The Purposes of Framework Legislation

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Much recent scholarship studying Congress has focused on issues of institutional design and assessed procedural innovations to determine why rules have been changed or retained and to describe the effects of certain design features on outcomes. Notwithstanding the focus on procedure, one component of contemporary legislative process has not received sustained attention. There is no systematic study of what I call "framework legislation."[1] Framework legislation creates rules that structure congressional lawmaking; these laws establish internal procedures that will shape legislative deliberation and voting with respect only to certain laws or decisions in the future. The set of legislative actions that will trigger a particular framework is defined in the framework law. Often these procedural frameworks are part of more comprehensive laws that include delegations of authority to the executive branch or that have legal effects beyond shaping congressional procedure. Although these aspects of the laws that include framework legislation are relevant to the details of the framework and may explain why Congress decides to set up a framework, my objective is to focus primarily on the internal procedures, discussing the larger context only as it illuminates the decision to use frameworks and their design.

Framework legislation is related to other structures that shape all three branches of government. Constitutions are frameworks, but they are more durable than framework legislation and they usually apply generally, rather than to a subset of issues. The Administrative Procedure Act is a framework setting out the default methods of decision

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[1] See Elizabeth Garrett, *The Impact of Bush v. Gore on Future Democratic Politics*, in The Future of American Democratic Politics: Principles and Practices 141, 156-60 (G.M. Pomper & M.D. Weiner eds. 2003) (discussing framework legislation and beginning the analysis that this paper continues in more depth).

making for administrative agencies.[2] The standing rules of the House and Senate also establish frameworks for deliberation and congressional action; again, they tend to apply generally, although certain rules of procedure may be related to the kind of framework legislation I study here. In contrast to the standing rules, framework legislation establishes a procedural framework to structure congressional decision making in a particular policy area; it supplements, and sometimes supplants, ordinary rules of procedure.[3] The best known and most ubiquitous example of framework legislation is the congressional budget process. Although the budget process tends to dominate discussion of framework legislation, and exerts great influence on the design of other frameworks, it is only one example of a larger phenomenon.

Other scholarship studying the institutional design of Congress has discussed framework legislation, typically in one of two contexts. First, frameworks have been assessed in studies of the larger phenomenon of modern congressional change and reform. This scholarship identifies and explains various procedural innovations adopted by the post-reform Congresses, changes that began in the 1970s with the Legislative Reorganization Act of 1970 and continued through the reforms implemented by the 104th Congress and its Contract with America. Sinclair labels these developments as "unorthodox lawmaking" to differentiate the complicated reality of modern lawmaking

[2] Perhaps the Administrative Procedure Act would qualify as a "super-statute" as Eskridge and Ferejohn use that term, although it is not a statute that they analyze. See William N. Eskridge & John Ferejohn, *Super-Statutes*, 50 Duke L.J. 1215 (2001). Framework laws are not super-statutes because they do not have legal effect outside of Congress; they are internal rules of procedure. Presumably, some super-statutes could have accompanying framework laws, although none of the super-statutes Eskridge and Ferejohn discuss have framework aspects. They describe super-statutes as establishing "a new normative or institutional framework for state policy" that has a "broad effect on law." Id. at 1216. However, they are using "framework" in a different way that my use of that term here. They do not mean that their laws set up rules of procedure, but rather that they set up a framework of reference that transforms a particular substantive field, such as antitrust or civil rights. Super-statutes profoundly affect other laws in the area and shape citizens' views and values. Like other laws with legal force, super-statutes may serve some of the purposes of framework laws, such as symbolism and entrenchment, but they reach those objectives in different ways.

[3] Framework legislation is enacted as a law, so it passes both houses of Congress and requires the President's signature, although it is sometimes accompanied by changes in the standing rules. Statutory provisions dealing with internal rules of deliberation are identified in the statute as exercises "the rulemaking power of the House of Representatives and the Senate … with full recognition of the constitutional right of either House to change such rules (so far as relating to such House) at any time, in the same manner, and to the same extent as in the case of any other rules of such House." Section 13305 of the Budget Enforcement Act of 1990. See also Section 1103(d) of the Omnibus Trade and Competitiveness Act of 1988, Pub. L. 100-418 (Aug. 23, 1988) (similar language about fast track process).

from the textbook process.[4] Unorthodox lawmaking and post-reform innovation include the adoption of framework legislation, but the procedural changes discussed in this scholarship are broader and thus any analysis of framework laws is incidental.

Framework laws are discussed in a second scholarly context that has a narrower focus than the assessment of sweeping procedural trends in modern Congresses. Some scholars have analyzed one particular example of framework legislation, often the congressional budget process.[5] Although such focused studies may lead to conclusions about framework legislation in general, as well as about other congressional procedures, the scholarship tends to be restricted to understanding and critiquing the congressional budget process, or much less frequently, another particular framework. Moreover, to the extent that general conclusions can be drawn, they are often left to the reader and not made explicitly. This approach is consistent with the objective of the scholarship – to understand the development or operation of a particular framework.

This paper begins the study of framework legislation as a distinct legislative phenomenon in the United States, and its scope includes but is not limited to the congressional budget process. Although understanding the context of broader procedural change that often accompanies the adoption of significant framework legislation is necessary, I emphasize framework legislation, assessing general trends only as they relate to this particular kind of lawmaking. In this article, I first provide specific examples of framework laws. Virtually all significant framework legislation has been passed since the 1970s, but framework legislation was not invented in the last thirty years so examples can be found back to the mid-1800s. I then present five purposes served by framework legislation: enacting a symbolic response to a problem salient to 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

[4] Barbara Sinclair, Unorthodox Lawmaking: New Legislative Processes in the U.S. Congress (2d ed. 2000).

[5] See, e.g., Allen Schick, Congress and Money: Budgeting, Spending, and Taxing (1980); Charles H. Stewart, Budget Reform Politics: The Design of the Appropriations Process in the House of Representatives 1865-1921 (1989). For studies of other framework laws, see John Hart Ely, War and Responsibility (1994) (War Powers Resolution); Sharyn O'Halloran, Politics, Process, and American Trade Policy (1994) (discussing trade fast track as part of institutional analysis of trade policy); John W. Burgess, *The Law of the Electoral Count*, 3 Pol. Sci. Q. 633 (1888) (the Electoral Count Act); Elizabeth Garrett, *Enhancing the Political Safeguards of Federalism? The Unfunded Mandates Reform Act of 1995*, 45 U. Kan. L. Rev. 1113 (1997) (UMRA).

decisions are more likely to align with them; and changing the internal balance of power in Congress. With a clearer understanding of the purpose of framework legislation, future work can more systematically describe its effects on the legislative process and provide recommendations for its use and reform.

I. Examples

Most framework legislation is a modern phenomenon, flourishing in the 1970s, also popular with the 104th Congress as a tool in the Republican House's quest to deliver the Contract with America, and often related to the congressional budget process. The congressional budget process is the prototypical framework law. The history of budgeting is a history of inter-branch conflict and sporadic attempts by Congress to rationalize its budgeting process, including several committee reorganizations.[6] Before 1974, Congress vacillated between legislating through lump sum appropriations that provided much discretion to the executive branch and using detailed line items that attempted to control administrators but were sometimes ignored. Previous attempts to improve the budget process included the Anti-Deficiency Acts to eliminate coercive deficiencies and the Budget and Accounting Act of 1921, which required the President to submit an annual budget and established the Comptroller-General of the General Accounting Office (GAO) to audit the executive branch and monitor implementation of appropriations. Spending ceilings during the Johnson and Nixon administrations, accompanied by grants of impoundment authority to the President to enforce the limits, fell out of favor because of congressional distrust of Nixon and the budget wars of the 1970s.[7] The Congressional Budget and Impoundment Control Act of 1974 used a different sort of innovation to deal with perennial budgeting difficulties; among other techniques, it began the use of framework laws in this area, including establishing the concurrent budget resolution, setting the stage for the reconciliation process, and

[6] For a history of this conflict before the mid-twentieth century, see Lucius Wilmerding, The Spending Power: A History of the Efforts of Congress to Control Expenditures (1943).
[7] See Dennis S. Ippolito, Congressional Spending: A Twentieth Century Fund Report 55-56 (1981); Allen Schick, Congress and Money: Budgeting, Spending, and Taxing 17-49 (1980).

ultimately providing points of order and other internal enforcement provisions to increase congressional authority over the federal purse.

In addition to the several acts that have established or modified the congressional budget process, several other frameworks deal with budgetary, economic, or regulatory decisions. The Unfunded Mandates Reform Act of 1995 (UMRA), an amendment to the budget laws, deals primarily with directives from the federal government to subnational governments, in particular mandates that are not accompanied by federal funding. It requires that significant intergovernmental mandates be identified and analyzed in committee reports. UMRA uses a point-of-order enforcement system to ensure the information is produced and to make it more difficult to enact such mandates without also funding them. The Line Item Veto Act of 1996 (LIVA), struck down by the Supreme Court in 1998,[8] was also a variation on the congressional budget process and included rules for legislative responses to presidential cancellations of spending as well as a special congressional procedure to identify limited tax benefits subject to cancellation. Also in 1996, Congress passed the Congressional Review Act (CRA) providing for enhanced legislative review of major regulations and an expedited procedure for Congress to disapprove of regulations with which lawmakers disagree. In addition to limiting debate in the Senate and thereby eliminating the possibility of a filibuster, the CRA allows thirty senators to discharge a resolution disapproving a regulation from committee. Finally, a smaller framework law was passed in the 1998 IRS Restructuring and Reform Act. The Joint Committee on Taxation (JCT) is required to prepare a Tax Complexity Analysis for tax provisions with widespread applicability to individuals and small businesses. If such an analysis does not accompany the bill or conference report, a point of order can be lodged against it on the House or Senate floor.

Particular issues relevant to budgeting and especially difficult for Congress to address using normal legislative procedures have led to the adoption of framework laws. Since 1988, Congress has used an innovative structure to help it close and consolidate military bases and facilities no longer needed after the end of the Cold War. Congress has enacted three base closure and realignment laws, and four rounds of recommendations for base closures have been sent to Congress with a fifth planned in 2005. The Base

[8] See Clinton v. City of New York, 524 U.S. 417 (1998).

Realignment and Closure Acts have delegated the authority to determine which military bases to close or scale down to a bipartisan independent commission of experts. Its recommendations, if accepted as a package by the President, are submitted to Congress. A congressional framework process makes it more likely that all of the Commission's recommendations will take effect, compared to the likely outcome under ordinary rules. Indeed, the base closure rules require that Congress affirmatively reject the recommendations, as a package, through a joint resolution in order to stop the recommendations from taking effect. The President has the ability to veto such a resolution, a likely prospect since he will have accepted the recommendations before they are sent to Congress. Thus, Congress would need to muster a 2/3 vote of both houses to override a veto if it wants to block the recommendations. Not surprisingly, given this structure, all four rounds of recommendations that have been sent to Congress have gone into effect.

The base closure process is somewhat similar to processes used occasionally to determine pay increases for legislators, federal judges and high-level political appointees. In 1967, Congress established an independent commission with members appointed by all three branches, to periodically recommend salary increases for legislators, federal judges and high level executive branch employees. This delegation included a one-house legislative veto as a way to prohibit the pay increases from going into effect after the President approved the commission's proposals. If Congress did nothing, salaries were increased as the commission recommended. Over time, because of public outcry, Congress changed the procedures so that pay increases could not occur without a vote of the legislature.[9] The resolutions to approve recommended salary hikes are currently protected by a minimal framework law that designates them as matters of the highest privilege if offered by the majority leader of either house.[10] In addition, a related statute, the Federal Pay Comparability Act, which adjusts federal employees' salaries to reflect cost-of-living increases, included framework legislation structuring a one-house legislative veto. The legislative veto could be exercised to disapprove a presidential plan

[9] See Louis Fisher, Congressional Abdication on War and Spending 153-55 (2000) (discussing history of salary acts); Congressional Quarterly, Congressional Pay and Perquisites: History, Facts, and Controversy 6-18 (1992).
[10] 2 U.S.C. § 359.

to alter comparability adjustments that would otherwise occur under the law. This framework law provided for automatic discharge of the disapproval resolution from committee, prohibited amendments, and eliminated the possibility of a Senate filibuster.[11] The framework was repealed in 1990, along with the legislative veto, although other provisions of the Comparability Act remain in effect.

Framework legislation has also been used to structure congressional consideration of legislation dealing with international trade. Congress has long granted the President broad authority to negotiate international trade agreements dealing with tariffs. Beginning with the Trade Reform Act of 1974, many delegations of trade promotion authority to the executive, authority that was extended to include nontariff barriers in 1974, have been accompanied by an expedited congressional process to consider implementing legislation. Among other procedural features, the congressional framework protects such legislation from amendments or delay. The President's proposed implementing bill, which is the product of negotiation between the executive branch and congressional committees with jurisdiction over trade, is voted on by the House and Senate with a single up-or-down vote in each house. This "fast track" procedure changed congressional involvement in the trade arena; previously Congress had delegated to the executive branch the ability to negotiate and implement tariff agreements without further formal congressional involvement. Congress retained influence by drafting these delegations as temporary grants of authority, requiring congressional action to extend them, and including substantive limitations.[12] Fast track procedures, adopted first to apply to the Tokyo Round of trade negotiations on nontariff barriers in the mid-1970s and subsequently used for other trade deals, envisioned formal congressional involvement at the beginning and end of the process, as well as ongoing formal and informal interaction. It provided special rules to facilitate congressional enactment of implementing legislation as long as extensive inter-branch consultation had occurred.[13] Fast track was used to implement the Tokyo Round of GATT, trade

[11] Pub. L. 91-656, 84 Stat. 1946 (1971), codified at 5 U.S.C. §§ 5305(c)-(k).
[12] See Sharyn O'Halloran, supra note 5, at 86-87 (describing mechanisms used by Congress to control exercise of delegated authority by President).
[13] See generally I.M. Destler, American Trade Politics: System under Stress (1986).

agreements with Israel and Canada, NAFTA with Mexico and Canada, and the Uruguay Round that established the WTO.[14]

The fast track process for trade agreements and implementing statutes was based on an earlier framework: the structure used by Congress several times since 1939 to consider executive reorganization plans presented by the President under power delegated by the legislature. Executive reorganization not only provides an early example of fast track procedures, it also represents an early use of the legislative veto, subsequently ruled unconstitutional.[15] This framework legislation was passed periodically to apply only to one reorganization effort at a time, but authority was extended several times until 1984 and thus came to affect various similar decisions made over the course of several decades. The framework provided that Congress would have a period of time following a presidential reorganization proposal to consider the change and perhaps to block it by passing a concurrent resolution of disapproval, a legislative vehicle which does not require the President's signature. In some reorganization laws, a one-house legislative veto was sufficient to block the President's proposal.[16] Discharge rules kept a committee from bottling up a resolution of disapproval, and debate in the Senate was limited, thereby removing the filibuster threat.

Although the executive reorganization fast track was a model for the trade fast track, the effect of legislative inaction was very different. If, notwithstanding the relative ease of legislating a trade implementing agreement under fast track, Congress cannot agree to the legislation, then the President's proposal is not enacted. If the President presented an executive reorganization plan, it went into effect *unless* Congress disapproved it, a process made easier by expedited procedures. In that way, the executive reorganization is more like the federal pay, base closure, or CRA process: the effect of legislative inertia

[14] See Charles Tiefer, *How to Steal a Trillion: The Uses of Laws About Lawmaking in 2001*, 17 J. L. & Pol. 409, 458 (2001).
[15] See Sarah A. Binder & Steven S. Smith, Politics or Principle? Filibustering in the United States Senate 186-88 (1997); Louis Fisher, Constitutional Conflicts between Congress and the President 136-52 (3d rev. ed. 1991). Although the legislative veto was first used in the 1930s, it became a common feature of legislation in the 1970s, at the same time that framework legislation became increasingly popular. See Jessica Korn, The Power of Separation: American Constitutionalism and the Myth of the Legislative Veto 40-41 (1996). Not all delegations of executive reorganization authority included legislative veto provisions. For example, in 1933 Congress delegated sweeping power to President Roosevelt without the ex post monitoring tool of the legislative veto, although the delegation expired after two years. See Title IV of the Treasury and Post Office Appropriations Act for FY 1934, 47 Stat. 1489, 1517-20 (1933).
[16] See Louis Fisher, supra note 15, at 138.

is that the proposal before Congress (whether from the President or an independent commission) becomes the law. However, because the executive reorganization bills, like the Federal Pay Comparability Act, included the legislative veto, before it was declared unconstitutional, Congress did not have to worry about a presidential veto of any disapproval decision.

Although the executive reorganization framework is an early example of framework legislation, there is at least one framework law passed in the preceding century. The Electoral Count Act (ECA) was passed in the wake of the contested Hayes-Tilden presidential election. It provided a framework for deliberation and a series of default rules of decision in case the electoral votes in a future presidential election were disputed. This Act, passed in 1887, languished in obscurity for over one hundred years until the presidential election of 2000 threatened to trigger some of its provisions. A Supreme Court decision[17] short-circuited the political process and denied Congress the opportunity to use the framework and discover its strengths and limitations. Nonetheless, the ECA provides an unusual early example of framework legislation adopted at a time when the policymaking environment was simpler and changed more slowly.

A final example of framework legislation comes from the foreign affairs and defense arena. The War Powers Resolution of 1973 (WPR), adopted like much other framework legislation in the 1970s and like the congressional budget process influenced by larger inter-institutional issues between President Nixon and Congress, is designed to structure the legislature's involvement in declaring war and overseeing military conflict. The WPR requires that Congress authorize, through a declaration of war or some other means, the use of the force in hostile conditions within a certain time period after the President has introduced the military into hostilities or there is the imminent likelihood of hostile action. It also sets up a system of consultation and reporting designed to keep Congress apprised of presidential decisions likely to bring the military into hostilities. Finally, the WPR provides for expedited procedures that can be used to pass a concurrent resolution directing the President to remove the military engaged in hostilities. The WPR is not considered a particularly effective framework. For example, the clock that would require the President to remove the military absent congressional authorization does not begin to

[17] See Bush v. Gore, 531 U.S. 98 (2000).

run unless he has reported to Congress under a specific provision of the WPR, so presidents just do not report under this section. However, while the formal provisions of the Resolution have little effect, consultations on these matters do occur, and Fisher reports that the executive branch often behaves as though there is a clock ticking that requires formal congressional authorization.[18]

With this collection of framework legislation in mind, we can now turn to a discussion of the purposes and characteristics of framework legislation.

II. Purposes of Framework Legislation

In all the cases affected by framework laws, Congress could have just made the particular substantive decision directly rather than constructing a sometimes elaborate framework to shape subsequent decision making. One puzzle posed by framework laws is why Congress chooses a procedural tool rather than directly confronting the problem with substantive legislation. In other words, why adopt a budget procedure to reduce the deficit rather than making spending and revenue decisions that lead to a balanced budget? Framework laws serve at least five purposes that could not be achieved as easily without the special rules. A particular framework may serve only one purpose or, more likely, will be motivated by several. Some of these purposes are not unique to framework laws – for example, laws other than frameworks can be symbolic. However, a framework law provides a different kind of symbolism that may be more appropriate in particular circumstances. In other instances, frameworks are the only way to solve a problem – for example, frameworks may be necessary to solve internal collective action problems or to provide more neutral rules to govern future decisions.

A. Symbolism

A framework law may be intended as entirely symbolic, an attempt to defuse an issue that has roused a normally quiescent and inattentive public while leaving the underlying

[18] See Louis Fisher, Presidential War Power 132-33 (1995)

process of lawmaking, bargaining and interest group interaction largely unchanged.[19] In such cases, lawmakers hope to reap some electoral gain by passing symbolic framework legislation rather than doing nothing about a problem that has become pressing on the national agenda. A symbolic framework law may allow legislators to appear to address a problem without spending the time to draft specific provisions that make real headway toward a solution. Symbolic legislation may be sufficient to meet the demands of the unorganized public who cannot easily monitor lawmakers. At the same time, legislators can assure attentive and active interest groups that business will go on as usual, notwithstanding the new structure. Furthermore, the adoption of a symbolic framework may postpone, at least until after the next election, the need to address the underlying substantive problems.

Legislation other than framework laws can serve symbolic purposes, but frameworks can be more attractive to lawmakers in certain circumstances for three reasons. First, a framework can better respond to constituent beliefs that part of a problem lies in the way Congress makes decisions. When voters are demanding changes in politics as usual, a legislative reaction that includes a reconfiguration of congressional procedures, like the budget process or UMRA, is targeted to that concern. Second, if constituents view the problem as a long-term one that needs a more comprehensive response than passing one piece of legislation, a framework law that will apply to a series of related decisions over time will again be a more precise response. The War Powers Resolution, which appeared to change the way Congress would be involved in decisions to send troops into hostilities, promised a long-term and full solution, rather than a one-shot fix. Finally, lawmakers may choose a symbolic framework over a law that appears to implement a substantive solution because they believe that a procedural change is more likely to be solely symbolic without real effects. Lawmakers may hope that as long as the underlying interest group relationships and economic and social conditions remain unchanged, new procedures will be largely ineffectual in changing outcomes. Because legislators and their staffs are sophisticated when it comes to parliamentary maneuvering, they may be

[19] For discussions of symbolic legislation, see Murray Edelman, The Symbolic Uses of Politics (1964); John P. Dwyer, *The Pathology of Symbolic Legislation*, 17 Ecology L.Q. 233 (1990). For work distinguishing the inattentive public from more attentive segments of the public and their respective influences on legislative behavior, see R. Douglas Arnold, The Logic of Congressional Action (1990).

convinced that they can appear to comply with the new rules without implementing any real substantive reform. In other words, framework laws can be more purely symbolic than other laws, although to the extent that voters also sense that procedural reform is not real reform, they will not be content.

When it becomes apparent that the underlying problem remains, the value of symbolic legislation may be substantially reduced. Those who might have hoped that the Tax Complexity Analysis would encourage lawmakers to simplify the tax code surely felt showered by cold water as they read through the extraordinarily complex tax bills passed during George W. Bush's term. The hope of legislators who use framework legislation symbolically is that the public will have lost interest in the problem before it becomes apparent that the framework response has been unavailing. In some instances, the problem will abate on its own, and lawmakers can claim credit by pointing to the passage of the framework. Sometimes legislation designed to be purely symbolic may change conditions enough to alter legislative behavior and change congressional outcomes, although this change would be incidental rather than intentional.[20]

B. Providing Neutral Rules

The procedural structures that framework laws put in place will often apply in situations that are not anticipated when the framework is enacted, or to laws which will have details that cannot be completely predicted. In such cases, the choice of rules and procedures will be driven by factors other than – or at least in addition to – how political actors expect the rules to further the particular interests of their constituents and other electoral supporters. When procedures are specified before it is entirely clear what precise issues will be considered and how participants will be affected, the rules can be designed to further longer-term, more public-regarding objectives. At this stage,

[20] Jon Elster differentiates between incidental constraints, which would describe any constraints that actually come about as a result of symbolic legislation, and essential constraints, which are intended to be self-binding. See Jon Elster, Ulysses Unbound 3-4 (2000). The other purposes of framework laws, particularly the third, fourth and fifth purposes, should be viewed as imposing essential constraints because they are constructed to achieve certain expected benefits for the lawmakers who will be bound by the rules.

lawmakers act behind at least a partial veil of ignorance[21] because they are uncertain about which procedures will help them and which will hurt them in the future. By taking advantage of the ability to specify rules and procedures before specific issues that will trigger application of the framework can be fully anticipated, lawmakers are able to devise rules that will appear, and often are, fairer and that can therefore enhance legitimacy of decisions.

Some framework laws strive for complete neutrality and seek not to favor a particular outcome over other possible ones. For example, the Electoral Count Act was drafted so that it did not favor one party's candidate over another; instead, it provided a series of default rules to ensure that Congress would be able to select a President when the Electoral College vote was contested or inconclusive. The ECA is the prototypical framework law serving the neutrality objective because its framers did not expect that it would be triggered in the near future nor that it would apply to any candidates they knew. The configuration of Congress when it was passed was conducive to adopting neutral rules because the partisan makeup was relatively balanced and no party could force adoption of rules that would systematically benefit its candidates.

In other cases, legislators use framework laws to set out relatively neutral procedures that will guide decisions intended to advance a particular outcome. As I will discuss below, another objective of framework laws is to entrench a particular outcome that is difficult for Congress to reach in the absence of a special structure. Although such a framework is not intended to be neutral in its overall effect,[22] the methods used to reach the objective can be relatively neutral, treating affected parties and interests without favoritism. Since the mid-1980s until 2002, budget frameworks have been constructed to make deficit spending less likely through the use of deficit and spending targets. This

[21] This concept is derived from John Rawls, A Theory of Justice 118-23 (rev. ed. 1999). It is an important aspect of Elster's analysis of constitutions as commitment devices. Jon Elster, supra note 20, at 130-33. The partial veil of ignorance idea has been developed in contexts similar to mine by Adrian Vermeule in the context of constitutional frameworks, see *Veil of Ignorance Rules in Constitutional Law*, 111 Yale L.J. 399 (2001), and Michael Fitts in the context of political institutions generally, see *Can Ignorance Be Bliss? Imperfect Information as a Positive Influence in Political Institutions*, 88 Mich. L. Rev. 917 (1990).

[22] Eric Hanushek distinguishes between process rules, which merely govern how a decision is reached, and outcome-oriented rules, which are explicitly designed to facilitate particular decisions. Eric A. Hanushek, *Formula Budgeting: The Economics and Analytics of Fiscal Policy under Rules*, 6 J. of Pol'y Analysis & Mgmt. 3, 6 (1986). The ECA is a process rule; the budget framework since Gramm-Rudman-Hollings is outcome-oriented, although the 1974 Budget Act was a process rule because there was no congressional agreement on the outcome that the framework should facilitate.

outcome-oriented framework took advantage of the partial veil of ignorance in its design because the goal of deficit reduction was pursued through procedural rules, chosen in advance of any particular spending decisions, that were arguably intended not to systematically favor one interest group over another.[23] In this way, even outcome-oriented frameworks can be viewed as setting into place fairer methods to each the outcome, and thus impeding lawmakers' ability to choose rules that work in their self-interest. This sort of neutrality may be vital to ensuring passage of a controversial outcome-oriented framework.

Devising framework laws that meet the neutrality objective is difficult. Vermeule observes that there is an information-neutrality tradeoff whenever drafters seek to take advantage of a partial veil of ignorance.[24] To succeed as neutral rules of decision, frameworks must set out procedures in some detail so that they effectively shape deliberation and work to counteract self-interest and bias. Frameworks must be precise enough to eliminate avenues for evasion once concrete issues are before Congress and lawmakers have a definite sense of what outcomes they prefer. To draft fairly specific frameworks, lawmakers must have enough information about the problem, the contexts in which it is likely to develop, and possible contingencies. The more information lawmakers possess, however, the more likely they are to discern their self-interest and the less likely the rules will truly be neutral. Many budget rules to meet spending and deficit objectives are temporary, expiring five or so years after they have been adopted. Thus, the veil of ignorance may not be especially concealing. There is some opacity, however, both because some uncertainty about the future remains and because many budgetary players will be in different positions over the time period, sometimes seeking new funds, sometimes protecting existing programs. Both types of uncertainty give players an incentive to adopt relatively unbiased rules, but the situation in the budget context is very different from the uncertainty faced, for example, by drafters of the Electoral Count Act.

Furthermore, even when both neutrality and sufficient information are possible, as it was in the case of the Electoral Count Act, lawmakers may be unwilling to spend the

[23] Michael A. Fitts, *The Paradox of Power in the Modern State: Why a Unitary, Centralized Presidency May not Exhibit Effective or Legitimate Leadership*, 144 U. Pa. L. Rev. 827, 862-62 (1996) (describing the rules used by Gramm-Rudman-Hollings to reach deficit targets as "neutral").
[24] Adrian Vermeule, supra note 21, at 428-29.

time necessary to devise and enact framework laws. They must be convinced that it is in their interest to do so; in the case of the ECA, they were responding to disgust for the ad hoc and overtly partisan selection process that resolved the Hayes-Tilden election, and they were aware that they had lived through a serious constitutional crisis that the country would do well to avoid again. In most cases, however, lawmakers have little incentive to enact a framework law if they anticipate it will not be triggered during their political careers. If the event that will require the framework legislation will be faced by lawmakers different from those considering adopting the procedures, legislators may decide that the opportunity costs are not outweighed by any benefit to them. Even if they expect to benefit from the framework legislation, these future benefits will be discounted and then compared to the immediate costs of foregoing opportunities to work on other legislation.

Thus, I would expect that few frameworks would serve the neutrality objective, and those that do are likely to apply to decisions in the relatively near term. Many framework laws are temporary, and some of these, like fast track for trade agreements, allow lawmakers an explicit opportunity to avoid their procedures after they have much more information about the deal that could be considered under the framework rules. When the President wants a particular agreement to qualify for fast track procedures that Congress has previously enacted, he must notify the relevant congressional committees who can choose to withdraw the procedural protection. These features of some framework laws undermine, but may not entirely eliminate, their ability to put into place truly neutral processes.

Framework laws aimed at neutrality will be used when lawmakers are convinced that voters will react negatively to a decision that appears infused with self-interest so they adopt procedures that appear – and sometime are – unbiased. This explains the adoption of the ECA, and perhaps also the adoption of the various federal salary acts that delegated congressional pay decisions to an independent body. The latter was not particularly successful because voters tend to react strongly to any congressional pay increase – whether recommended by a neutral third-party or not. Voters understand that regardless of the framework in place, lawmakers have the power to overrule recommended salary increase. Whether the ECA is a successful neutral framework is still an open question

because the Supreme Court halted the political process and determined the 2000 presidential contest. Not only did *Bush v. Gore* deny the political branch the opportunity to use its framework law, but it also made adoption of frameworks less likely in the future. If Congress knows that the time it spends drafting frameworks is wasted because the judiciary will intervene, it has even less incentive to incur the opportunity costs.

Neutral provisions in framework laws will also be used when lawmakers cannot reach agreement about the means to reach an end supported by a majority. In this circumstance, legislators are willing to adopt relatively neutral procedures to structure the consideration of means to ensure that no particular interest will be at an advantage relative to others. The congressional budget framework provides an example of such an attempt to construct somewhat neutral procedures, although the veil of ignorance about funding decisions to be made over the following five years is not particularly opaque, and the procedures are not entirely neutral.

Finally, even supposedly neutral process rules may not be neutral in application. Such rules may assist one interest rather than another because of the characteristics of the groups supporting or opposing the proposal, the nature of the proposal, the size and structure of the agenda, etc. Some "neutral" rules have institutional biases, favoring the policy chosen by the President and reducing the ability of Congress to affect details of the proposal, although they do not favor a particular substantive outcome. By favoring a particular institution to make the decision, however, they may have ramifications for the substance of the decision reached. Thus, fast track procedures coupled with trade promotion authority increase the likelihood that trade agreements negotiated by the President, whatever their terms, will be approved by Congress. Locating a decision in a particular institution – the executive branch, an independent commission, or a congressional committee – invariably affects the outcome, although it may not be clear at the time the framework is adopted how that institutional decision will play out in the details of the policy.

C. Coordination Device

The remaining three objectives deal with solving various challenges that face a collective body. Although they are related, and there is often overlap among them, it is helpful to deal with them separately. The three purposes of framework laws relating to the collective nature of Congress are 1) facilitating coordination to produce goods for the entire body or to respond to inter-institutional challenges; 2) entrenching particular outcomes that would be difficult to achieve absent some sort of precommitment; and 3) changing the relative power of interests within Congress, such as empowering the majority relative to committees or vice versa. Let us begin with the coordination role.

Framework laws can solve internal coordination problems for a multi-member and relatively decentralized legislature. When achieving an objective requires enactment of several bills over a period of time and involves several committees in the process, frameworks can coordinate action. The congressional budget process coordinates the actions of the thirteen appropriations subcommittees in each house, the tax-writing committees, and the committees with jurisdiction over entitlement programs so that the final budget enacted through many separate laws conforms to macro-budgetary objectives. For example, appropriations subcommittees are constrained by predetermined allocations that are set to achieve an aggregate spending level. Thus, the first bills to pass cannot use up all the money intended to be spent in that fiscal year unless they overcome parliamentary objections allowed by the framework laws and sometimes protected through supermajority voting requirements. UMRA also contains an enforcement device that coordinates congressional action taking place over several bills. If the funding for an intergovernmental mandate is in a separate bill, and that bill either does not pass or the funding is reduced, the mandate does not go into effect unless Congress subsequently provides funding or scales back the mandate. Frameworks often contemplate frequent use of omnibus legislation that facilitates coordination by enacting related policies simultaneously in one bill. The budget process provides favorable rules for some omnibus bills such as reconciliation proposals, thereby increasing the use of this form of legislation.[25]

[25] The coordinating function of omnibus reconciliation bills was diluted by a parliamentary decision that allowed more than one reconciliation bill per fiscal year. Nonetheless, omnibus bills, whether of the reconciliation variety or not, encourage coordinated action, and they facilitate legislation generally because they allow deals to be reached and simultaneously implemented.

Specific aspects of the legislative process may be especially susceptible to coordination problems. Take the challenge of producing information in a multi-member body. Frameworks often create expert staffs within Congress that produce and analyze relevant information for the entire body. In that way, the public good of information is more likely to be produced at optimal levels than when members must rely on their own aides to generate necessary data. Frameworks may also set out how often information is to be generated and how it should be disseminated within Congress. If the framework somewhat insulates the staff from partisan pressures, the information produced may be more credible in the eyes of voters, who may view the substantive legislation based on this information as more legitimate. Certain frameworks may structure interest group activity so that private entities produce information helpful to lawmakers. In this way, information costs can be externalized. So, for example, the offset requirements in the federal budget process that required groups seeking new funding to attack existing programs yielded helpful information about both the proposed program and the targeted "prey."[26]

Another collective action problem that can be solved, or at least ameliorated, by coordination devices is the tragedy of the commons. O'Halloran describes this collective dilemma in the trade environment, and it as a general problem of pork-barrel politics with distributive aspects.[27] This collective action problem occurs when lawmakers logroll to enact bills with a benefit for everyone's constituency but with a net loss to the country as a whole. Not surprisingly, many of the arenas in which Congress uses framework laws are characterized by distributive politics: trade; appropriations and tax expenditures; and unfunded mandates. Collective mechanisms, together with precommitment to an overarching goal that can be enforced through internal rules (the next objective I will discuss), can help to avoid the commons tragedy. O'Halloran notes that delegation to a unitary actor is another solution to the tragedy of the commons, although Congress may not be willing to delegate broad power in such areas without enhanced oversight ability such as a framework law can provide. With regard to trade, Congress delegates broadly but uses the fast track framework to extract concessions and consultation from the

[26] See Elizabeth Garrett, *Harnessing Politics: The Dynamics of Offset Requirements in the Tax Legislative Process*, 65 U. Chi. L. Rev. 501, 556-61 (1998).
[27] See Sharyn O'Halloran, supra note 5, at 31-32.

executive branch, an approach which provides only a partial solution to the commons problem because the collective action problem can reappear during these inter-branch negotiations.

Framework laws can be a collective solution to inter-institutional tensions and problems of delegation even without the additional need to solve a commons problem. Congress often finds that it has serious institutional shortcomings compared to the President, who, as a unitary actor in charge of substantial resources, can take more decisive action and pursue more comprehensive policy. Congress must therefore devise effective coordination strategies to counter the inherent advantage of the unitary executive. 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.[28] It is also a time of frequently divided government,[29] a fact of political life which increases congressional concern that a strong executive branch will usurp its prerogatives. In addition, the party in control of Congress will want 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.

Inter-institutional tension, especially under divided government, is particularly evident in congressional delegations of power. Epstein and O'Halloran find that Congress constrains executive discretion more when delegating power to a President of a different party,[30] although for institutional and political reasons, Congress includes

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[28] See Sarah A. Binder, Stalemate: Causes and Consequences of Legislative Gridlock 51 (2003) (referring to characterizations by Sundquist and others).

[29] 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 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) and Morris Fiorina, Divided Government (1996) (arguing that coalition governments, the situation with divided government, do not necessarily lead to negative consequences). 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., Fiorina, supra, at 104 (noting that divided government may well produce "second-order" effects related to the ease of governing).

[30] David Epstein & Sharyn O'Halloran, Delegating Powers: A Transaction Cost Approach to Policy Making Under Separate Powers 162 (1999). In their study of the effect of divided government on delegations, they found that Congress delegated less frequently and provided less expansive discretion than when delegating to a copartisan. Id. at 132, Table 6.2. Epstein and O'Halloran included some aspects of

substantive and procedural constraints in laws delegating power in times of unified government as well. When lawmakers worry that the executive branch may not exercise power consistent with congressional wishes, they will try to restrain the discretion they grant through both substantive guidelines and enhanced oversight capability. For example, the history of the executive reorganization acts includes changes to the substantive directives – for example, prohibiting presidents from abolishing or creating certain department as part of a reorganization – as well as changes to the legislative veto and framework rules.[31] Framework laws can operate as constraints that require the President to consult with lawmakers as policy is developed and that can allow Congress a final say before policy is adopted – or at least make it more likely that Congress can exercise some oversight. Congressional oversight is problematic in issue areas where Congress delegates broadly; delegations of substantial discretion tend to occur with regard to issues about which Congress has little or poor information. This informational disadvantage will also hamper its ability to monitor effectively.[32] Congress understands that reality and often relies on oversight by third parties – primarily courts – to constrain the exercise of delegated power.[33]

Even though increasing congressional oversight capacities may generally be less effective than ex ante specification and use of third party monitors, legislatures may nonetheless rely in part on framework laws and other internal mechanisms in certain circumstances. Enhancing internal monitoring is particularly attractive in areas where Congress finds it difficult to specify in advance the substantive criteria that will both constrain the President's discretion and enable courts to discharge oversight consistent with congressional intent. The difficulty of setting out guidelines in delegations of executive reorganization authority was a reason, for example, the American Enterprise Institute supported changing the burden of legislative inertia so that no presidential plan

framework laws in their list of constraints, including requirements of subsequent legislative action and consultation requirements; they also measured use of the associated tool of the legislative veto.

[31] Ronald P. Seyb, *Reform as Affirmation: Jimmy Carter's Executive Branch Reorganization Effort*, 31 Pres. Studs. Q. 104, 108-09 (2001).

[32] See David Epstein & Sharyn O'Halloran, supra note 30, at 74.

[33] Id. at 117, 120. In periods of divided government, the use of most types of constraints studied by Epstein and O'Halloran increased, but the only statistically significant increase occurred with tools that strengthened the monitoring abilities of third parties, not of Congress, indicating that Congress may see third party monitoring as most effective as well. Id. at 132, Table 6.2.

could go into effect before it was approved by a joint resolution.[34] Although this proposal was not adopted, the fast track procedures in the reorganization bills that removed legislative obstacles to passing resolutions of disapproval were demanded by some in Congress before they were willing to enact sweeping delegations to the executive branch. Here, as in other areas such as the budget or war powers context, the concern is not that courts will not be able to meaningfully oversee agency action because of the lack of specific guiding principles. Instead, these are arenas where courts do not tend to become involved at all because they are issues considered to be committed to the other branches and more suitable for political than judicial resolution. Thus, although the enhanced oversight ability provided by framework laws may not be as effective as other methods of control, they may be the best option available to Congress when it believes that relatively open-textured delegation is necessary and third party monitoring unlikely.

Frameworks improve congressional oversight capabilities in various ways. Just as agencies' structure and procedures can be devised to better ensure fidelity with congressional goals, as McNollgast persuasively demonstrated,[35] framework laws can alter the structure and procedures of Congress so that lawmakers can use ex post oversight more effectively. Some of the same structural devices that McNollgast identified in the design of agencies can be seen in framework laws' design: requirements about the production and dissemination of information, rules altering interest group dynamics, and procedural changes decreasing the transaction costs of oversight and legislating. It is worth briefly discussing each of these techniques.

First, frameworks often set in place mechanisms to produce information for Congress that can play a role in larger inter-institutional battles where the vast federal bureaucracy churns out data and studies to assist presidential policymaking. In addition to establishing congressional entities to produce competing information, frameworks can require the executive branch to share its information and to consult with Congress. This allows Congress to monitor delegations and also to craft new legislation. In the trade arena, fast-track procedures have been a carrot to entice early consultation by the President with Congress and as a stick to punish a chief executive who ignores Congress

[34] American Enterprise Institute, Legislative Analyses: The Executive Reorganization Act 15 (1977).
[35] See Mathew D. McCubbins, Roger G. Noll, & Barry R. Weingast, *Administrative Procedures as an Instrument of Political Control*, 3 J. Law, Econ. & Org. 243 (1987).

and its committees. Since the 1980s, laws delegating trade promotion authority to the President and providing the possibility of favorable fast-track procedures for any implementing agreements have also included provisions that facilitate repeal of fast track if the President does not fully consult with the relevant congressional committees.[36] Because the fast track rules are internal rules of procedures, they could have been repealed at any time without "reverse fast track" provisions, but including a formal and expedited process made the threat more salient to the executive branch and highlighted congressional concerns. Again, this procedural device is not used in isolation from other tools; inter-branch negotiations to extend fast track authority often result in simultaneous enactment of the expedited congressional procedure and legislative directives that the trade agreements conform to specific substantive objectives, such as environmental standards or labor protection.[37] If the directives are ignored, Congress can refuse to use fast track to consider the President's proposal.

Second, some delegations that accompany framework laws improve fire alarm monitoring of executive branch officials by creating private sector advisory groups and requiring open hearings and published findings before the executive branch can act. In the trade context, the impetus for reverse fast track has sometimes come from groups knowledgeable about the details of an implementing agreement because of the consultation and advisory committee provisions.[38] Thus, it is not Congress alone that can use the favorable framework as a threat; powerful interest groups can threaten to use their power in the legislative branch to derail the agreement.

Finally, framework laws decrease the costs first of oversight and then of legislating in reaction to information obtained through monitoring. Frameworks can provide expedited procedures for laws overturning exercises of delegated authority (for example, the Congressional Review Act), although without the legislative veto, any resolution of disapproval requires the President's signature – unlikely in most cases – or passage by a supermajority that can override the veto. Expedited procedures can reduce various kinds of transaction costs facing legislation: they can mandate discharge of bills from

[36] For a discussion of reverse fast-track, see Sharyn O'Halloran, supra note 5, at 141-42, 148.
[37] See David Epstein & Sharyn O'Halloran, supra note 30, at 224-25.
[38] See, e.g., Harold Hongju Koh, *The Fast Track and United States Trade Policy,* 18 Brooklyn J. Int'l L. 143, 152 (1992).

committee after a short time and notwithstanding the view of the committee; they can reduce the ability to amend proposals in committee or on the floor; and they can move decision making into informal entities like task forces or budget summits where party leaders negotiate with the executive branch in relative secrecy.

D. Entrenchment and Precommitment

Outcome-oriented frameworks operate by changing the transaction costs of legislating. In some cases, they reduce political transaction costs, thereby making enacting legislation consistent with a particular outcome more likely. Fast track trade promotion authority significantly increases the chance that the President's proposal for implementing legislation will be enacted. Thus, supporters of such laws actively work to ensure that the proposals trigger the protection and expedited process provided by the framework. In other cases, frameworks increase political transaction costs for legislative proposals that undermine a particular outcome.[39] UMRA makes it harder to enact legislation that contains substantial unfunded intergovernmental mandates, and the budget process made it difficult to enact legislation that violated spending caps or reduced tax revenues. In these cases, opponents of the legislation will work to trigger the framework in order to stall proposals. Some frameworks have both kinds of provisions: the congressional budget process makes it easier to enact reconciliation bills (measured against the baseline of the normal rules of procedure), but then makes it difficult to enact certain kinds of programs through reconciliation or other vehicles.

As long as the frameworks remain in place, the objectives they promote are entrenched. The question is entrenched against change by whom? Frameworks can seek to bind four groups. First, framework laws can be precommitment devices intended to constrain the lawmakers who enacted them so that they are more likely to reach different legislative outcomes than would have been possible under regular rules. Frameworks can take certain options off the legislative table; they can change the dynamics of bargaining

[39] The possibility of affecting transaction costs in both ways has not always been appreciated. Tiefer's study of framework laws, which he terms "laws about lawmaking," focuses on how they facilitate legislating and does not also assess aspects of frameworks that erect greater hurdles to collective action. See Charles Tiefer, supra note 14.

by providing more secrecy or favoring legislative vehicles that are harder to amend; or they can make certain actions more costly in political terms and thus less likely. All these are devices identified by Elster and others as components of precommitment used by actors who fear that they will take future actions inconsistent with their current and perhaps enduring preferences.[40] Frameworks can be adopted when lawmakers worry that they will be tempted by immediate considerations to depart from a course that offers greater benefits to them and their constituents in the long run.

Although it may not be rational in many cases for a lawmaker to favor a framework that constrains her range of options in the future, precommitment is a rational response if the lawmaker fears that she – or her colleagues – will use a broader set of options irrationally. In some cases of framework legislation, lawmakers believe that they will face collective action problems in the future like prisoners' dilemmas or tragedies of the commons if defection from an important collective goal is not impeded by something more binding than regular rules. Several budget-related frameworks may be designed to combat both these collective action problems. I have already discussed the tragedy of the commons in areas of distributive policy. The prisoners' dilemma arises in budgeting when legislators believe that the public interest is best served by reduced federal spending, but they also know that in the absence of coordination and enforcement, most of their colleagues will not resist the temptation to spend. The cost of government programs is spread among millions of taxpayers, while the benefit of federal spending can be concentrated on a few who will reward their benefactors with votes and campaign contributions. So every lawmaker will be tempted to reward her constituents, justifying her departure from the collective goal on the ground that this spending program makes very little difference to the deficit, but a great deal of difference to her re-election. Knowing this, other lawmakers will also defect, not wanting their constituents to lose doubly – both by not receiving targeted benefits and by not benefiting from a lower deficit. Thus, framework laws, in addition to coordinating the behavior of various policy actors, often also include enforcement devices to counter defection from previously-agreed-to goals.

[40] See Jon Elster, *Don't Burn Your Bridge Before You Come to It: Some Ambiguities and Complexities of Precommitment*, 81 Tex. L. Rev. 1751, 1754 (2003); John Ferejohn & Lawrence Sager, *Commitment and Constitutionalism*, 81 Tex. L. Rev. 1929, 1946 (2003).

If a majority of lawmakers decide it is in their interest to defect from the goal, they can change framework laws, although at some potential political cost. In that way, frameworks are not absolutely self-binding. Unlike individuals who might be able to adopt external constraints that are truly binding – like the cords binding Ulysses to the mast or the flames burning the bridge that offers escape – collective bodies have control over the rules that purportedly bind them, so they are not really external or immutable.[41] But that does not mean that they are entirely illusory as precommitments for several reasons. First, if defections are likely to come from individual lawmakers over a series of decisions necessary to achieve the collective goal, frameworks can facilitate detection and effective punishment by the majority and therefore reduce the incentive to defect. In this case, the majority could punish the bad actor without a framework (although some frameworks produce information that increases the chance of detection), but the procedures can reduce the costs of inflicting punishment. Second, by imposing political costs, frameworks can also make defection more difficult even when a majority wants to defect.[42] For example, by making certain budgetary decisions more salient through points of order that empower one member to highlight a decision and force a separate vote, frameworks alter the costs and benefits of a decision to depart from the entrenched outcome and yield to immediate desires. These political devices can make a difference in legislative behavior. Even when budget surpluses encouraged lawmakers to defect from the budget framework put into place in balanced budget agreement of 1997, such defections were hidden in the details of omnibus appropriations laws. Apparently, legislators were somewhat concerned about political cost and thus tried to obscure their decision to eviscerate devices of fiscal discipline.

Framework laws also serve as precommitment devices when lawmakers must reconcile conflicting preferences, where one serves their short-term electoral interests and the other serves a longer-term interest likely to be under-valued by re-election motivated policy makers. Framework laws can commit lawmakers to the pursuit of objectives that promise a stream of benefits over the long term but that will require sacrifice of some interests that provide immediate, albeit less valuable, benefits. They are thus methods to

[41] See Jon Elster, supra note 40, at 1760.
[42] See D. Roderick Kiewiet & Mathew D. McCubbins, The Logic of Delegation 80 (1991).

counteract the excessive discounting of future benefits inherent in a legislature populated by re-election minded representatives.[43] Again, some of this effect is achieved by making the longer-term objective more salient when the short-term considerations come into play. The framework thus allows lawmakers to make better decisions more likely to be in their overall self-interest. In a sense, then, the framework is not binding them because they are acting rationally, but the framework affects their political calculation of the rational course of action by ensuring that all relevant benefits – even those far into the future – will be appropriately considered.

Relatedly, frameworks might work to entrench an objective for which there is a majority support in Congress at a time there is not also agreement about the way to reach the objective. By making it harder to depart from the overall goal – such as reducing the deficit or closing military bases – a framework seeks both to take an issue off the table, allowing lawmakers to focus on the next set of questions, and to block renegotiation of the end during the bargaining about the means. Often, frameworks designed to entrench for this reason will also include relatively neutral rules to shape subsequent deliberation and decision making that are adopted behind a partial veil of ignorance about whose interests will be harmed by laws achieving the outcome entrenched by the framework.

Before rational lawmakers will agree to precommitment devices that will bind them in the future – imposing constraints either to solve collective action problems or to reduce the effect of hyperbolic discounting – they must be convinced that the constraints are in their interests. Thus, such frameworks are often a response to outcry from the public when some focusing event or policy entrepreneur brings the voters' attention to a problem with long-term consequences. When the federal budget deficit reached then-record proportions in the 1980s, for example, lawmakers put into place new budget framework laws designed in part as a symbolic reaction to placate voters but also in part as a way to change the legislative environment and constrain the behavior of lawmakers in the future. Legislators are loathe to accept such constraints – which, if successful, may disserve their short-term interests relevant to re-election. Thus, such laws are passed only when the public becomes sufficiently roused that even the short term electoral landscape

[43] See Jon Elster, supra note 20, at 29-34.

may be affected.[44] They may also hope that the framework may change the political optics not only in Congress, but also in the public so that voters value longer-term benefits as well as immediate gains when they decide which candidate to support. To put this more concretely: Public outcry made the deficit salient to lawmakers who adopted a budget framework that could help achieve the goal of deficit reduction but at the price of less pork sent back home. The budget framework could also highlight for voters the long-term good that has been served by the legislative decision that reduced their benefits, and therefore they might not punish the incumbent on Election Day.

There is a second answer to the question of who is being bound by frameworks. By making it costly to change a framework and by establishing a particular status quo against which new laws are drafted, a current majority can use a framework law to entrench its preferences – at least for some time – on future majorities who may have different desires.[45] The entrenchment will not last forever, but the possibility of some influence into the future may be attractive enough to convince a majority to enact a framework law, especially when it also serves other purposes. Legislators generally find it somewhat difficult to change the status quo because change requires collective action; thus procedures tend to be sticky, remaining effective past the life of the enacting coalition. All laws have elements of this type of entrenchment because the enactment of any statute changes the status quo against which future legislators act; outcome-oriented frameworks vary the procedural status quo rather than the substantive baseline. Like self-binding precommitments, a framework may impose political costs on future majorities who wish to depart from it as long as it protects an outcome still salient to the public. If

[44] In addition, frameworks can be constructed so that they provide immediate benefits to enough lawmakers so that a majority will vote for the framework. For example, frameworks tend to empower party leaders, so lawmakers with party positions or who seek party positions may favor them. Some lawmakers serve constituencies that receive fewer of the short-term benefits and that therefore value the long-term benefits more highly. See R. Michael Alvarez & Jason L. Saving, *Deficits, Democrats, and Distributive Effects: Congressional Elections and the Pork Barrel in the 1980s*, 50 Pol. Res. Q. 809 (1997). The process of gaining majority support for frameworks, the compromises required to pass frameworks, the reactions to frameworks, and the unforeseen consequences of such compromises and the reactions are subjects for future work in this area.

[45] See Jon Elster, supra note 20, at 93. Some who study entrenchment analyze only this aspect of entrenchment, i.e., when today's majority seeks to reduce the options of tomorrow's majority. See, e.g., Eric A. Posner & Adrian Vermeule, *Legislative Entrenchment: A Reappraisal*, 111 Yale L.J. 1665 (2002) (focusing only on this type of entrenchment and defending it against attack that it is anti-democratic); Samuel Issacharoff, *The Enabling Role of Democratic Constitutionalism: Fixed Rules and Some Implications for Contested Presidential Elections*, 81 Tex. L. Rev. 1985 (2003) (noting that constitutional entrenching rules are primarily designed to bind future generations).

circumstances have changed so that voters no longer care about the outcome entrenched by a framework law, however, then ignoring or repealing it should be within the power of the current majority.

Third, by adopting a framework, the current majority may improve its own position in Congress vis-à-vis the minority that opposes the framework and its substantive goals. So frameworks can entrench this third group – the losing minority – as do all enactments, but, again, frameworks entrench through procedures and thus affect future substantive decisions in a slightly different way. For example, by passing a framework law, a current majority may be able to avoid frequent reconsideration of an issue, thereby saving transaction costs even in Congresses where they dominate and thus could win the votes. If, for example, a current majority disfavors laws that impose burdens on the states and localities without providing federal funding, it can pass a framework law that disfavors all such laws, thereby affecting with one vote all such legislation in that session of Congress and future ones. This procedural shortcut will allow the majority more time to spend on other aspects of its agenda. A framework may package decisions in ways that reduce the political costs of relatively unpopular decisions and make it difficult for a minority to force frequent salient votes on hot-button issues. Posner and Vermeule identify these qualities of entrenchment as "agenda control."[46]

Fourth, a minority block crucial to passage of a law including the framework may have demanded the framework in the hope that it will bind the current majority in subsequent related decisions.[47] For example, lawmakers nervous about the broad delegation of power to the executive branch in reorganization bills could demand an expedited process for disapproval resolutions, as well as a legislative veto to locate the ability to overturn the President's plan in an entity with preferences closer to the minority coalition's.[48] Although a minority bargaining for such a framework may realize that, absent majority support for its position when the framework is triggered, it is unlikely to

[46] Eric A Posner & Adrian Vermeule, supra note 45, at 1671.
[47] See Eric Schickler, Disjointed Pluralism: Institutional Innovation and the Development of the U.S. Congress 13-14 (2001) (noting that such concessions can shape institutional change along with other forces).
[48] See, e.g., Richard Polenberg, Reorganizing Roosevelt's Government: The Controversy Over Executive Reorganization 1936-1939 (1966) (describing support for amendments to include various formulations of a legislative veto and framework laws which ultimately resulted in a two-house legislative veto provision in the 1939 Act).

prevail in future battles, it may hope that the framework will strengthen its hand if circumstances change. Perhaps other lawmakers will change their minds once they see how the President has exercised his power, or a new Congress will be more closely aligned with the coalition's views. Expedited procedures that eliminate the ability to filibuster or allow members to bypass committees could allow the current minority to prevail with only a bare majority, rather than a supermajority, and to avoid potentially troublesome vetogates. Thus, the offer to establish a framework law as part of a law delegating authority to the executive branch may be worth enough to gain key votes of pivotal lawmakers, particularly when the margin of victory is slim. A close vote suggests that today's majority may not continue to wield power for long, and a framework allows a new majority to overcome supermajority requirements.[49]

E. Changing the Internal Balance of Power in Congress

Framework laws can alter the power dynamics within Congress, providing some groups like party leaders more power relative to committees, or vice versa. In some cases, those power shifts can be unintentional, although subsequent changes to the framework laws which occur in the new environment may be intended to consolidate the winning groups' gains (or could be a reaction by the losing group to regain some power).[50] The 1974 Budget Act's objective of coordinating congressional activity had the effect, somewhat unanticipated, of strengthening centralizing entities like congressional parties. Party leaders then used their increased power when the budget framework was amended to further augment their power vis-à-vis the appropriations and

[49] This is a different conclusion than Binder reaches with regard to when minority rights are curtailed in Congress and when they are expanded. See Sarah A. Binder, Minority Rights, Majority Rule: Partisanship and the Development of Congress (1997). Her study demonstrates that a united and strong majority tends to restrict minority rights, which includes the filibuster in the Senate, and a closely divided body is more likely to enact minority rights because the minority needs to attract fewer additional votes to enact change and cross-party coalitions seek to strengthen their position through such procedures. Her conclusions would not necessarily hold for framework laws applied to particular bills that are likely to force congressional action in the near term. In that case, a strong minority may prefer a method of reconsidering or undoing the law that eliminates some traditional protections for minority rights because it realistically can hope only to acquire a bare majority in the near future, not overwhelming power.

[50] See Eric Schickler, supra note 47, at 254-55 (describing how procedural change prompts responses from competing interests).

tax-writing committees.[51] Those committees reacted, using formal and informal means to regain and retain power. The current budget process is a product of these contending forces. A framework's effect on internal power and influence will play a role in whether the framework is enacted, modified or retained, and which legislators support the new procedure and which will oppose it.

Such power shifts are also relevant in the analysis of framework laws' objectives because some of these internal rearrangements are intentionally designed to respond to collective action problems that Congress faces with respect to monitoring the executive branch. Congress does most of its work through committees, relying on them to draft legislation and to perform most of the legislative oversight of the regulatory state. In some cases, frameworks strengthen the committees' power. Perhaps more interestingly, some frameworks transfer power over policy and oversight to the floor, and therefore largely to party entities which coordinate floor action and control the agenda. Such frameworks can reflect a distrust of the committees' ability to act as faithful agents for the body. Epstein and O'Halloran's study of delegation underscores the relationship between the design of delegated power and Congress' ability to choose among delegatees. They argue that Congress has the choice when making policy whether to empower substantive committees or to rely mainly on agencies. When a majority in Congress fears that the committee with jurisdiction has preferences that diverge significantly from the majority's, Epstein and O'Halloran argue that the legislature will delegate more power to agencies through laws that allow the executive branch substantial discretion.[52] Throughout their study of delegation, their analysis focuses on the congressional choice between committees and agencies, with some discussion of third-party oversight by courts and interest groups.[53] They do not discuss the ability of the floor to retain control over policymaking and oversight through the use of framework laws when the majority distrusts both the executive branch and the relevant committee. Drafting, enacting and applying these rules are costly for the majority, so one would

[51] See generally Elizabeth Garrett, *The Congressional Budget Process: Strengthening the Party-in-Government*, 100 Colum. L. Rev. 702 (2000); Lance T. LeLoup, The Fiscal Congress: Legislative Control of the Budget 70-71 (1980) (describing how party leaders took advantage of the budget process to increase their influence).
[52] See David Epstein & Sharyn O'Halloran, supra note 30, at 194-95.
[53] See, e.g., id. at 232.

expect such framework laws only in particularly salient areas and perhaps in areas where oversight of regulatory outcomes by third parties – such as courts – is unlikely or nonexistent. In those cases, lawmakers cannot hope that judges will rein in wayward agencies insufficiently disciplined by outlying committees, so legislators will at least consider taking the time to engage in enhanced monitoring of both delegatees through decision making on the floor. Floor action pursuant to such framework laws is coordinated by party leaders, who tend to be empowered by such procedures both by formal provisions and informal developments.

First, consider the ability of framework laws to strengthen committees. Such procedures work in much the same way as restrictive rules in the House: they protect the committee's legislative product from floor amendment or filibuster. Budget rules protect omnibus reconciliation bills from significant change on the floor, although this framework has cross-cutting effects on committee strength because it also shifts power to entities that are heavily influenced by congressional parties, such as the budget committees and budget summits. Another example of a framework that favors particular committees is fast track for trade implementation bills. At first glance, fast track appears to transfer substantial power away from the committees with jurisdiction over trade bills and to the executive branch because fast track protects the President's proposal from amendment and includes mandatory deadlines for committee and floor action. The reality of fast track, however, is that the committees play a substantial and enhanced role in shaping the executive branch's proposal. When the President wants the advantage of fast track for a particular negotiation that could qualify for the expedited procedures, he must notify the House Ways and Means and Senate Finance Committees. Either committee can deny fast track for agreements resulting from the negotiations, so this provides the legislative committees leverage at an early stage.[54] If the President and trade officials do not sufficiently consult with these committees during negotiations, the committees can initiate the reverse fast track provisions, although both houses must agree to this enforcement device. Implementing legislation that will be considered under fast track is drafted in a process that resembles the traditional committee process but actually

[54] This aspect of fast track as added in 1984 to enhance the committees' gatekeeping role. See Harold Hongju Koh, supra note 38, at 148.

provides more power than usual to the key committees. After gathering information in "nonhearings," members of the two committees consider drafts of the President's proposal and make recommendations in a process called a "nonmarkup." Differences between the committees of the two houses are resolved in a "nonconference."[55] Because these committee meetings are informal, congressional rules do not require that they be held in public. Thus, members are able to negotiate and compromise in secret, further increasing their power relative to non-committee members and interest groups that cannot monitor the proceedings.[56] The implementing bill is introduced by the President – which triggers fast track procedures protecting the bill from amendment and expediting the legislative process – only after the committees have agreed to the language. The committees and the President will take sufficient account of non-members' preferences to ensure that the bill garners majority support, but the floor will ultimately be presented with a take-it-or-leave-it vote on the bill. The floor's leverage is further decreased in the Senate because fast track eliminates the filibuster threat.

One reason the majority in Congress has been willing to adopt a system that strengthens the committees with trade jurisdiction may be that the key committees are representative of the floor median.[57] The primary committees, called "gatekeepers" in this process, are the House Ways and Means and Senate Finance Committees which have broad jurisdiction that includes numerous contending interest groups.[58] Although other committees with jurisdiction over aspects of implementing legislation are involved in the nonmarkups and nonconferences, the gatekeeping committees determine how to involve the other committees, and they coordinate the inter-branch negotiations. The Rules Committee, a committee that is representative of the majority-party's median preferences, is also involved in the reverse fast track decision in the House.

By requiring that fast track authority be periodically re-extended, Congress not only redetermines whether it wants to continue to delegate substantial trade negotiating authority to the President, the floor also has the opportunity to reassess whether it wants

[55] For a description of this process, see Sharyn O'Halloran, supra note 5, at 148-49.
[56] See John B. Gilmour, Strategic Disagreement: Stalemate in American Politics 152-54 (1995) (discussing strategic advantage of secret negotiations).
[57] See David Epstein & Sharyn O'Halloran, supra note 30, at 174, Table 7.2 and 176.
[58] See Edward A. Zelinsky, *James Madison and Public Choice at Gucci Gulch: A Procedural Defense of Tax Expenditures and Tax Institutions*, 102 Yale L.J. 1165 (1993) (discussing the advantages of these committees in terms of interest group dynamics).

to continue to empower the gatekeeping committees. Changes in fast track in 1984 reflected the majority's trust of the committees of jurisdiction because their gatekeeping functions were dramatically enhanced.[59] Adoption of reverse fast track in 1988 signaled that although Congress was willing to continue to vest substantial responsibility the committees, it also wanted a role in determining whether the executive branch's consultation failed to live up to its expectations. Disputes about extending fast track in recent years have focused not only on inter-branch relationships but have also reflected worries that the interests of those off the gatekeeping committees have been disregarded in the largely closed process.[60] Thus, refusals to extend the framework law may be products of distrust both of the President and of the committees, particularly as environmental and health issues that are related to trade are considered for inclusion in bills that take the fast track.[61]

Although congressional refusal to extend fast track reduces the power of the committees with jurisdiction, it merely returns committees to the position they occupy under normal circumstances. So they remain relatively powerful vetogates and oversight entities, although a general trend in recent Congresses has been to empower party organizations like task forces and to reduce the power of committees and their now term-limited chairs.[62] A different type of framework law rearranges power within the House or Senate to transfer influence away from the committees and to the floor, and therefore in large part to party leadership. These framework laws often require that if the committee with jurisdiction has not acted on a resolution of disapproval within a specified period of time, the resolution can be discharged. Under the CRA, if the Senate committee has not acted within twenty days, a written petition signed by thirty Senators can bring the resolution to the floor, where debate is limited. Other procedural

[59] See Harold Hongju Koh, supra note 38, at 148-50.
[60] See I.M. Destler, American Trade Politics 213, 256 (3d ed. 1995) (discussing growth of such concerns).
[61] For discussions of how these additional issues have complicated decisions about how to structure and whether to extend fast track, see Charles Tiefer, "*Alongside" the Fast Track: Environmental and Labor Issues in FTAA*, 7 Minn. J. Global Trade 329 (1998).
[62] For discussions of the role of parties in the postreform Congresses, see Gary W. Cox & Mathew D. McCubbins, Legislative Leviathan: Party Government in the House (1993); 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 (D.W. Brady & M.D. McCubbins eds., 2002). For an excellent discussion of the evidence of parties' strength in recent years, see Michael J. Malbin, *Political Parties Post-BCRA: Why the Supreme Court's Seemingly Minor Change to BCRA Could Make a Big Difference to the Law's Effect*, 3 Elec. L.J. __ (forthcoming 2004).

requirements for both houses place agenda control with respect to resolutions brought under the CRA firmly in the hands of party leadership.[63] The Line Item Veto Act mandated that the relevant House committee must discharge resolutions disapproving the President's exercise of the enhanced rescission authority in a very short period of time, and the committee could not amend the resolution which had to follow a pre-set format. LIVA also imposed automatic discharge procedures on the Senate committees, and any disapproval bill sent by the House to the Senate was sent immediately to the floor, bypassing the committee entirely. The War Powers Resolution contains mandatory reporting requirements for the committees with jurisdiction over resolutions authorizing the use of force after the President has made a particular report about his decision to introduce armed forces into hostile conditions.

The base closure process is the best example of a framework law transferring power from the committees of jurisdiction to the floor. This framework evidences distrust not just of the Armed Services committees, but also of the Department of Defense. In the decade before enactment of the base closure law, virtually no domestic military bases were closed despite the increasing need to reduce military spending after the Cold War, a need made salient by the growing budget deficits of the 1980s. Congress had long constrained the Department of Defense's discretion to close military bases, demonstrating its distrust through laws that required Defense to notify the Armed Services Committee whenever it identified a base as a candidate for closure or reduction, to prepare voluminous reports on the effects of any closure, to involve various interest groups in this process, and to provide sixty days notice before any base was closed.[64] Military bases are valuable resources for a community, and lawmakers mightily resisted decisions which could harm the economy of their districts or states.

When the legislature decided that fiscal and world conditions required substantial base closures and reductions, it used a framework as a precommitment to achieve that goal. With agreement reached only on the larger objective to close a significant number of bases, Congress then had to set up relatively neutral procedures to determine which bases would affected. Although delegation over power over the details of this decision is

[63] See Charles Tiefer, supra note 14, at 472.
[64] Section 2687 of the Military Construction Authorization Act of 1978, Pub. L. 95-82, 91 Stat. 358, 379 (1977).

one way they could have reached their objective, lawmakers did not want to vest that authority primarily in the Defense Department, which had lied to members about previous closure decisions, denied lawmakers access to information, and proposed closure plans that were perceived as politically motivated.[65]

As Epstein and O'Halloran suggest, Congress had an alternative to delegation to the executive branch. It can also delegate authority to committees; in this case, the Armed Services Committees could have produced a list of bases to close. If lawmakers were worried that members would unravel any committee compromise on the floor, the committee's bill could have been protected by restrictive rules in the House and by a framework law in the Senate to eliminate the filibuster threat and protect the proposal from amendment. But Congress also distrusted the Armed Services committee. Epstein and O'Halloran analyze House committees and measure the proportion of bills they report that receive restrictive rules and the amount of discretion delegated to the executive branch in their areas of jurisdiction. These last two measures can be seen as a way to gauge the trust the majority reposes in the committees – the more restrictive the rule, the more the trust that the committee's proposal will reflect the floor's preferences; and the more discretion that the floor demands be vested in the executive, then the less the trust it places in the committee to determine the details of policy. Although there were few laws in their sample that come from Armed Services, it is notable that this committee received no restrictive rules for its proposals, and the average discretion delegated to the executive branch was particularly high.[66] One reason for the lack of deference accorded by the floor to this committee is that its members have outlying preferences. Studies of the House Armed Services Committee show that its members are more pro-military than the House as a whole; similar results have been found with respect to the less-frequently-studied Senate Armed Services Committee.[67] Moreover, outlying

[65] See Kenneth R. Mayer, *Closing Military Bases (Finally): Solving Collective Dilemmas Through Delegation*, 20 Legis. Studs. Q. 393, 398-99 (1995).
[66] David Epstein & Sharyn O'Halloran, supra note 30, at 189 Table 7.6. See also Steven S. Smith & Christopher J. Deering, Committees in Congress 183 (1990) (finding the House and Senate Armed Services Committees to be notable exceptions to the overall pattern of proportionately less amending activity among constituency committees).
[67] See Gary W. Cox & Mathew D. McCubbins, Legislative Leviathan: Party Government in the House 74 (1993) (finding House Armed Service Committee to be consistently and frequently unrepresentative); Barry S. Rundquist & Thomas M. Carsey, Congress and Defense Spending: The Distributive Politics of Military Procurement 52-54 (2002) (summarizing studies and findings).

preferences are likely in the context of military base closures because membership on the House Armed Services Committees is associated with districts with high levels of base employment.[68] In short, this constituency committee is seen as part of a pro-military and pro-military-base iron triangle, and the floor was unwilling to trust it with the responsibility of designating bases for closure, particularly since restrictive floor rules would be necessary to prevent defection from the overall objective of reducing spending through amendments to remove certain bases from the large closure proposal.

Thus, the base closure framework reduced the power of all the untrustworthy agents: the Defense Department and the congressional committees. Congress established the independent base closure commission with a bipartisan membership appointed by both houses and the executive branch. Although the Secretary of Defense was still involved in the process because he submitted a list of bases for commission consideration, the executive branch was limited in its influence over the final recommendation because the President could only approve or disapprove the recommendation in its entirety. Congress not only reduced the power of the Armed Services Committees to make the policy decisions in the first place, but it also vastly reduced the committees' role of the primary overseer of such military decisions. The base closure law provided that the commission's recommendations, once accepted by the President, would go into effect unless blocked by a joint resolution of disapproval that presented the entire package to the floor of Congress as a take-it-or-leave-proposition. The form of the joint resolution was specified in the framework law, which also discharged the resolution automatically from committee by a certain date, allowed any member to move to consider the disapproval resolution, waived all points of order against the resolution, and eliminated the possibility of a Senate filibuster.[69] Unlike trade promotion fast track authority, the Armed Services Committees were not involved in a meaningful way in negotiating with the commission about base closures and realignments. Committee members, like any other legislator, could testify before the commission and assist constituents in presenting their cases, but they were not involved in informal or formal negotiations over specifics.

[68] Barry S. Rundquist & Thomas M. Carsey, supra note 67, at 54-55.
[69] See Pub. L. 100-526, Section 208 (1988).

This use of framework laws to change the internal dynamics of Congress and shift power from committees of jurisdiction to the floor has implications for studies of delegation and congressional organization. It suggests an additional consideration for Epstein and O'Halloran's assessment of the delegation decision as a choice between empowering committees or agencies. With the assistance of framework laws, the majority in Congress can empower unusual entities like the independent commission and also shift the power of oversight away from an outlying committee and into the hands of the floor and its leaders. DeShazo and Freeman have recently questioned the legitimacy of oversight by congressional committees that can consist of members with outlying preferences. They characterize delegation as double delegation by Congress – first to the executive branch and then to substantive committees that perform oversight.[70] Committees have competing principals: Congress as a whole, congressional parties, and constituencies with interests in laws falling within their jurisdictions.[71] When committee members follow their constituents' wishes most faithfully and when those are different from the objectives of the floor median – as appears to be the case for the Armed Services Committees, for example – the committees cannot be trusted to pursue the majority's wishes in oversight. If democratic accountability requires fidelity to the wishes of a majority of Congress, not to the preferences of an outlying committee, this possibility is disturbing.

DeShazo and Freeman do not contend that all committees divert the agency from the mission entrusted to it by Congress, but they do find that to be the case in their study of implementation of a provision in the Endangered Species Act. In their assessment of solutions to this problem of principal-agent slack between the majority and the committees, they are not optimistic that internal procedures can be adopted to weaken the authority of congressional committees.[72] This pessimism is unwarranted. Presumably, solving the problem they identify would not necessarily require a wholesale reconfiguration of committees in Congress because they do not present evidence that all oversight committees are outliers. Indeed, the evidence is to the contrary, particularly

[70] J.R. DeShazo & Jody Freeman, *The Congressional Competition to Control Delegated Power*, 81 Tex. L. Rev. 1443, 1499 (2003).
[71] See Forrest Maltzman, Competing Principals: Committees, Parties, and the Organization of Congress (1997).
[72] See J.R. DeShazo & Jody Freeman, supra note 70, at 1512.

with respect to committees with jurisdiction over issues salient to other lawmakers.[73] The possibility that framework laws can shift power with respect to a particular set of laws from committees to party leaders and the floor provides yet another check on outlying committees. Such a check may be particularly important in the Senate, where the party has fewer tools to constrain committees and centralize legislative decision making.[74] Moreover, to the extent frameworks eliminate the ability of a determined minority to block action in the Senate though a filibuster, they facilitate enactment of policy closer to the preference of the median legislator rather than the legislator pivotal to invoking cloture.

Such framework laws are not costless devices for Congress to use to control rogue committees – they take time to draft and require majority support to enact, and they will require more time when they are triggered (because the floor cannot rely on the committee to deliberate, negotiate and draft), although expedited procedures can minimize this opportunity cost. But they are a weapon, along with a host of other procedural devices currently employed by the House and Senate leadership to constrain committees and to ensure that policy outcomes are more consistent with the objectives of a majority. Depending on their design they can shift more or less power to party leaders, centralizing entities, or floor members. Most such frameworks inevitably shift power over the agenda to party leaders who manage the floor and provide coordination; frameworks that require congressional action to change policy – such as trade fast track – also empower a majority in each house which is presented with a comprehensive policy to vote up or down without the threat in the Senate of a filibuster. However, rank-and-file members are often denied the opportunity to amend the package. In that case, the real power is obtained by those who determine the details of the proposal, usually the party leaders.[75]

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[73] See Gary W. Cox & Mathew D. McCubbins, supra note 67, at 73-79; David Epstein & Sharyn O'Halloran, supra note 30, at 176; Forrest Maltzman, supra note 71, at Chapter 5.

[74] See Forrest Maltzman, supra note 71, at 139-52.

[75] Thus, Gilmour's characterization of the budget framework as empowering floor majorities is only part of the story. See John B. Gilmour, Reconcilable Differences? Congress, the Budget Process, and the Deficit 134-137 (1990). Although the budget process is floor centered relative to other legislation, it primarily strengthens party leaders who coordinate action, negotiate details, and influence the outcomes of summits. Gilmour does acknowledge the importance of parties in the budget process, but argues they have not systematically dominated the process. Party leaders and entities may not dominate the process, but they influence it greatly and certainly more than any other organized actor.

III. Conclusion

This paper lays the foundation for a more sustained study of framework laws by identifying several important examples of framework laws and describing the purposes of these laws. This article is intended to set the stage for future work identifying common characteristics of frameworks laws, detailing the conditions under which framework laws are likely to be passed, analyzing the motivations of lawmakers who draft and enact framework legislation, and describing this legislation's effect on interest group dynamics, information, deliberation, and inter- and intra-institutional relationships. The project, of which this article is the start, will allow for an assessment of framework legislation, proposals for reform, and suggestions of areas of decision making that could be improved with adoption of a procedural structure.

Table 1

Purposes of Framework Laws with Examples

Symbolism

- War Powers Resolution
- Tax Complexity Analysis

Providing Neutral Rules

- Electoral Count Act
- Budget Process (within an outcome-oriented framework since 1985)

Enabling Collective Action

- Budget Act of 1974
- Base Realignment and Closure Acts

Entrenchment

- Unfunded Mandates Reform Act
- Gramm-Rudman-Hollings Budget Act

Shifting Power Internally

- Fast Track for Trade Agreements (increasing committee power)
- Base Realignment and Closure Acts (decreasing committee power)