority parties in Congress. Thus, one would expect that frameworks are more likely under some distributions of power between the parties than others. Scholars have discussed related issues in the context of rule changes affecting the power wielded by the minority party, and those conclusions may apply here, although framework laws present twists on the more general question of rules changing the balance of power between parties. The hypotheses I advance here are suggestive and draw on this literature dealing with different sorts of rule changes. Moreover, relating this study of framework laws to the larger study of congressional procedures indicates that further study of the partisan configuration in both houses at the time framework laws are passed or strengthened may shed light on the larger phenomenon of rule changes that affect the relative power of congressional parties, as well as answering questions about the adoption of frameworks.

1. Party Cohesion

Framework laws generally are tools to centralize and organize congressional decision making. They frequently transfer power away from committees and toward entities that

[18] Gary W. Cox & Mathew D. McCubbins, Setting the Agenda: Responsible Party Government in the US House of Representatives (2005 forthcoming).

can take advantage of centralizing forces – party leaders and party organizations. To the extent that some committees are advantaged by frameworks, they are often committees that are closely associated with party leaders, such as the Budget Committees or the House Rules Committee.[19] Frameworks also tend to favor committees that are representative of Congress as a whole and thus more likely to report out bills that satisfy the party than are committees with outlying preferences. For example, frameworks often empower the tax-writing committees, with memberships that are microcosms of the floor, and one framework, the base closure process, transferred power away from the Armed Services Committees, comprised of members with atypical preferences, and to the floor and party leaders.[20] Although these observations are generally true of current framework laws, some older frameworks empowered particular committees, some of which were not representative of the body, because they included legislative vetoes that could be exercised by one or more committees.[21] Even with these frameworks, however, Congress had a choice in determining which entities would be given power to exercise legislative vetoes and could transfer power away from a committee to the full house or to both houses.[22]

In their forthcoming book on the influence of parties in Congress, Cox and McCubbins argue that the main power of the majority party in Congress lies in its control of the agenda, and they identify two types of agenda power. Positive agenda power allows party leaders to push their proposals through to enactment; negative agenda power allows party leaders to block bills they do not like from reaching final passage.[23] Frameworks can enhance both types of power, and they are fundamentally part of the majority party's tools of agenda control. Among other things, frameworks can allow

[19] See Roger H. Davidson, *The Emergence of the Postreform Congress*, in The Postreform Congress 21 (R.H. Davidson ed. 1992). For a discussion of the role of the budget process in empowering congressional parties, see Elizabeth Garrett, *The Congressional Budget Process: Strengthening the Party-in-Government*, 100 Colum. L. Rev. 702 (2000).
[20] See Elizabeth Garrett, supra note 5, at ___.
[21] See Louis Fisher, Constitutional Conflicts Between Congress and the President 140-42 (1991) (describing committee vetoes). Legislative vetoes were also constructed that could be exercised by both houses or sometimes by one house acting alone; indeed, these are often referred to as "legislative vetoes" while the vetoes exercised by one or more committees are called "committee vetoes." The defining characteristic of all such vetoes is that they allowed some part of Congress or both houses to act with legal effect without meeting the presentment clause of the Constitution.
[22] See Elizabeth Garrett, supra note 5, at __ (discussing base closure framework and Congress' decision to transfer power away from committees with outlying preferences to the party organization and the floor).
[23] See Gary W. Cox & Mathew D. McCubbins, supra note 18, at 375.

party leaders to bypass committees; they empower committees that are closely aligned with the congressional parties; they enhance the importance of parliamentary tactics on the floor where party leaders excel; they put in place supermajority voting requirements in the Senate or protective rules for omnibus packages to reduce the ability of members to change the terms of negotiated agreements; they lead to deal making in summits controlled by party leaders in the legislative and executive branches; they package provisions and put them to legislators for one vote to make the deal more palatable to rank-and-file members.

Why would many lawmakers agree to frameworks that strengthen party leaders or support retaining frameworks that increase the power of congressional parties? Certainly, members serving in party leadership positions, or hoping to use those offices as a route to power and influence, would support centralizing reforms. But they will be a small minority of members in the final vote. Under some conditions, more powerful congressional parties also serve the interest of rank-and-file members, whose votes are necessary to enact frameworks. Virtually all politicians affiliate with parties because the party cue is one of the strongest, if not the strongest, voting cues.[24] Recent evidence suggests that voters increasingly perceive the two parties as different with respect to their positions on important social and economic policy issues, making the party cue more meaningful.[25] In order to continue to provide candidates with an established brand name, parties need to demonstrate to voters that they pursue and can implement certain policies. Stronger parties-in-government enable members to overcome collective action problems, arguably made worse by the decentralizing reforms of the 1970s, in order to pass legislation advancing the parties' policy agendas.

Just how strong the individual members are willing to allow parties and their leaders to become depends on the amount of party cohesion. Recent Congresses have consisted of partisans with more homogenous ideological preferences, so giving up some individual

[24] See John H. Aldrich, Why Parties? The Origin and Transformation of Political Parties in America 205 (1995); Gary W. Cox & Mathew D. McCubbins, Legislative Leviathan: Party Government in the House 120-22 (1993); Gary W. Cox & Mathew D. McCubbins, supra note 18, at 37-40, 56-59.

[25] See, e.g., Margaret Weir, *Political Parties and Social Policymaking*, in Social Divide: Political Parties and the Future of Activist Government 1, 8, 10-11 (M. Weir ed., 1998); Michael J. Malbin, *Political Parties Under the Post*-McConnell *Bipartisan Campaign Reform Act*, 3 Election L.J. 177, 179 (2004). See also Keith Krehbiel, Pivotal Politics: A Theory of U.S. Lawmaking 200 (1998) (noting that budget issues, now structured by frameworks, are salient issues used by parties "to build and maintain their brand name").

autonomy has been relatively less costly for members than it was for members of previous congresses.[26] Nonetheless, members' willingness to adopt procedural frameworks to strengthen parties that at the same time reduce the overall influence of Congress will be tempered. Individual members value their autonomy to pursue constituent interests without the confines of party discipline.[27] Members will want to balance their interest in crisp political brand names provided by parties with clear-cut agendas on which action has been taken with their interest in sending particular benefits to constituents. These interests are not wholly unrelated, however. The ability to enact the laws that send benefits to those constituents depend on the ability to compromise and logroll – activities that parties facilitate.[28]

Inter-institutional dynamics also play a role in the willingness of rank-and-file members to empower congressional parties. Political parties can allow members of Congress to act together as a more potent force against a strong unitary presidency. Such coordination is desirable, even at the cost of individual autonomy, because members of a legislature dominated by the President, particularly one of a different party, share the same bleak fate in terms of their ability to shape and initiate policy. Not surprisingly, perhaps, the period of the most frequent use of framework laws is also an era identified by many congressional scholars as a time Congress was working to "institutionalize its capacity to challenge the President" because the executive branch was particularly aggressive.[29] It is also a time of frequently divided government,[30] a fact of political life

[26] See John H. Aldrich, Mark M. Berger & David W. Rohde, *The Historical Variability in Conditional Party Government, 1877-1994*, in Party, Process, and Political Change in Congress 17, 33-34 (D.W. Brady & M.D. McCubbins eds., 2002) (describing resurgence of conditional party government).
[27] See Lawrence C. Dodd, *Congress and the Quest for Power*, in Congress Reconsidered 269, 272, 281-82 (L.C. Dodd & B.I. Oppenheimer eds., 1st ed. 1977) (discussing this tension).
[28] Barbara Sinclair, The Transformation of the U.S. Senate 210 (1989).
[29] See Sarah A. Binder, Stalemate: Causes and Consequences of Legislative Gridlock 51 (2003) (referring to characterizations by Sundquist and others).
[30] The effect of divided government on the quantity and substance of legislation is the subject of much debate. Compare James L. Sundquist, *Needed: A Political Theory for the New Era of Coalition Government in the United States*, 103 Pol. Sci. Q. 613 (1988) (arguing that divided government is inefficient and unaccountable) with Morris Fiorina, Divided Government (1996) (arguing that coalition governments, the situation with divided government, do not necessarily lead to negative consequences) and David R. Mayhew, Divided We Govern: Party Control, Lawmaking, and Investigations, 1946-1990 (1991) (finding no significant difference in legislative activity between areas of divided and unified government). That divided government would affect the use of framework laws and Congress' interest in establishing more effective ways to articulate distinct policies for electoral gain seems likely. Cf., Morris Fiorina, supra, at 104 (noting that divided government may well produce "second-order" effects related to the ease of governing).

which increases congressional concern that a strong executive branch will usurp its prerogatives. In addition, during periods of divided government, the party in control of Congress wants to enhance its ability to formulate clear policy that contrasts with the President's agenda so that it has the chance of unified government after the next election.

Not surprisingly, frameworks do not favor party organizations without exception; they are often blends of provisions, many of which centralize, but some of which continue to place power with committees, individual members or floor majorities.[31] Framework laws can be complex; although many of their provisions favor parties, some do not, for example, by guaranteeing certain bills privileged access to the floor regardless of the views of party leaders. This complexity is a result of the balance that members seek to reach vis-à-vis congressional parties, as they weigh their desire for autonomy against their interest in stronger party organizations. For example, in his study of the budget reconciliation process, Gilmour describes the shift in power as favoring congressional majorities, rather than congressional parties.[32]

Gilmour's conclusion slights the power shift to political parties in the budget framework, particularly through the reconciliation process. Certainly, it is the case that the majority parties in the House and Senate do not absolutely control budget outcomes, but they are stronger in this arena than they were before the adoption and evolution of the federal budget process. One would not expect that lawmakers, whose interest in stronger political parties competes with their interest in the unfettered ability to send particularized programs back to their districts, would accede to a procedural framework that would allow parties to dominate budgeting completely. Nevertheless, the majority party and the President, another party leader, exert greater control over the shape of the budget resolution and the fiscal policy agenda than any other entities. The most recent budget resolutions have been drafted almost entirely by party leaders, in consultation with the

[31] See Christopher M. Davis, CRS Report to Congress, "Fast-Track" or Expedited Procedures: Their Purposes, Elements, and Implications (July 21, 2003) (describing how many frameworks change the power of committees and party leaders). Although frameworks may take some flexibility away from party leaders because they provide certain laws privileged treatment on the floor or limit the possible amendments or time for debate, some of these provisions may actually enhance the power of the majority party by protecting legislative vehicles from interference by either committees or members during floor deliberation. As long as party leaders have substantial influence over the details of the legislation considered under framework laws, such limitations do not reduce their power but may enhance it.

[32] John B. Gilmour, Reconcilable Differences? Congress, the Budget Process, and the Deficit 134-37 (1990).

budget committees, and cannot be changed substantially on the floor because of restrictive rules. Other budget proposals emerge from summits that are orchestrated primarily by party leaders and frequently bypass committees entirely.[33] Nonetheless, Gilmour's emphasis on the shift of power to floor majorities, rather than solely to party leaders and organizations, underscores that the internal dynamics resulting from framework laws will often not entirely favor any one institution but may balance power among several competing players.

Members of Congress will vote for frameworks that transfer power, in varying amounts, to congressional parties if copartisans have relatively homogenous preferences that tend to parallel the party's positions on issues. Higher party cohesion favors enactment of frameworks. Moreover, transferring power to party organizations will be particularly attractive during times that coordinated congressional action is desirable to react to an aggressive President. As Congress has grown both more polarized[34] and more cohesive within parties, members are more willing to accept framework laws as solutions to collective action and other problems.

Cox and McCubbins argue that the mix of negative and positive agenda powers will change over time as the majority party becomes more or less homogenous. Framework laws will provide an arena to test these conclusions because they can exhibit both negative and positive characteristics. The empirical work necessary to assess the importance of party cohesion on frameworks must consider the different types of frameworks separately, because each type has a different mix of positive and negative tools. For example, the frameworks that have enhanced the majority party's positive agenda powers – by facilitating consideration and passage of particular legislation on the floor and transferring positive power from committees to party leaders – have become more evident during the 1970s and 1990s as parties have become more cohesive and homogenous. Studies must also distinguish between the House and the Senate, because regular House procedures tend to benefit parties and thus framework laws may have less effect on internal dynamics there than in the Senate where party leaders lack the tools of the Rules Committee and special rules governing debate on the floor. Thus, although

[33] Elizabeth Garrett, supra note 19, at 724-29.
[34] See Sarah A. Binder, supra note 29, at 23-26.

further empirical work is required to precisely determine how the mix of negative and positive agenda control in frameworks shifts according to the level of party homogeneity, partisan cohesion and the willingness to transfer power to leaders is a necessary condition for enactment of many provisions that comprise framework laws.

2. The Balance of Power between the Parties

Many framework laws eliminate or weaken aspects of the legislative process that can be used by minorities in Congress to obstruct passage of bills they dislike or to force compromise. By eliminating the filibuster in the Senate, for example, frameworks avoid the need to put together large bipartisan coalitions and allow simple majorities to act.[35] One important framework, the congressional budget process, not only eliminates the filibuster, but it also includes several procedural points of order that require 60 votes to waive. Many of these points of order work to protect the legislative vehicle constructed by party leaders and their agents from attacks or change on the floor, or preserve packages so that rank-and-file members are not put to difficult political votes. Thus, the framework shifts the effect of supermajority voting from a context that weakens the majority party in the Senate – the filibuster – to on that largely strengthens it – points of order. Thus, one question posed by the enactment of many frameworks is what conditions lead the adoption of rule changes that reduce the power of congressional minorities?

Dion and Binder have reached apparently conflicting conclusions about the partisan balance most likely to lead to rules that limit minority rights. Both scholars agree that it is the partisan dynamic that is most relevant to the development and maintenance of procedures affecting minorities. They both find that claims that such rules are driven by workload considerations or by desires to establish norms of reciprocity so that today's majority is treated well when it is tomorrow's minority do not withstand rigorous analysis. Although they agree on the relevant factor driving change, they seem to disagree on the details.

[35] See Keith Krehbiel, supra note 25, at 90-91 (discussing negotiating dynamics caused by filibuster pivot in Senate).

Dion concludes that "there is convincing evidence from a number of institutions [primarily the House of Representatives, but also the Senate and some comparative work] that it is small majorities that tend to adopt limitations on minority rights."[36] In part, this occurs, he argues, because small majorities are more cohesive than large ones and thus the party caucus of a small majority can agree on the procedural changes more easily. In addition, large minorities are most likely to obstruct successfully and thus there is more reason in these circumstances for the majority to attempt to change the rules. While Dion's conclusion is superficially appealing because it is small majorities that have the most to fear from obstructionist tactics, it overlooks the difficulty of enacting rules that harm minorities, or repealing those that strengthen them, in a context where inherited rules already provide some protection for minorities. When the minority is relatively large and cohesive, it is in a better position to successfully resist change that weakens it.[37]

In a comprehensive study of formal rule changes affecting minority rights, Binder comes to a different conclusion. Although Dion may describe the world in which the majority most wants to limit minority rights – when the majority is small and the relatively large minority aggressively exploits mechanisms for obstruction – Binder's work reveals that this is also the world in which limitations on minority rights are most difficult to pass.[38] A relatively strong minority party, which can appeal for support from some fraction of the majority party that expects to find its interests aligned in some cases against its own party, can resist unfavorable rule changes. It is usually only relatively powerful majority parties that can overcome the status quo bias of the legislative process and alter inherited rules in a way that decrease the ability of minorities to obstruct and force concessions. Thus, Binder agrees with Dion that the size of the party coalitions matters to the procedures that will be adopted, but change at the cost of minority rights is most likely to occur when the minority is weak and the majority particularly strong. She does not claim that this partisan configuration explains all such procedural change,[39] but

[36] Douglas Dion, Turning the Legislative Thumbscrew: Minority Rights and Procedural Change in Legislative Politics 246 (1997).
[37] As Dion himself warns, his analysis is limited to the cases he studies and may not apply to "any and all attempts by the majority to limit any sort of minority rights." Ibid.
[38] Sarah A. Binder, Minority Rights, Majority Rule: Partisanship and the Development of Congress 205 (1997).
[39] Id. at 207. Adrian Vermeule offers a different perspective on the relationship between Dion's and Binder's studies. "Sarah A. Binder ... argues that small majorities must often make procedural concessions,

she thinks it the best explanation given her thorough canvassing of the history of congressional reform.

Binder briefly mentions the statutory frameworks that have included restrictions on the filibuster in the Senate, noting that they are an exception to her larger finding that Senate majorities have not been generally successful in limiting the rights afforded minorities by the inherited rules.[40] She suggests that the policy and institutional concerns that motivate frameworks might convince senators who are traditionally protective of minority rights to water them down in limited circumstances. Yet, further testing of the Dion and Binder hypotheses in the context of framework laws could reveal which vision of the role of parties more accurately depicts the conditions giving rise to frameworks. Even though senators may directly feel the effect of any weakening of the right of filibuster, such a rule change affects dynamics in both houses. Both houses engage in negotiations with respect to framework laws that often result in fewer minority protections for a subset of bills; thus, the partisan configuration in the House as well as the Senate should be considered when assessing the conditions under which framework laws are likely to pass. Representatives who believe that their interests are likely to coincide with the obstructing minority in the Senate have an interest in retaining the filibuster and other protective rules. If Binder's analysis is a better explanation, we would expect that framework laws weakening protections provided to minorities are passed when the majority parties in the Senate *and House* are relatively strong vis-à-vis the minority party. However, this condition may not be as strongly pronounced in the context of frameworks because the specific policy and other considerations that lead to the adoption of the framework may allow even a somewhat weaker majority party to amass enough support for the procedural change.

Particular framework laws are different in another key way from the usual context in which minority rights are weakened, i.e., when the reduction in minority rights applies

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as a few defections can turn the tables. Douglas Dion … argues that small majorities are more cohesive and thus more likely to curtail minorities' procedural rights. Binder is emphasizing a factor that reduces the capacity of small majorities to have their way, while Dion is emphasizing an offsetting factor that increases the same capacity; the net effect is unclear." Adrian Vermeule, *Submajority Rules: Forcing Accountability upon Majorities*, 12 J. Pol. Phil. [6-7] n.17 (forthcoming 2004). Studying framework laws could help provide an answer to the question Vermeule raises, along with the questions discussed in the text.

[40] Id. at 200.

generally rather than to a defined set of legislative actions. Often expedited procedures that restrict committee influence and eliminate the filibuster and rights to amend on the floor are adopted as ways to more easily disapprove of the President's exercise of a particular delegated power. Before the Supreme Court ruled the legislative veto unconstitutional in *Immigration and Naturalization Service v. Chadha*,[41] many frameworks empowered a bare majority in one house or both houses to block the executive branch's decision. The legislative veto was an innovation associated with framework laws that allowed a part of Congress – often one or both houses but sometimes a congressional committee – to disapprove of an executive branch action. The President was not involved in the legislative veto process, which was ultimately part of the reason the Supreme Court found the procedure unconstitutional. But when the legislative veto was a possibility, a minority might well support the adoption of the framework because it held out the chance that they could convince a few in the opposing party to join them and overturn future executive action. Without expedited procedures, they would need a filibuster-proof majority in the Senate or support from key committee members. In other words, when the framework acted as a mechanism to negate executive branch decisions without presidential involvement and often without bicameral requirements, it might actually empower a relatively strong minority because they would need to attract fewer supporters from across the aisle to undermine the use of power delegated to the executive by a congressional majority. The posture of the legislative veto makes simple characterizations of the procedural changes difficult.

After *Chadha*, however, this description of the benefit of expedited procedures to a strong minority is no longer accurate. Now, although a bare majority may be able to pass a joint resolution of disapproval under certain framework laws, the President must sign the resolution. Presumably he is very unlikely to agree to undo the work of agencies or his own decisions, so resolutions of disapproval must effectively have the support of supermajorities in both houses. Currently, expedited procedures have real bite in frameworks such as fast track for trade implementing agreements or budget reconciliation

[41] 462 U.S. 919 (1983) (ruling that legislative veto violates bicameralism and presentment clauses). Before *Chadha*, many laws had included the legislative veto which was typically accompanied by a framework law and allowed both houses, one house or sometimes just a committee to disapprove an executive branch action. For a discussion of the legislative veto, see Jessica Korn, The Power of Separation: American Constitutionalism and the Myth of the Legislative Veto (1996).

bills where they provide more favorable rules for passing these bills – and these are instances where the procedures do operate to limit minority rights to obstruct or to significantly change legislative proposals.

II. Conditions Leading to Adoption of Frameworks in Statutory Form

The Constitution provides that "[e]ach House may determine the Rules of its Proceedings."[42] The rulemaking power is reserved to each house, which has the power to unilaterally change its rules of proceedings, consistent with some minimal constitutional requirements, without the involvement of the other house or the President.[43] One would expect, then, the House and Senate would adopt their rules primarily through internal vehicles such as simple resolutions when the procedures affect only one house or concurrent resolutions when coordinated action is required. Contrary to the seemingly internal character of congressional rules and procedures, however, framework laws are all contained in statutes. Furthermore, Congress has occasionally enacted sweeping rule changes as statutes, such as the Legislative Reorganization Acts of 1946 and 1970, so the conclusions reached about the statutory nature of framework laws will also shed light on this related phenomenon. Thus, we turn to a second question: Under what conditions might Congress use a statute for rule changes, such as those that comprise framework laws?

The choice of statutory form is not a costless one; it matters which route Congress uses to pursue internal change. First, as inclusion of boilerplate reserve clauses suggest, Congress understands that putting a provision in a statute might lead a court to believe that it had power to enforce those rules, whereas judges are more likely to refrain from interfering with the implementation of clearly internal rules. Although courts have not viewed these statutory provisions as different in a meaningful way from rules adopted in

[42] U.S. Const., Art. I, § 5.
[43] See Yellin v. United States, 374 U.S. 109 (1963); United States v. Ballin, 144 U.S. 1 (1892). For discussions of the case law, see John C. Roberts, *Are Congressional Committees Constitutional?: Radical Textualism, Separation of Powers, and the Enactment Process*, 52 Case W. Res. L. Rev. 489, 530-41 (2001); Aaron-Andrew P. Bruhl, supra note 2, at 384-87.

internal resolutions,[44] the statutory form could be seen as a signal that Congress is adopting something with legal effect to be treated by courts just like other laws. For example, Bruhl describes an argument that the trade fast track procedure has legislative effect because it affords the President "the right to implement a trade pact through the expedited process set forth in the statute."[45] Of course, whether the President has the right to fast track depends on whether the process is indeed legislative rather than an internal procedure wholly within the control of each house of Congress. Various aspects of fast track demonstrate that Congress has not conferred any right on the executive. Reverse fast track provisions providing an internal process to revoke fast track if the President does not adequately consult with Congress during trade negotiations and the requirement for decisions by congressional entities to trigger the process for particular bills make it clear that no right has been conferred, as does the reserve clause. Nonetheless, by putting fast track in a statute, rather than by enacting it in a related concurrent resolution at the same time trade promotion authority is delegated to the President, Congress leaves open the possibility that some will consider it legislative and therefore capable of enforcement by third parties like courts.

Some scholars are now making constitutional arguments against framework laws based on the form of these rules. Kesavan argues that Congress cannot deploy its constitutional rulemaking authority through statute because such a form is too "binding" with respect to rules of proceedings.[46] The implication of this argument is unclear – perhaps such provisions should be viewed as ineffective, requiring readoption by simple or concurrent resolution, or perhaps the statutory form renders them into something more binding on Congress, although that could be inconsistent with the exclusive grant of rulemaking authority to each House. Bruhl rejects the entrenchment attack but raises separation of powers concerns if rules are adopted in a vehicle that demands presidential involvement in internal congressional matters.[47]

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[44] See, e.g., Metzenbaum v. FERC, 675 F.2d 1282 (D.C. Cir. 1982) (describing such rules in statutes as "binding upon [the House] only by its own choice" and holding their enforcement to be nonjusticiable political questions). See generally, Michael B. Miller, *The Justiciability of Legislative Rules and the "Political" Political Question Doctrine*, 78 Cal. L. Rev. 1341 (1990).
[45] See Aaron-Andrew P. Bruhl, supra note 2, at 392.
[46] See, e.g., Vasan Kesavan, *Is the Electoral Count Act Unconstitutional?*, 80 N.C. L. Rev. 1653, 1779-87 (2002) (making argument with respect to some provisions of the Electoral Count Act).
[47] See Aaron-Andrew P. Bruhl, supra note 2, at 404-13.

Regardless of the outcome of these constitutional questions, the point is that Congress should not be indifferent about the form it chooses to adopt new rules and procedures. Scholars and, more importantly to Congress, some judges could view the form as significant, either leading to nullification of the rule or inviting judicial interference in its enforcement and application. Past experience with some frameworks demonstrates that courts have been willing to disapprove of congressional innovations that are not seen as purely internal rules. In *Chadha*, the Supreme Court invalidated the legislative veto, a key component of many framework laws before the mid-1980s. In *Bowsher v. Syner*,[48] the Court struck down the delegation of sequestration authority to the Comptroller of the General Accounting Office, although it did not consider any question of internal congressional procedure. In *Clinton v. City of New York*,[49] the cancellation authority delegated to the President was ruled unconstitutional. Although only *Chadha* dealt with the congressional procedure, and even that case implicated the framework law only indirectly, these cases certainly suggest to lawmakers that the Court may not stay on the sidelines forever, particularly when it comes to rulemaking statutes.

Second, even if the fact of presidential approval raises no constitutional concerns, it is a significant aspect of the initial process to adopt frameworks. Using the statutory vehicle threatens the ability of Congress to adopt the rules quickly because a statute can be vetoed. Thus, even if the involvement of the president is not necessary, is not seen as changing the nature of the new rules, and does not alter the ability of either house to unilaterally change the rules, presentment is another step in the process that may lead to delay and the need for renegotiation and readoption, albeit in a resolution rather than a statute. Why should Congress choose to use a process with an additional vetogate – and one exercised by a different branch – when it has the constitutional authority to adopt the same rules without executive branch involvement?

To answer this question, we must analyze three possible conditions for statutized rules. First, Congress could view the statutory format as signaling that the procedural change is particularly important or substantial, and perhaps that it should be accorded

[48] 478 U.S. 714 (1986).
[49] 524 U.S. 417 (1998). See also Michael B. Miller, *The Justiciability of Legislative Rules and the "Political" Political Question Doctrine*, 78 Cal. L. Rev. 1341 (1990) (arguing that the Court should intervene in some cases concerning internal rules of procedure, whether or not embodied in statutes).

greater durability. Although this condition surely plays some role in the choice of format, and it deserves further scrutiny particularly with respect to claims about durability, I argue that it is not a significant factor in the decision to use statutized rule. Second, a statute is used when some parts of an inter-branch treaty require legal changes and the dynamics of negotiation require that all parts of the agreement be enacted in the same vehicle. If some aspects of the treaty must be in statutory form, then the internal rules required to assemble majority support for the package must be enacted in the same vehicle. This condition is a necessary – and the key – condition in the use of statutory vehicles to enact frameworks. Third, there may be an element of path dependency, so that when an area has been characterized by statutory framework laws, subsequent changes tend to occur via statute. This condition is only a plausibility condition, making framework laws more likely in the context of interbranch negotiations or large packages with legislative components.

A. Statutes as Signals of the Extent of the Change

Although no scholarship I have discovered focuses on why the 1946 and 1970 Legislative Reorganization Acts were adopted as statutes, some do characterize them as relatively substantial changes in the internal dynamics of both houses of Congress. The far-reaching changes in committees made in 1946 still generally determine the organization of the House and Senate, and the 1970 Act worked to redistribute power away from committees and to open the legislative process to greater public scrutiny. Both acts are referred to as symbols communicating a message of change to those holding power under the status quo ante.[50] Some framework laws, such as the congressional budget process, the War Powers Resolution, the base closure process, and the fast track for trade implementing acts, are intended in part as signals of renewed congressional

[50] The 1946 Act was "the first attempt at comprehensive reform of the modern Congress, "Thomas R. Wolanin, *A View from the Trench: Reforming Congressional Procedures*, in United States Congress 209, 212 (D. Hale ed., 1985), and was intended to signal the executive branch that Congress would no longer follow the submissive model it had adopted during the 1930s and World War II. Similarly, the 1970 Act was seen by some members as a "symbol to [primarily committee] leadership that they couldn't run over us like they used to." Norman J. Ornstein, *The Legislation Reorganization Act of 1970: First Year's Record*, in Congress in Change: Evolution and Reform 187, 200 (N.J. Ornstein ed., 1975) (quoting Rep. Thomas M. Rees, D-Calif.).

resolve to address an issue or of a change in the way Congress will make certain decisions. However, not all framework laws are intended to bring about sweeping change – indeed, some are obscure and little used – so this explanation for the use of the statutory form is only partly satisfying at best.

The symbolism of using a statute to establish a framework could be used to communicate one of several messages. First, Congress could be communicating the breadth of the change – that it intends reform to be substantial and comprehensive. However, some of the most significant rule changes in modern congressional history, the adoption of Reed's Rules of the 1880s, were not adopted by statute but by simple resolution changing the standing rules and by alterations in the rulings handed down by the Speaker.[51] Although statutized rules were rare at this time, they were not unknown. The Electoral Count Act of 1887 is an early example of a framework law.

Second, Congress uses framework statutes to make the change more salient to outside audiences – the executive branch or the public. This could explain the choice of format for Reed's Rules, which were primarily directed at an internal audience. But other important changes that Congress has clearly seen as communicating messages to outside audiences – such as the changes made by the House of Representatives after the Republican takeover in the 104th Congress – were made through nonstatutory means. In this case, although the House supported the changes, some of which were part of the Contract with America, the Senate did not share the sense of urgency or the commitment to the reforms. Accordingly, a simple resolution which did not require bicameral action was used by House reformers to adopt the changes. So the political realities dictated the form of the rule changes. Similarly, if Congress is working to send the executive a signal that it plans to be more aggressive in the future, enacting that signal in a form that requires presidential involvement may be risky because the President can use the even more powerful signal of his constitutional veto. Presumably, for example, one reason Congress has been unwilling to change the concurrent budget resolution into a joint resolution, which is a legislative vehicle that requires presidential approval, is the desire to reduce the President's influence over this internal budget process. Thus, it seems puzzling that Congress would choose to send the President a chastening message using a

[51] See Gary W. Cox & Mathew D. McCubbins, supra note 18, at 119-24.

method that requires his involvement, unless circumstances suggest that he will have no choice but to accept.

Third, Congress might hope to signal that it expects a framework reform to be more durable than reforms adopted through internal vehicles. This signal is complicated because one reason Congress may use a framework rule rather than a primary rule directed at the same objective is that secondary rules, whatever their format, are somewhat less durable. They can be changed unilaterally, and they can be waived or ignored in particular circumstances. However, statutized procedural rules may signal durability in a way that procedural rules adopted through internal vehicles do not; in other words, frameworks may have a sort of intermediate strength between substantive laws and internally-adopted rules.

But the strength of this signal is undermined, at least with respect to sophisticated audiences, by the reserve clauses included in framework laws explicitly stating that they are exercises of rulemaking authority and have no greater durability than any other internal rule. In addition, the House reenacts the rules adopted by statute each session when it passes its standing rules (which it does in the form of a simple resolution), suggesting that, just like other internal rules, statutized rules must be readopted each session to remain effective. Just as with the standing rules themselves, the House could adopt changes or modifications to the frameworks at this time, although it has always included boilerplate language in the rules resolution keeping the framework procedures in place.[52] All Senate rules, whether or not contained in framework statutes, are relatively durable because as a continuing body its standing rules remain in effect from session to session, just as do the procedures contained in statutory frameworks. Changes to Senate can be filibustered just like framework laws, but it is actually harder to cut off debate on changes to the standing rules because 67 votes, not the usual 60, are required to invoke cloture.[53] Moreover, to the extent that the standing rules have general applicability and therefore broader effects on future lawmaking, it could be the case that Congress considers internal changes made in these legislative vehicles more durable. Framework

[52] See 2003 H.Res. 5 (adopting all "applicable provisions of law ... that constituted the rules of the House at the end of the One Hundred Seventh Congress"); House Rule XXVIII, 1999 H.Res. 5 (providing that the "provisions of law that constituted the Rules of the House at the end of the previous Congress shall govern the House in all cases to which they are applicable").
[53] Senate Rule XXII.

laws, on the other hand, affect on certain policy arenas and thus may be viewed as more limited in their impact and easier to change without far-reaching effect.[54] In short, the signal of durability provided by a rulemaking statute rather than a rule adopted by concurrent or simple resolution is ambiguous at best.

Enactment of a statute may show a greater commitment to a particular action because it requires the cooperation of both houses and the President – or if he vetoes the framework, the agreement of supermajorities in Congress. That support may ensure durability for as long as the preferences of policymakers remain unchanged. But in that case, durability stems from acceptance of the practice by those who follow it, not from the form in which it was enacted. To determine whether the statutory form itself makes a different to the "stickiness" of the rule or procedure, further work is required to study the frequency and rate of change to rules adopted through statutes compared to those enacted in other forms. Because changes to frameworks need not occur in subsequent statutes, one or both houses can formally change the rules through internal vehicles, or they can simply waive the procedures in particular cases. Thus, any study of the rate of change to statutory frameworks compared to similar non-statutory procedures would need to include all sorts of methods of revision. I suspect that any difference in durability is insignificant. For example, even though the House readopts statutized rules each session with boilerplate language, it also leaves most of the other rules unchanged from session to session. Most alterations to House procedures occur through special rules promulgated by the Rules Committee that apply to a single bill or to more actions throughout one session of Congress.

Thus, none of the messages that might be communicated through the use of the statutory form seem to require this method of adoption for the signal to be expressed. There are other ways to make a framework salient to internal and external audiences. Although congressional insiders claim there is a perception of greater durability with respect to frameworks than to rules adopted in simple or concurrent resolution, this statement is least undermined by the reserve clause and may well turn out to be countered by the practice with the implementation of framework statutes. It is the second condition

[54] Thanks to Sarah Binder for this speculation.

– that of enacting all parts of a comprehensive bargain simultaneously – that seems a more promising explanation.

B. Enacting Bargains as a Package

The key to understanding the use of statutes to enact frameworks lies in the most important difference between a statute and the various other legislative options available to Congress. Statutes are different from simple and concurrent resolutions because they can be used to adopt reforms that have legal force and effect.[55] Thus, statutory frameworks (and other statutory rule changes) will be enacted under the following three related necessary conditions:

1. The congressional frameworks are related to other changes that require legal change, such as delegating authority to the President, changing legislative salaries, or modifying other aspects of the legislative process that have legal consequences, not just internal effects.
2. The entire package is negotiated as an integrated "treaty"; passage is possible only if all parts of the package are enacted, and contending forces demand simultaneous adoption to reduce the chances that the deal will unravel and only some parts will be enacted.
3. The negotiated package can obtain the support of both houses and the President – or it has two-thirds support in both houses which is sufficient to override a presidential veto.

My claim here is not that the framework laws are given legal force and effect because they are adopted in statutes; indeed, the reserve clauses explicitly deny frameworks status as legislation. Rather, frameworks passed as statutes are critical components of larger packages that include legal changes. If parties agreeing to the compromise insist that all parts of the package be enacted at the same time, then all must be adopted as a statute because some parts cannot be enacted as anything else. That necessity also means that all parts of the deal – internal changes as well as, say, delegation of authority to the president

[55] Joint resolutions are the same as statutes for these purposes – they have legal consequences, and, accordingly, they must be signed by the President.

– must be able to pass the hurdles of bicameralism and presentment. If the President is unwilling to accept all parts of the deal – or the package cannot obtain supermajority legislative support sufficient to override a veto – then supporters of the package will have to decide if they will accept piecemeal passage of the deal, or if the compromise will founder.

Simultaneous enactment of these packages is therefore a requirement of their negotiation, not a legal requirement. Of course, deals can be enacted in parts, with some in statutory form and some in the form of concurrent or simple resolutions. However, the 1921 Budget Accounting Act may be a cautionary tale for those considering passing the parts of the deal in different formats. After Congress passed the first version of the Act in 1920, which primarily instituted an executive budget process and required the President to submit a budget each year, lawmakers then considered controversial rule changes that would alter the congressional appropriations process in response to the new executive branch apparatus.[56] The new rules created one large appropriations committee in the House, thereby centralizing the legislative budget process in a move that mirrored the Act's centralization of the executive budget.[57] A divided House adopted the rule changes in a separate resolution, which served the strategy of the reformers who hoped to use the executive branch changes as leverage to force internal reform. Congress was then surprised, after it passed the internal restructuring, when Wilson vetoed the Accounting Act. Ultimately, President Harding signed the bill and both parts of the compromise were enacted, but the episode highlights the danger posed to comprehensive reform by piecemeal enactment. Congress could have been left only with a new internal appropriations process that a pivotal block of legislators had supported only in the context of executive branch reorganization. Although Congress could have repealed the internal reorganization, the status quo bias inherent in the legislative process would have made that somewhat difficult as long as the new structure maintained some significant support. The episode demonstrates to groups that view certain provisions are essential to their support that they should be sure to get their provisions at the same time those supporting the other parts of the bill get theirs.

[56] See Charles H. Stewart, Budget Reform Politics: The Design of the Appropriations Process in the House of Representatives 1865-1921 204-211 (1989).
[57] See id.

There are at least two related circumstances in which statutory frameworks are necessary to adopt larger packages of legal change. First, many framework laws are found in bills that delegate substantial authority to the President and executive branch.[58] Supporters are able to assemble majority support for the broad delegation only if it is accompanied by a framework law that enables Congress to more easily disapprove of the exercise of the delegated authority. This has been the case, for example, in laws delegating the power to reorganize the executive branch, empowering the executive to make certain arms sales, formally accepting the President's power to introduce the military into conflict in some cases without prior congressional approval, and dealing with particular emergencies.[59] Sometimes the internal structure merely guarantees consideration of a disapproval resolution on the floor, allowing a committee to be bypassed, or it can also provide privileged and expedited procedures for floor action. Sometimes, the framework moves the main locus of oversight from a committee seen as too closely allied with the executive branch to the floor or to party leaders, such as occurred in the base closure framework.[60] The heyday of framework laws, the 1970s and 1990s, have also been times of interbranch conflict, so it is not surprising that large delegations of authority came with changes designed to increase congressional capacity to check the use of the power.

Of course, not all – not even most – delegations of authority to the President are accompanied by framework laws. So while this aspect of frameworks is part of a necessary condition for their enactment as statutes, it is clearly not sufficient. It remains for further work to specify the conditions under which delegations are, or are likely to be, enacted with framework laws for disapproval resolutions or for approval of subsequent related legislation. It seems likely that, at the least, frameworks are used to enhance congressional oversight when ex ante specification of guidelines for the exercise of

[58] See Elizabeth Garrett, supra note 5, at ___.
[59] See, e.g., James L. Sundquist, The Decline and Resurgence of Congress 349 (1981) (discussing demands by some in Congress for legislative vetoes, which were often accompanied by framework laws, before delegating substantial authority). Often the advantage of expedited procedures provided by framework laws is available only for a certain time after the President has exercised his delegated authority. See Christopher M. Davis, CRS Report to Congress, Expedited Procedures in the House: Variations Enacted Into Law CRS-2 (July 21, 2003).
[60] The base closure process delegates most authority to make decisions about which bases to close or realign to an independent commission, with only limited involvement by the executive branch.

discretion is difficult and when oversight by third parties, such as courts, is extremely unlikely. Many frameworks have been enacted in areas where courts have declined to intervene, such as budgeting, foreign relations, trade, and emergencies.[61]

The coupling of framework laws with delegations of authority to the President reveals why Congress does not worry about obtaining presidential approval of some frameworks to enhance congressional oversight. If the President wants the delegated power, he must accept the bitter with the sweet. He may object to the framework, but his constitutional veto does not allow him to excise out the offending portions of a bill. In fact, after *Chadha*[62] declared the legislative veto unconstitutional, the President may not be particularly concerned about inclusion of framework provisions because any resolution of disapproval requires his signature and therefore effectively requires passage by veto-proof majorities. More problematic from the President's perspective are frameworks like trade fast track procedures which require congressional approval before action can be taken. However, sometimes these frameworks actually serve the President's interest; for example, fast track protects his proposal for implementing legislation from amendment or delay once it is introduced in Congress. This framework benefits the President because it enhances his ability to make credibly binding deals in bilateral and multilateral negotiations. However, it also protects the congressional interest by requiring extensive consultation during negotiations, providing for a "reverse fast track" process to withdraw the framework from a particular bill, and ensuring committee involvement in the drafting of the implementing legislation.[63]

Not all frameworks accompany laws that expand presidential power, however; the 1974 Budget Act constrained the President's impoundment power; the War Powers Resolution arguably constrained his military powers in some ways (while expanding it in others); the base closure process delegates power that might have gone to the executive branch to an independent commission. In these cases, Congress must be certain either that the President has no choice but to accept the law in its entirety – perhaps because it provides sufficient goodies to entice him or because the President is relative weak – or

[61] For preliminary analysis of these conditions, see Elizabeth Garrett, supra note 5, at ___.
[62] 462 U.S. 919 (1983).
[63] For a discussion of how fast track works to protect congressional interest, see Elizabeth Garrett, supra note 5, at ___.

that it has the votes to override a veto. For example, the framework structuring consideration of rescissions proposals sent by the President to Congress requires that lawmakers affirmatively accept the rescissions before they go into effect. President Nixon accepted this framework, and the larger congressional budget process, because he was at the brink of impeachment and knew that he could not successfully veto the Budget Act of 1974.

A second sort of package also needs to be enacted as a statute. Some compromises require legal changes as well as internal ones to be entirely effective. For example, the 1946 Legislative Reorganization Act – not a framework law but a sweeping and general internal change adopted through a statute – included a pay raise for lawmakers and a new pension system, both provisions necessary to gain support for the entire package. Those who favored the legislative pay raise knew that it had to be passed together with internal reforms to make it more palatable to the press and the public.[64] The base closure process required that Congress establish an independent external commission to make closure and realignment recommendations because a majority trusted neither the Department of Defense nor the Armed Services Committees to make those decisions.[65] Such a commission could be set up only by passing a statute with legal force. Internal reform of the budget process would have been unlikely had it not been coupled with provisions to respond to the unprecedented policy impoundments by Nixon.[66] Later budget procedures contained both internal enforcement devices, which could have been passed by concurrent resolution, and also external enforcement of sequesters if spending exceeded predetermined caps. UMRA had a title applying to congressional deliberation, and a separate title applying to administrative agencies with respect to unfounded intergovernmental mandates. If one part of a legislative deal has to be enacted by statute to be effective, and parties to the compromise insist on simultaneous enactment, then all parts of the treaty must be enacted statutorily.

It is not necessary that all negotiated deals containing some legal aspects and some internal restructuring must be enacted by one statute. Congress can always disaggregate

[64] See Eric Schickler, supra note 6, at 143 (also quoting La Follette that it all had to be "wrapped up in one package").
[65] See Elizabeth Garrett, supra note 5, at ___.
[66] See Keith E. Whittington & Daniel P. Carpenter, *Executive Power in American Institutional Development*, 1 Persp. on Pol. 495, 508 (2003).

the parts and enact the legal changes through statute and the rule changes through some sort of internal resolution. Indeed, both the House and Senate could use procedures to tie the enactment of two vehicles together so that they are both enacted at the same time. But the more coordination that is required, the more difficult it is to credibly commit to enactment of multiple parts. Particularly in the Senate where unanimous consent is required for many procedural moves, it is hard to credibly promise that separate bills will stay connected as consideration proceeds. In addition, there may be symbolic value to adoption in one package; that is, enacting pay increases along with internal reforms sends a different kind of message to voters than enacting each separately.

During negotiations on these legislative treaties and omnibus bills, those demanding procedural changes as the price for their support of the legal changes are surely aware that the former are less durable than the latter. The reserve clauses included with most framework laws make clear that each house reserves its right to change the rules including in the statute unilaterally without meeting the constitutional requirements for legislation of bicameralism and presentment. Nonetheless, there is a status quo bias inherent in all congressional action, and those who advocate frameworks know that once they are enacted, they will be relatively difficult to repeal. Although lawmakers may ignore or waive internal rules, there may be a political cost to be paid for that decision.[67] Frameworks are not illusory constraints, and legislators who demand them in return for their support of a larger package understand that. Moreover, there will be entities in Congress that become interested in retaining the frameworks once they begin to operate; for example, often the committee that has oversight responsibilities or party leaders who control the floor agenda work to protect a framework that has empowered them.

C. Path Dependency

Finally, there is another practical reason that frameworks tend to be passed as statutes rather than through other mechanisms. Once an area of decision making is structured by rulemaking statutes, lawmakers may continue to adopt procedures through this

[67] See Frederick Schauer, *Legislators as Law-Followers and Rule-Followers*, in The Role of Legislatures in the Constitutional State __ (R. Bauman & Tsvi Kahana eds., 2005) (forthcoming) (discussing internal enforcement mechanisms for congressional rules and norms).

mechanism. Moreover, problems that are similar to those that are governed by framework laws may also be the target of new frameworks. One can characterize this as path dependency, or as a form of institutional learning. In other words, once members of Congress become familiar with a certain form of legislative process, they will often continue to use that form because it reduces transaction costs and poses less uncertainty. This condition is thus a plausibility condition, not a necessary one, making it more likely that Congress will respond to a problem with a framework.

Legislative entrepreneurs who champion framework legislation as a solution to a particular problem can reduce transaction costs by using familiar rules and procedures – it is more costly to invent a new wheel than to appropriate an old one and make it work with a few changes. Legislative entrepreneurs are vital to the adoption of framework legislation, as they are with respect to other legislative activity.[68] These actors will seek to minimize the costs of their entrepreneurial activity when they can so that they can spend more time on constituent service, advertising, and other behavior vital to their re-election. They can save significant costs by using past frameworks as models for new proposals. Not only are costs of creation reduced, but it may also be easier to persuade others to join in the effort when the proposal borrows from other structures. Garnering majority – or sometimes supermajority – support for the adoption of a framework is more likely if lawmakers are comfortable with its familiar features and can better predict how they will be able to pursue their objectives within the new structures. The change can also be portrayed as less dramatic when it draws on or amends structures already in place rather than establishing entirely new arrangements. In short, there is institutional learning that takes place after experience with frameworks.

Thus, it should not be surprising that frameworks modifying the congressional budget process, enacted in statutory form because of the second condition, were also adopted as statutes. In some cases, a legal change was required so the statutory choice was dictated by the second condition relating to enactment of packages. In other cases, the choice of statute might be largely a matter of path dependency to decrease transaction costs associated with uncertainty (albeit at the cost of the greater transaction costs of enacting a

[68] See generally Gregory Wawro, Legislative Entrepreneurship in the U.S. House of Representatives (2000).

statute rather than an internal resolution). If the concurrence of both houses and the President are likely, then entrepreneurs may choose the familiar form for framework laws to mute opposition. Of course, if one of the players in the Article I, Section 7 game[69] is unwilling to play, then a different route may be taken, such as a concurrent resolution to ensure bicameral action, or a simple resolution to effect intrachamber reorganization. For example, readoption of the budget pay-as-you-go rule in the tax and entitlement arena which was part of the 1990 Budget Enforcement Act was considered in 2004 during debate on a concurrent budget resolution – a vehicle that does not require presentment. Putting the rule in a budget law was not an option because President Bush supported pay-as-you-go only in the entitlement arena and not applied to tax bills.

III. Conclusion

I have isolated several conditions relevant to the decision to enact framework laws. First, two conditions are relevant to the decision to attack a problem through a framework rather than through some of other mechanism. The problem must be concrete enough to allow for the framework solution, with requires Congress to define ex ante when the framework will be triggered. Moreover, the partisan configuration of Congress doubtlessly figures prominently in the decision to use a framework response, but more empirical work is required to get a clearer sense of these partisan dynamics. Second, three conditions are relevant to the decision to use a statute to adopt internal congressional rules, with the most important necessary condition being that the rule changes are part of a deal that must be adopted as a package and that includes some provisions that must have the force of law.

[69] See William N. Eskridge, Jr. & John Ferejohn, *The Article I, Section 7 Game*, 80 Geo. L.J. 523 (1992) (using this terminology to explain the interactions between legislative and executive branches in legislating).

TABLE 1

Examples of Framework Laws

The *Electoral Count Act* (1887) – procedures and default rules triggered by contested Electoral College votes.

Executive Reorganization Acts (first in 1939) – expedited process to disapprove presidential reorganization plans formulated under power delegated by the Acts.

Various Congressional Pay Acts (first in 1967) – expedited process first to disapprove of pay increases proposed by independent commission and then to approve the recommendations before they went into effect.

Congressional Budget and Impoundment Control Act (first in 1974, with significant changes by *Gramm-Rudman-Hollings Act*, 1985, and *Budget Enforcement Act*, 1990) – provides complex structure for congressional budget process, as well as setting up impoundment process.

Fast Track for Trade Implementing Agreements (first in 1974) – expedited process for enacting President's proposed implementing laws for certain multilateral and bilateral trade agreements negotiated under trade promotion authority delegated to the President.

War Powers Resolution (1974) – structures congressional involvement in declaring war and overseeing introduction of forces into military conflict.

Base Realignment and Closure Acts (first in 1988) – expedited process to disapprove of recommendations to close and realign military bases that are put forward by an independent commission established in the Acts.

Unfunded Mandates Reform Act (1995) – structures consideration of laws imposing intergovernmental mandates and makes it more difficult to enact them without also providing federal funding.

Line Item Veto Act (1996) – expedited process to disapprove presidential cancellations and internal process to identify targeted tax provisions eligible for cancellation.

Congressional Review Act (1996) – expedited process to disapprove major regulations.

Tax Complexity Analysis (1998) – internal process to ensure that information about complexity of certain tax proposals is available to Congress.