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Congressional Procedure and Statutory Interpretation

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Eight years ago, a seemingly uneventful Supreme Court decision, *Chevron, USA v. Natural Resources Defense Council,* prompted a watershed debate over the role of administrative agencies in ascertaining legislative intent. In *Chevron,* a unanimous Supreme Court recognized broad agency power to interpret often ambiguous statutory language, holding that "permissible" agency interpretations are controlling unless Congress has spoken to "the precise question at issue." Counterbalancing this apparent elevation of agency interpretation at the expense of judicial interpretation, however, *Chevron* made clear that judicial analysis of legislative history is wholly appropriate in determining legislative intent: "If a court, employing traditional tools of statutory consideration, ascertains that Congress had an intention on the precise question at issue, that intention is the law and must be given effect." *Chevron*'s recognition of a potentially broad judicial role likely explains the Court's unanimity. It also explains why, as Judge Patricia Wald observed in her analysis of post-*Chevron* decisionmaking, the Supreme Court still relies on legislative history in many of its statutory construction cases. *Chevron* has nonetheless caused a firestorm by suggesting that electorally accountable agencies take the lead in filling in the gaps left behind by the Congress rather than "[j]udges [who]"

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2. Id. at 843 n.9 & 11.
3. Id. at 843 n.9 (emphasis added).
are not experts in the field, and are not part of either political branch of the
Government. This incendiary rhetoric prompted more law review articles than
anyone would care to read in a lifetime and, more significantly, has led the House
and Senate Judiciary Committees to examine the *Chevron* doctrine.

The battleground over *Chevron* raises both fundamental balance-of-powers issues
and more pedestrian concerns over what, if anything, can be learned by examining
legislative history materials. The nuanced and detailed balance-of-powers debate
has thus far proven the focus of attention. The empirical debate, in contrast, often
seems like a "Yes You Can, No You Can't" shouting match. This article considers
an unexamined aspect of this empirical debate, namely, the critical role played by
the internal procedures of Congress in shaping legislative output. Our purpose is
to raise some previously unexamined issues about existing conceptualizations of
legislative intent and to relate these issues to the controversy concerning *Chevron*.
Although we raise more questions than we can answer with rigor, we believe that it
is crucial for jurists and legal scholars to better incorporate the richness and complex­
ity of the legislative process into their arguments about statutory interpretation.

In this article we argue the following: A key aspect of the *Chevron* doctrine is the
notion that courts can usually ascertain legislative intent, albeit with great difficulty.
As often is the case with positions occupying the middle ground, the *Chevron* decision
has drawn fire from two divergent sets of critics. One line of criticism (the "textual­
ist" position) holds that courts cannot ascertain legislative intent from nonstatutory
sources. The textualists argue that the legislative process is too volatile and the con­
cept of legislative intent may be meaningless, absent clear directions in statutes.
The other line of criticism (the "traditionalist" position) holds that *Chevron* actually
underestimates the ability of judges to ascertain legislative intent from nonstatutory
sources and that the *Chevron* doctrine induces courts to shirk their responsibility to
fully scrutinize the actions of administrative agencies.

This article, in contrast, argues that the "middle ground" approach of the *Chevron*
doctrine reflects very well the practical exigencies of the legislative process in Con­
gress. We base our argument on a richer notion of legislative intent than existing
commentaries about *Chevron*. Specifically, we describe how congressional proce­
dures can influence and stabilize legislative outcomes. We reject radical critiques of
nonstatutory interpretation such as that articulated by Justice Scalia. However,
we also demonstrate that the means through which congressional procedures shape
legislative outcomes vary from issue to issue and over time, depending on a wide
range of contextual factors. As a result, it is very difficult for judges to make accurate

5. 467 U.S. at 865.
7. See supra notes 17-21.
predictions about how Congress would have acted when the relevant statutory language is vague or nonexistent. In short, a greater sensitivity to the role of procedure in Congress supports the *Chevron* doctrine and points the way to a more empirically grounded conceptualization of legislative intent in other areas of the law.

We proceed in three phases. Section I is a descriptive summary of the debate over whether nonstatutory sources are useful or necessary for understanding congressional intent. The relevance of congressional procedure to this debate is underscored. In Section II, the relevance of congressional procedure to this debate is emphasized and an empirical overview is provided of perhaps the most important aspect of congressional procedure: control over the agenda. Finally, in Section III we explore the significance of our argument for the debate over *Chevron* and existing conceptualizations of legislative intent.

I. The Debate Over Legislative Intent

The "ferment" surrounding *Chevron* has placed administrative agencies squarely in the middle of an increasingly furious cross-fire over the interpretation of federal statutes.9 As noted previously, this debate has largely crystallized around the two central themes of *Chevron*: normative concerns about the constitutional balance of powers and the empirical question of what relationship legislative history actually bears to "legislative intent." Although the emergence of these two themes has resulted in a bifurcation of the debate, which has run its turbulent course in two relatively independent streams, the overall debate remains cohesive. The battle lines that have been drawn in the *Chevron* controversy have defined two distinct camps—roughly termed "textualist" and "traditionalist"—that retain their identity with regard to issues arising under each theme.

A. BALANCE OF POWERS

*Chevron* scholarship has placed inordinate emphasis on the balance-of-powers aspects of the decision. This focus can perhaps be best explained by the fact that the legal community is far more familiar and comfortable with the concepts and vocabulary underlying the balance-of-powers debate than with the concept of legislative history and the process of its production, a realm that has generally been left to the arena of political science. In any event, balance-of-powers issues played a critical role in the *Chevron* decision, and a discussion of the debate on this issue is necessary for a full understanding of the empirical issues.

The textualist position. Textualists are not troubled by *Chevron* 's apparent elevation of the agency role over the judicial role when legislative intent is unclear. Rather, this camp argues that judicial consultation of legislative history is inappropriate and leads to an imbalance of powers among the three branches of government. Although a statute is subjected to the constitutional requirements of bicameralism and presentment, the legislative history accompanying the statute is not.10 As a re-

9. See Mashaw, supra note 6.
sult, legislative history cannot be said to have the force of law in the strict constitutional sense, and judicial reference to nonstatutory sources permits Congress to exact lawmaking authority in a manner beyond that contemplated by the Constitution. Likewise, the role of the courts is to interpret the law, i.e., statutes, and not to decode the extra-legal documents comprising a statute's legislative history or to "reconstruct legislators' intentions." Therefore, exhaustive judicial use of legislative histories amounts to an abdication of the judiciary's constitutional role.

Furthermore, textualists suggest that a paramount agency role actually affirms and strengthens traditional notions of separation of powers. Claiming that "statutory interpretation must not only avoid excesses condemned by the Constitution, but should also be conducted 'in a fashion which fosters that democratic process,' " textualists argue that agencies are better suited than courts to fill in gaps left open by Congress.

The traditionalist position. Traditionalists argue that judicial consultation of legislative history is consistent with the proper balance of powers. Chevron's elevation of the agency role in statutory interpretation is viewed as an abdication of the judiciary's central responsibility to say "what the law is." Furthermore, the enlargement of executive power resulting from the displacement of judicial review by agency interpretation is a source of trouble to traditionalists. Finally, traditionalists assert that Congress does not overstep its role when it produces legislative history. The requirements of bicameralism and presentment only prevent Congress from exercising veto authority over the executive. But these constitutional considerations do not render nonstatutory sources irrelevant in determining the intent of Congress when it enacts measures pursuant to constitutional procedures.

11. In other words, Congress must express its intent through statutory language, or not at all. This formalistic argument was also used to invalidate the legislative veto in INS v. Chadha, 462 U.S. 919 (1983). If one house of Congress cannot dictate policy to the President through a resolution that has not met the requirements of bicameralism and presentment, then it may not dictate the interpretation of the law to the courts through the use of unenacted legislative history. Kenneth W. Starr, Observations About the Use of Legislative History, 1987 DUKEL J. 371, 375. See also Wald, supra note 4, at 307.


15. See Farina, supra note 5.

16. Eskridge, supra note 4, at 671-72 ("Consulting [committee reports] does not violate bicameralism or presentment any more than would consulting a dictionary."). Indeed, it has been argued that textualism increases the likelihood that substantive results will be inconsistent with the desires of the elected branches as evidenced by compliance with the commands of bicameralism and presentment. Nicholas S. Zeppos, Legislative History and the Interpretation of Statutes: Toward a Fact-Finding Model of Statutory Interpretation, 76 VA. L. REV. 1295, 1314 (1990).

Traditionalists, moreover, dispute textualists claim that judicial reliance on legislative history improperly expands legislative power. Traditionalists emphasize that legislative history is produced publicly and that the President has an opportunity to review it in determining whether or not to sign
B. LEGISLATIVE HISTORY

The key empirical differences between textualists and traditionalists regard the question of what—if anything—can be learned from an examination of legislative history. This empirical question lies at the heart of *Chevron*. If legislative history is a reliable predictor of legislative purpose, courts should be more willing and more likely to find that Congress has spoken to "the precise question at issue." Put another way: Courts, not agencies, will define statutory purpose when Congress is found not to have left a gap in its statutory scheme. In contrast, if legislative history is unreliable, courts should be more hesitant and less likely to find a specific congressional intent. Instead, courts should be more willing to validate "permissible" agency constructions of unclear legislation. Textualists and traditionalists offer fundamentally different appraisals of this empirical question.

**The textualist position.** The textualist critique of *Chevron* argues that nonstatutory sources like committee reports and agency interpretations are irrelevant in ascertaining legislative purpose.\(^\text{17}\) By allowing a reviewing court to stray from statutory language to employ "traditional tools of statutory construction" to ascertain [c]ongressional intent "on the precise question at issue,"\(^\text{18}\) *Chevron* perpetuates, rather than curtails, judicial reliance on untrustworthy sources.\(^\text{19}\) Textualists argue that legislative history presents, at best, a distorted view of the legislature's intent, and, at worst, a counterfeit description of what the legislature actually had in mind when it voted on a statute. Predicating their arguments upon empirical assumptions of legislative behavior, specifically the manner in which legislators and their staffs generate a statute's legislative history, the textualists conclude that the statutory text is the most reliable source for discerning legislative will.

Textualists suggest that legislative history is not necessarily representative of the true preferences of the legislature.\(^\text{20}\) Committee reports, the most frequently cited sources of congressional intent, are not written by the legislators themselves, but rather by their staffs.\(^\text{21}\) Compounding this lack of direct involvement is the fact that members of Congress often have only superficial familiarity with the contents of committee reports and other nonstatutory sources of information, such as floor debates.

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17. The most visible textualist is Supreme Court Justice Antonin Scalia. For Scalia's explication of his position, see Scalia, supra note 4. For assessments of Scalia, see Eskridge, supra note 4; Arthur Stock, Note, Justice Scalia's Use of Sources in Statutory and Constitutional Interpretation: How Congress Always Loses, 1990 DUKL.J. 160.


21. Justice Scalia has quoted at length from an actual exchange on the Senate floor supporting the assertion that the legislators themselves are seldom actively involved in the drafting of committee reports. See Hirshey v. Federal Energy Regulatory Comm'n, 777 F.2d 1, 8 n.1 (D.C. Cir. 1985) (Scalia, J., concurring) (quoting 128 Cong. Rec. S8659 (daily ed. July 19, 1982)). For a critique of this assertion, see Farber & Frickey, *Legislative Intent and Public Choice*, supra note 16.
and hearings. 22 Indeed, committee reports are seldom read by legislators and are never subjected to an up or down vote. Therefore, the statutory text—the only source that was subject to the immediate approval or disapproval of legislators—provides the only reliable indication of what most members intended when they voted. 23

Not only do textualists contend that legislative history is a poor reflection of legislative intent, they also argue that it can be deliberately skewed in order to influence subsequent judicial interpretation. Members of Congress frequently engineer floor debates that are not designed to persuade or inform their colleagues. Rather, these exchanges are targeted for a judicial audience, which will later examine these debates to gauge what the institution itself actually “intended” when it enacted the legislation. 24 Senate debate on major civil rights legislation in 1991 illustrates the potential for strategic manipulation of legislative history. With an eye to influencing future court action, Democrats and Republicans, during floor debate, articulated highly different interpretations of the standards regarding what constitutes “business necessity” in hiring decisions. The lawmakers eventually had to place a three-paragraph memo in the Congressional Record to serve as the “exclusive legislative history.” 25 Such inclusions in the record are relatively rare, however, and textualists argue that the strategic manipulation of legislative history typically goes unnoticed and unchallenged.

Congressional staffers, according to the textualists, are even more prone to committing this offense than are their employers. The minimal involvement of legislators in the process of drafting report language places heavy responsibility on their staffs, who actually prepare the committee reports. Because of the intense scrutiny such reports are subjected to in the courts, there is incentive for staffers to load these sources. 26 An overzealous staff member, or one susceptible to interest group influence, may find it both tempting and uncomplicated to pack the committee report with information that, if later relied upon by courts, would effectively change the meaning of the statute Congress actually enacted. 27 As Justice Scalia has argued: “What a heady feeling it must be for a young staffer, to know that

22. Hirschey, 777 F.2d at 7 (Scalia, J., concurring) ("I frankly doubt it is ever reasonable to assume that the details, as opposed to the broad outlines of purpose, set forth in a committee report come to the attention of, much less are approved by, the house which enacts the committee's bill.").
23. See Pennsylvania v. Union Gas Co., 491 U.S. 1, 29 (1989) (Scalia, J., concurring) ("[W]e find no reason to believe that any more than a handful of the Members of Congress ... (if at all) voted ... on the basis of the referenced statements in the Subcommittee, Committee, or Conference Committee Reports, or floor debates."). See also Zeppos, supra note 16, at 1310.
26. "[T]he routine deference to the detail of committee reports, and the predictable expansion in that detail which routine deference has produced, are converting a system of judicial construction into a system of committee-staff prescription." Hirschey, 777 F.2d at 8 (Scalia, J., concurring). See generally Starr, supra note 11; Zeppos, supra note 16; Melnick, supra note 4; Richard J. Pierce, Jr., Chevron and Its Aftermath: Judicial Review of Agency Interpretations of Statutory Provisions, 41 VAND. L. REV. 391 (1988).
his or her citation of obscure district court cases can transform them into the law of the land, thereafter dutifully to be observed by the Supreme Court itself,' 28

The traditionalist position. Traditionalists take issue with the textualist assertion that legislative history is fundamentally unreliable. In defending the reliability of legislative history, traditionalists have challenged the empirical assumptions supporting reliance on the text alone. According to advocates of legislative history, the textualist view of the legislative process is 'jaundiced' and overly pessimistic, reflecting a narrow view of "legislators at their worst." 29

Traditionalists argue that members of Congress not only are familiar with the information in committee reports, but in many cases are familiar with little else. 30 Anecdotes about congressmen who fail to read the statutes they vote on are legion. Legislators look to committee reports for voting cues and rely on the information they provide. As a result, traditionalists maintain that committee reports are a credible source for determining what the intent of Congress was when the bill was enacted. 31

Traditionalists also present an array of arguments that the legislative process does not result in active misrepresentation of congressional intent. They accuse Scalia and others of ascribing too much power, too few constraints, and too few scruples to congressional staffers and interest groups. Staffers are not potential renegades pursuing their own personal agendas in the legislative process; substantial evidence demonstrates that they generally adhere to the preferences of their elected employers. 32

And even if the textualist position is correct and the staff system is susceptible to abuse, then this is simply an argument for cautious and thoughtful use of nonstatutory sources rather than a basis for entirely disregarding legislative history. 33 Indeed, the delegation of power to congressional staff is part of a larger system that is supported by the elected representatives and thus reflects the way Congress prefers to operate. 34 And because committee reports are central to the

33. See George A. Costello, Average Voting Members and Other "Benign Fictions": The Relative Reliability of Committee Reports, Floor Debates, and Other Sources of Legislative History, 1990 Duke L.J. 39, 67; Farber & Frickey, Legislative Intent Of Public Choice, supra note 16, at 425-37. Traditionalists also note that staff members are as closely involved with the drafting of the statutory text as they are with the drafting of committee reports. Zeppos, supra note 16, at 1312-13.
35. Farber & Frickey, Law and Public Choice, supra note 16, at 98-99 ("What [the role of committee staff] should be is, however, surely the primary concern of the legislative rather than the judicial branch."); Costello, supra note 33, at 65-67; Wald, supra note 4, at 306-07 ("[T]o disregard committee reports as indicators of congressional understanding . . . is to second-guess Congress' chosen form of organization and delegation of authority, and to doubt its ability to oversee its own constitutional functions effectively.")
judicial interpretation of statutes, there is little possibility that interest groups or staff would be able to egregiously slant reports without the knowledge of other factions, who have strong incentives to monitor the drafting process.  

Traditionalists not only defend the value of nonstatutory sources as a general proposition, but also argue that consultation of legislative history can prove useful in virtually all circumstances, including those where it is not directly on point. When a statute and its legislative history fail to confront an issue that confounds subsequent interpreters, a judge should choose the interpretation that (1) most likely reflects the wishes of the enacting legislature and (2) is the most beneficial reading of the statute. Under this approach to statutory interpretation, "[t]he characterization of legislative purpose is an act of creation rather than discovery."

In other words, the court "must take into account both the odds of being right and the consequences of being wrong." Id. at 103. For similar formulations, see Eskridge & Frickey, supra note 13, at 329-30 (1990) ("Where Congress has written a statute broadly or where its concerns do not allow us to reconstruct its imagined intent, courts should simply seek the most reasonable interpretation."). Posner, supra note 32, at 287 ("[A] judge must imagine as best he can how the legislators who enacted the statute would have wanted it applied to situations they did not foresee.").

In short, the dominant contenders in the contemporary debate over statutory interpretation can be considered extremes on a continuum. Textualists reject both the credibility and the legitimacy of legislative history in illuminating legislative intent. Some even question the fundamental concept of a coherent legislative intent. Traditionalists, in contrast, not only defend the value of nonstatutory sources as a general proposition, but also argue that consultation of legislative history can prove useful in virtually all circumstances, including those where it is not directly on point. The Chevron formulation lies somewhat close to the center of this continuum. Although recognizing that nonstatutory sources can facilitate an interpreter's task, Chevron refuses to credit nongermane legislative history with persuasive force.

36. Costello, supra note 33, at 67 ("The possibility of appending individual views to a committee report serves both as leverage and as a safety valve against committee reports that do not represent accurately the views of a committee majority.").
37. EKIRCDG & FRICKEY, LAW AND PUBLIC CHOICE, supra note 16, at 102-06. In other words, the court "must take into account both the odds of being right and the consequences of being wrong." Id. at 103. For similar formulations, see Eskridge & Frickey, supra note 13, at 329-30 (1990) ("Where Congress has written a statute broadly or where its concerns do not allow us to reconstruct its imagined intent, courts should simply seek the most reasonable interpretation."). Posner, supra note 32, at 287 ("[A] judge must imagine as best he can how the legislators who enacted the statute would have wanted it applied to situations they did not foresee.").
38. Sunstein, supra note 14, at 427.
Therefore, each side in the debate has sought not only to undermine the contentions of its counterpart, but also to argue convincingly that the current state of the law should be modified to reflect its own positions. One relevant issue yet to be considered is how the internal procedures of Congress make legislative history more or less predictable. For example, if party and committee leaders wield enough power to consistently control legislative outcomes, leadership-produced legislative history—as traditionalists argue—would be an accurate measure of legislative purpose. In contrast, if the significance of leadership preferences are not predictable, leadership-produced legislative history—as textualists claim—would be indeterminate. The following section will examine a central aspect of procedure in Congress—agenda control—so that we can better evaluate the reliability of non-statutory sources as indicators of legislative intent.

II. Agenda Control and Legislative Intent

By all accounts, the internal procedures of Congress are relevant. For purposes of analysis, procedure is defined in this study as any formal rule or precedent that sets jurisdiction, the distribution of legislative resources, the range of admissible policy alternatives, the order of consideration, or the manner in which policy disagreements are to be resolved. Agenda prerogatives, which pertain to the range of admissible alternatives and the order of consideration, are perhaps the most significant subset of congressional procedure.

Congressional procedure is crucial because it influences the processes through which the policy preferences of individual legislators are aggregated into policy outcomes. Consider the reauthorization of the Clean Air Act, one of the most volatile items on the congressional agenda during the 1980s. Efforts to reauthorize the program failed on the floor of the Senate in 1988, but legislation was passed in the Senate in 1990. In this case, as in many others, the outcome was determined by who controlled the agenda. The two key players in the Senate were George Mitchell (Dem.-Maine) and Robert Byrd (Dem.-West Virginia), with Mitchell a vocal advocate of tighter acid rain controls and Byrd a staunch opponent because of the likely impact on West Virginia's coal-intensive economy. During the 100th Congress (1987-88), Mitchell chaired the subcommittee on jurisdiction and led the fight to reauthorize the Clean Air Act. But Byrd, as majority leader, controlled scheduling on the Senate floor, and he was successful in blocking final passage of the reauthorization in 1988. At the beginning of the 101st Congress, however, Byrd stepped aside as majority leader—and was replaced by George Mitchell. The Clean Air Act was successfully reauthorized within two years.

As this example suggests, congressional procedure is seldom neutral. The inter-
nal structure of Congress affects the substance of policy outcomes because it creates an uneven distribution of power in the institution—partisan leaders and committee chairs, for example, often have distinct policy-making advantages over their rank-and-file colleagues. To a certain extent, the rules and institutions of the Congress simply embody and promote a division of labor that enhances the institution's efficiency. But they also reflect trading off between different legislators, or what has been termed an "institutionalized logroll: legislators have disproportionate resources in the issue areas they care the most about.

It should be emphasized, however, that congressional structure is fundamentally majoritarian, even if its policy implications are seldom neutral. Under Article I, § 5 of the U.S. Constitution, the members of the House and Senate organize their respective chambers, and the rules, procedures, and institutions of each chamber can be altered by a majority of the relevant membership. Consequently, congressional structures can be conceptualized as "congealed preferences." And policy outcomes in Congress depend on both issue-specific preferences about policy and these less transitory preferences about structure.

Although the importance of procedural rules in Congress is widely recognized, the implications for statutory interpretation have not been adequately addressed. Judges and legislators instead tend to focus on preferences—on the policy views of key legislators. However, because the language in a statute is determined by the views of legislators combined with the procedures through which such views are aggregated, the concept of legislative intent should embrace both preferences and procedures. Individual policy preferences are relatively meaningless until they are combined within the legislative process and translated into law, and the internal institutional arrangements that Congress has developed structure this process of preference aggregation. Therefore, even if it is possible to discern subjective individual preferences about unresolved policy issues, this is not enough to predict how Congress as a whole would have settled the question. In order to reconstruct "legislative intent," a determination must be made of how the internal mechanisms of Congress would have channeled those preferences into a statutory format.

The political science literature on congressional procedure is massive, but it is apparent that the linkages between policy preferences, procedural arrangements, and legislative outcomes can be subtle and dynamic, often evading efforts at precise quantification and prediction. Many related factors influence how individual pref-

48. See Krehbiel, supra note 46.
ferences are assembled into laws. As a result, judicial interpreters cannot rely on a general principle that will enable them to decipher reliably the "intent" of the legislature with respect to unresolved issues. The internal structural characteristics of Congress can confound judicial attempts to reconstruct legislative intent when statutes are ambiguous or incomplete.

A complete accounting of the implications of congressional procedure for judicial efforts at discerning legislative intent is well beyond the scope of a single article. As a result, in this section we focus on a central aspect of congressional procedure—the distribution of agenda prerogatives, although most of our arguments can be extended to congressional structure in general.

A. Agenda Prerogatives

As mentioned, "agenda control" refers to actions that influence which policy alternatives are considered and the order in which they are considered. Manipulation of the agenda can directly influence policy outcomes, but, as is the case more generally with political power in Congress, the power to manipulate the institution's agenda is remarkably decentralized. No single individual or institution in Congress possesses the power to control the agenda at every stage in the legislative process. And because each chamber of Congress sets its own rules, the distribution of agenda prerogatives in each is different.

Even a cursory overview of lawmaking in Congress demonstrates the extent to which agenda prerogatives are widely dispersed. The first stage in the cycle of legislation is referral. In the House of Representatives, the Parliamentarian, working with the Speaker, refers newly introduced legislation to one or more issuespecific committees, and party leaders perform the same function in the Senate. Depending on the jurisdictional boundaries of the committees and the subject of the proposed legislation, a bill may be referred to a single committee, to two or more committees simultaneously, or to two or more committees sequentially. Referral decisions in the Senate are more informal, with party leaders playing key roles. But in both chambers of Congress, the decision about how, where, and when to refer legislation (a form of agenda control) is highly significant because most legislative work occurs in committee, and the action a committee takes on a bill often determines its ultimate fate.

The nature of the committee referral process decentralizes the agenda-setting function in Congress. Standing committees in the House and Senate have fixed jurisdictions, which are formally denoted in House Rule X and Senate Rule XXV. Jurisdictional alignments in the House and Senate are similar, but not identical.

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50. Although legislation is usually referred to standing committees of the House, on particularly complex items the Speaker has the power to form an ad hoc committee constituted for that legislation alone.

51. For example, the 1964 Civil Rights Act was referred to the House Judiciary Committee and the Senate Commerce Committee. Why the difference? At the time, the chairs of the House Commerce and Senate Judiciary Committees were staunch opponents of civil rights, and, as a result, moving the legislation through these alternate panels kept it from being killed in committee and improved the chances of passing the legislation. See Walter J. Oleszek, CONGRESSIONAL PROCEDURES AND THE POLICY PROCESS 86-87 (3d ed. 1989).
and they correspond roughly to the organization of the various executive departments. However, major issues often fall within the jurisdiction of more than one panel—thus the need for the referral of legislation to multiple committees.

There are countless examples of overlapping committee jurisdictions in Congress. Immigration legislation, for instance, although primarily within the jurisdiction of the House Judiciary Committee, has also been referred to the Committees on Agriculture and Education and Labor. Twelve House committees have some jurisdiction over environmental issues. During the 1930s, the issue of nuclear waste disposal was claimed by the House Committees on Energy and Commerce, Science and Technology, and Interior and Insular Affairs, among others. In the Senate, legislation to authorize the Superfund program has been considered by the Committees on Environment and Public Works, Finance, and Judiciary. Trade issues are rife with jurisdictional overlaps. During the 100th Congress, for example, fourteen House committees and nine Senate committees shared jurisdiction over one major trade bill.

Jurisdictional overlaps and the mounting complexity of many pressing policy concerns have resulted in a steady increase in bills referred to more than one committee of the House and Senate. Indeed, the percentage of multiple referrals in the House has grown from just 6 percent in the 94th Congress to 14 percent in the 99th Congress. With major legislation, the incidence of multiple referral is even higher. Since the congressional agenda is largely set in committee, on many measures jurisdictional overlaps and the practice of multiple referral combine to ensure that a wide range of actors in both chambers can exert agenda control at this crucial stage of the legislative process.

After referral to the relevant committee or committees, initial legislative action begins with the scheduling of hearings and, later, with bill writing sessions (called markups) where amendments are introduced and voted on. Agenda control is important at this stage in the process because a bill that does not receive a place on the committee’s agenda is a bill that probably will not pass. For instance, a committee leader who dislikes a measure may refuse to schedule it for committee consideration. Alternatively, he may postpone consideration indefinitely in order to preclude the bill’s passage or may delay scheduling until valuable concessions regarding the bill’s substantive content are received. Particularly toward the end of a session, even short delays can mean defeat for a piece of legislation. Once a

53. Id. at 72.
55. See id. at 213.
58. See also OLEZEK, supra note 51; C. LAWRENCE EVANS, LEADERSHIP IN COMMITTEE (1991).
bill is placed before the panel, the chairman controls the gavel, and thus retains significant authority over the pace, order, and content of legislative business. For example, observers of the House Energy and Commerce Committee regularly comment on how quickly Chairman John Dingell’s (Dem.-Michigan) gavel can fall when he opposes an amendment or a procedural motion. 58

As with referral powers, the distribution of agenda prerogatives in committees varies between chambers. In the House of Representatives, initial committee action tends to occur in an issue-specific subcommittee, while the smaller and more collegial Senate finds it more practical to manage business in full committee. 59 As a result, legislation in the House must pass through two levels of agenda control procedures—one in subcommittee and one in the full committee—while most critical decisions in Senate committees are made at the full committee level.

Although full committee and subcommittee chairmen have extensive power to control the flow of business in their panels, other committee members can avail themselves of procedures to dislodge an item that has been stalled by the leadership. There can be significant practical consequences and political costs to overruling a committee leader who, after all, has the power to make future decisions that may undermine a dissident member’s interests and give him cause to regret his rebellion. Such mechanisms are, therefore, rarely used, but they remain available for high salience issues and their potential impact cannot be overlooked.

Following completion of committee action, legislation moves to the floor, where it is also subject to the perils of the agenda. The impact of agenda control on floor deliberations is more profound in the House than the Senate. For measures in the House that cannot be assigned to the Consent Calendar or passed quickly by suspension of the rules, 60 the House Rules Committee provides a resolution, or “rule,” that sets the terms of floor consideration. 61 Although the contents of these resolutions vary from bill to bill, they typically control the time-limits on debate, the distribution of floor time to individual members, the number and types of amendments that will be allowed, the order in which these amendments will be considered, and the quantity of floor time allocated to each amendment. Nongermane amendments usually are not permitted.

Although the Rules Committee has formal control over the agenda for floor deliberations in the House, the Speaker exerts considerable influence over what gets scheduled and the terms of debate. Since 1975, the Speaker has nominated
all majority party members of the Rules Committee, subject to approval by the Democratic Caucus. As a result, the panel is often described as an "arm of the leadership" and usually promotes the Speaker's interests. House "rules" inevitably affect the nature of the substantive outcomes of the legislative process. For example, rules can be tailored to the specific purpose of getting a measure bogged down in unpopular amendments or can streamline the process of consideration so that passage of the bill is expedited.

Relative to the House floor, agenda prerogatives on the floor of the Senate are widely dispersed. There is no formal analog to the House Rules Committee in the Senate. Most Senate business is conducted by unanimous consent because the formal rules of the institution are relatively cumbersome. When legislation is brought to the Senate floor, a member, typically the majority leader, stands up on the floor and requests action on an item by unanimous consent. If no senator objects, the motion carries. As a result, individual senators have enormous influence over the pace and direction of floor action in their institution. By systematically objecting to requests for unanimous consent, a senator can often block items he or she opposes. Indeed, a member can bring the institution to a grinding halt.

These procedural prerogatives of individual senators are rooted in the filibuster, which is the central weapon in a senator's procedural arsenal. By extending debate, introducing scores of amendments, or repeatedly requesting quorum calls and roll call votes, a senator can block floor action on a piece of legislation. Of course, a filibuster can be curtailed by invoking cloture, but this requires 60 votes, as well as considerable time and effort. As a result, particularly toward the end of a session or as a recess approaches, the mere threat of a filibuster can be sufficient to derail a measure.

In summary, the potential for agenda control prerogatives to play a central and often determinative role is manifest at all stages of the legislative process in both the House and Senate. However, the exact manner in which these prerogatives influence the legislative process varies by chamber and stage of the process, and

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63. Bach & Smith, supra note 61.
64. Unlike the House Rules Committee, the Senate Committee on Rules and Administration is essentially an administrative panel, with jurisdiction over matters such as committee funding and campaign finance reform. The Senate Rules Committee is not responsible for structuring floor debate.
66. The collegial nature of the Senate deters individual members from asserting this prerogative, i.e., "go along to get along." However, the infrequency with which the prerogative is exercised does not change the fact that it is available and is used.
generalization is difficult. The power to manipulate the agenda is dispersed, particularly in the Senate. Furthermore, many opportunities exist for legislators to counter agenda control efforts by their colleagues in and out of the leadership. The following two cases illustrate the problems presented by the nature of agenda prerogatives in Congress for those seeking to reconstruct legislative intent.

B. CASE STUDIES

Agenda Control in Committee. The first case study pertains to the potential importance of agenda prerogatives during the committee stage of the congressional process. Certain aspects of agenda control in committee were apparent during Orrin Hatch’s (Repub.-Utah) chairmanship of the Senate Committee on Labor and Human Resources from 1981 to 1987. Hatch led a partisan majority of nine Republicans to seven Democrats. But the Republican majority included two senators—Lowell Weicker (Repub.-Connecticut) and Robert Stafford (Repub.-Vermont)—whose policy preferences often resembled those of committee Democrats. As a result, liberals had more votes on the committee than did conservatives like Hatch. Hatch’s strategic response as chairman was to restrict the committee’s agenda and exclude what he feared would be an avalanche of liberal initiatives—initiatives the chairman otherwise would have been unable to defeat because he lacked a majority of the votes. As Hatch later recalled, “[t]here was constant pressure from the Democrats on the agenda, and they were very good at it to give them credit. . . . But I controlled the agenda. As long as the Democrats wanted something, they had to be accommodating.”

Democrat Howard Metzenbaum (Dem.-Ohio), also a committee member, echoed Hatch’s comments: “The chairman of the committee didn’t have the votes to control his own committee. . . . Senator Hatch’s style was to use the schedule—not putting items on the calendar, not pushing things.”

Chairman Hatch’s agenda prerogatives often had a significant impact on the content of committee outcomes, but evaluating the magnitude of this impact requires a subtle understanding of committee politics because it varied from issue to issue depending on the distribution of preferences in committee.

First, there were certain issues considered in the Labor Committee during the Hatch chairmanship in which existing law fell between the preferences of Hatch and the two pivotal voters—Hatch favored moving policy to the right, while Stafford and Weicker favored more liberal alternatives to the status quo. The distribution of preferences on many labor, health, and civil rights issues resembled this configuration. Under these conditions the passage of conservative bills was not possible—the only policy changes that could muster majority support were movements away from Hatch’s preferences toward the views of committee liberals. With respect to these issues, Hatch employed the rational response of closing the gates and denying access to the full committee agenda. For example, in 1985,

68. The material in this section is adopted from Evans, supra note 57.
69. Id. at 67-68.
70. Id. at 68.
Hatch resisted scheduling an initiative sponsored by ranking Democrat Edward Kennedy (Dem.-Massachusetts) which would have extended the health insurance coverage of laid-off employees, widows, and divorcees. Hatch realized that liberals in the Labor Committee might have the votes necessary to report the legislation to the full Senate and he favored no action on the Kennedy measure.\textsuperscript{71}

In contrast, consider the case in which the preferences of Hatch and the two pivotal voters supported positions to the left of existing law, with Stafford and Weicker favoring more liberal alternatives than did the chairman. Legislation considered by Weicker’s Subcommittee on the Handicapped often fell into this category. In this instance, the chairman’s response was to threaten to block a proposal if it was not modified before full committee markup. Although Hatch wanted legislation, simply opening the gate to these bills would have resulted in departures from existing law that were more radical than he favored. In these instances, the result often was a compromise amendment acceptable to the chairman. For example, in 1985, Lowell Weicker introduced legislation authorizing $10 million to support advocacy programs for residents of mental institutions. Hatch wanted to pass a bill aiding the institutionalized mentally ill, but he favored greater reliance on existing state programs. As a result, Hatch refused to schedule Weicker’s bill for full committee consideration until certain changes were made in the draft. After some procedural sparring, a Hatch-Weicker compromise was achieved and the legislation was placed on the Labor Committee agenda and reported to the full Senate without opposition.\textsuperscript{72}

The Senate Labor Committee during the Hatch chairmanship demonstrates why agenda practices can confound efforts to predict legislative intent on unconsidered issues. Clearly, we could not have gauged the “intent” of the Labor Committee when its legislation was ambiguous by examining member preferences alone. The policy views of Stafford and Weicker best reflected the mood of panel members, but, as we have seen, committee policy typically diverged from their preferences toward those of Orrin Hatch because of the chairman’s strategic management of the agenda.

But the manner in which Hatch’s agenda prerogatives could have affected the outcome of an unconsidered policy issue is not at all certain. This is particularly so for issues where the preferences of Hatch and the pivotal voters were to the left of existing law (e.g., Weicker’s legislation to protect the mentally ill). Under such conditions, the outcome of committee deliberations will depend in large part on the bargaining advantages and skills of the relevant legislators. And, as discussed above, committee members can always force an item onto the agenda or offer legislation that has been successfully blocked in committee as an amendment to some other measure on the Senate floor. Circumstances existed in which committee liberals had both the incentive and the leverage necessary to challenge Hatch’s control and force their own preferences into legislation. However, it can be very

\textsuperscript{71} In the fall of 1985, however, Kennedy was able to partially circumvent Hatch’s agenda prerogatives by attaching the legislation to the Labor Committee’s reconciliation bill. See id. at 167-68.

\textsuperscript{72} Id. at 45-47.
difficult to predict the variables that determine whether these and other similar conditions would have prevailed: factors such as the intensity of support for a liberal proposal in committee, the degree of support on the floor, the content of both liberal and conservative alternatives, and the extent of contentment with the status quo. Each of these factors played a key role in determining whether committee liberals would have been willing to risk a frontal challenge to Hatch, and whether such a challenge could have been successfully waged in committee or on the floor. With respect to an issue that never actually confronted committee members, we cannot predict with precision how those variables ultimately would have played out. Therefore, it is problematic to reconstruct either the manner in which leadership would have influenced the outcome, or the outcome itself.

Agenda Control on the Floor. Our second case study pertains to the role of agenda prerogatives during floor deliberations. In 1985 the Senate considered a bill to reauthorize the Clean Water Act. Much of the conflict surrounding the reauthorization focused on a sewage treatment grant program that provided $2.4 billion in federal money to local governments each year. As is often the case in Congress, conflict about the sewage treatment grant program focused on the issue of how to allocate these funds to the various states.

In the Senate the reauthorization bill was referred to the Environment and Public Works Committee where the critical players were Robert Stafford of Vermont (chairman), John Chafee (Repub.-Rhode Island) (subcommittee chair), George Mitchell of Maine (subcommittee ranking minority member), and Lloyd Bentsen (Dem.-Texas) (ranking minority member of the full panel). Formal action began when Bentsen expressed deep concerns about the new allocation formula. Texas had not done well under the old allotment, and he wanted to increase funding for his constituents.

The political task facing committee leaders was to devise a formula that would benefit Texas, but also increase funding for a majority of senators in committee and in the full chamber so that the allotment formula as a whole could be passed. Although staff to Stafford, Bentsen, Chafee, and Mitchell eventually settled on a formula that met the necessary political criteria, a number of large industrial states were made worse off by the new numbers.

Two of the losers, New York and Minnesota, were represented on the Environment and Public Works panel, and dissention broke out during a committee meeting, with Daniel Patrick Moynihan (Dem.-New York) and Dave Durenberger (Rep.-Minnesota) voicing opposition. The committee leadership had the votes in committee, however, and the legislation containing the new allocation formula was reported by a 13-to-2 margin, with Moynihan and Durenberger casting the only nays. Unable to exert their will in the Environment and Public Works Committee, the Durenberger-Moynihan forces moved their battle to the full Senate.

73. The following description of Senate consideration of the sewage treatment grant program during 1985 is drawn from in-depth interviews with committee staff members who participated in the process. For a discussion of these interviews, see EVANS, supra note 57.
The sewage treatment grant issue illustrates very well the importance of agenda prerogatives on the Senate floor because there existed an infinite number of potential allotment formulas, and for each and every one it was technically feasible to devise an alternative that would improve the relative position of a majority of states. Since members tended to vote for the alternative that granted their constituents the largest portion of the allotment formula pie, there existed no formula that could not be defeated by some alternative.

After committee action on the bill, for example, Durenberger and Moynihan responded to the committee-passed formula by devising an amendment that would have increased funding for a majority of states relative to the committee bill. However, compared to the formula in what was then existing law, a majority of states did better under the status quo than under the proposed Durenberger-Moynihan amendment. Thus, if matters had come to a vote, it was expected that (1) the committee formula would have defeated current law; (2) the Durenberger-Moynihan amendment would have defeated the committee formula; and (3) current law would have defeated the Durenberger-Moynihan amendment. This is an example of the "paradox of voting," or "Arrow's Paradox." As a result of such dynamics, the order in which the alternatives were considered would determine the outcome. Control over the agenda was critical. As one committee aide involved in the issue recalled,

If you can manipulate the parliamentary situation so that a particular order for considering amendments is the choice presented, then you can just continue to roll. If you have the analytic capacity to do it, if you know what the factors are, then you know what the political consequences are. It's also possible to do it in such a cynical way that you can destroy someone who opposes you—in a way that just wipes out a state. We didn't reach that ground, but we had formulas available that could have done that.

Party leaders in the Senate often defer to the relevant committee leaders on scheduling. As a result, the committee leaders on Environment and Public Works expected to have more say than Durenberger or Moynihan about the order of consideration of the various allotment formulas on the Senate floor. However, as mentioned above, procedural prerogatives in the Senate are remarkably dispersed. Consequentially, the Durenberger-Moynihan forces were able to respond by threatening to filibuster the entire reauthorization unless their interests in the funding criteria were somehow accommodated.

The sewage treatment grant program was just a small part of the legislation, and there was considerable support in the Senate for reauthorizing the Clean Water Act. As a result, a meeting was held between the key senators and a compromise allotment formula was devised, which their passed the Senate. The final agreement gave states like New York and Minnesota more money than they would have achieved under the original committee bill, but less than they would have received under the Durenberger-Moynihan substitute.

74. For useful introduction to the paradox of voting and the importance of agenda control, see William H. Riker, Liberalism Against Populism (1982) and FERE & Frickey Law and Public Choice, supra note 16.

75. Interview with C. L. Evans.
Clearly, control over the agenda was crucial to the outcome of the allotment formula controversy. And because procedural prerogatives are so dispersed in the Senate, the committee leaders, party leaders, and Durenberger and Moynihan all influenced the process of floor consideration to a certain extent. However, the final outcome was not preordained. It turned on many factors, including the degree of support for cloture, the potential willingness of committee leaders to risk the entire bill to retain their formula, the intensity of the opposition from Durenberger and Moynihan, and the salience of the allotment formula issue to other senators. What if our task was to determine how the Senate would have voted on another formula entirely—a formula that was not even considered? Could we reliably ascertain whether the tools of agenda control would have been sufficient for the committee leaders' preferences to defeat such an unconsidered formula? Could we reconstruct how the forces in support of such a formula would have used their own agenda resources, and whether that strategy would have been successful?

The answers to these questions are unclear. The strategic calculations that govern the degree to which agenda control prerogatives are capable of influencing outcomes and the manner in which they do affect those outcomes vary significantly from issue to issue. When an entirely new policy alternative is put into the mix, not only do subjective policy preferences change, but also the way those preferences are assembled into law. As a result, the predicted outcome may bear little or no resemblance to the scenario that Congress may have actually followed.

Thus, the agenda control structures that Congress has instituted are directly and fundamentally relevant to the issue of legislative intent. These mechanisms not only determine how subjective preferences are translated into policy, but also have the potential to result in outcomes that cannot be explained by preferences alone. However, as suggested by the case studies on the Senate Labor and Human Resources Committee and the Clean Water Act reauthorization, a court cannot be expected to predict with much precision the interplay of agenda prerogatives with policy alternatives that were not directly considered by Congress. Each of these examples reveals that agenda prerogatives are diffuse, and that uncertainty accompanies this diffusion. The amount of influence that a coalition can exert over outcomes is contingent on a wide array of factors, each of which varies in different ways with respect to different issues. Therefore, the task of reconstructing how Congress would have responded to an unconsidered issue is always difficult and often impossible.

III. Conclusion

Legislative intent cannot be understood by reference to policy preferences alone. Rather, the fundamentally majoritarian system that converts those preferences into law is an integral part of the concept of legislative intent. Indeed, because these internal structures are capable of engineering a result that is not necessarily
consistent with subjective member preferences, any search for legislative intent that disregards those structures does so at the risk of misinterpretation.

In the context of “imaginative reconstruction,” i.e., the effort to predict how Congress would have resolved an issue it did not actually consider, the necessity of considering congressional structure results in turmoil and confusion. Although institutional arrangements exert a demonstrable influence over policy outcomes, they do so in ways that are not easily predictable. These arrangements create a diffuse yet irregular distribution of power in the Congress and, as a result, how this power is exercised varies significantly. Therefore, it is not clear that a judicial or administrative interpreter can reliably reconstruct legislative intent with respect to unresolved issues. Also, absent compelling evidence that Congress intended a particular outcome, statutory interpretation can be largely a matter of guess work.

While these assertions may not at first glance seem to say much about Chevron and the surrounding debate over statutory interpretation, their implications are profound. As the examples in this article have demonstrated, congressional procedures play a crucial role in determining outcomes in the legislative process. Therefore, their relevance to the issue of legislative intent, and the prediction of legislative outcomes, is beyond cavil. The fact that the precise effect of these procedures cannot be gauged means that the search for legislative intent on issues not placed before the legislature can be akin to a wild goose chase. In this respect, Chevron strikes a comfortable balance between what we can predict and what we cannot—a balance that is confirmed by the realities of the legislative process.

The question remains whether courts or agencies are better suited to fill in the gaps left behind by Congress. The balance of powers side of the Chevron debate is largely about this question. Chevron supporters argue that executive agencies are charged with implementing statutes, and they work closely with Congress in tailoring statutory schemes. The executive branch is therefore in a better position than the courts to answer questions to which Congress has not provided clear textual answers. Furthermore, statutory ambiguities that require judicial recourse to nonstatutory sources are essentially policy matters, which are in the purview of the agencies, rather than the courts. Finally, if Congress is dissatisfied with agency interpretations, it may enact more specific and precise statutes.

Chevron opponents claim that legislative ambiguity or incompleteness should not be equated with an affirmative act of delegation to an agency. Because there is

76. See Colin S. Diver, Statutory Interpretation in the Administrative State, 133 U. Pa. L. Rev. 549, 574-75 (1985); Pierce, supra note 26, at 307; Richard Posner, Economics, Politics, and the Reading of Statutes and the Constitution, 49 U. Chi. L. Rev. 263, 272 (1982); Kenneth W. Starr, Judicial Review in the Post-Chevron Era, 3 Yale J. on Reg. 283, 307-10 (1986). But see Scalia, infra note 4, at 514 (“If it is, as we have always believed, the constitutional duty of the court to say what the law is, we must search for something beyond relative competence as a basis for ignoring that principle when agency action is at issue.”).

77. Diver, supra note 76, at 583-84; Pierce, supra note 26, at 307-08 Starr, supra note 76, at 306. But see Scalia, supra note 4, at 515.

78. “Chevron offers no evidence to support its conclusion that silence or unclarity in a regulatory statute typically represents Congress’s deliberate delegation of meaning elaboration power to the agency.” Farina, supra note 6 at 470.
a wide variety of explanations for legislative ambiguity, and because statutes are often deliberately vague, it is inappropriate to assume that congressional silence is inevitably equivalent to agency delegation. Chevron therefore misreads congressional preferences to undermine the judicial role.

It is beyond the scope of this article to settle all aspects of the Chevron dispute. Nonetheless, our examination of the internal structures of Congress helps clarify this dispute. Specifically, the critical but complex role played by congressional procedures and structures cautions against efforts to read tea leaves to ascertain nonspecified legislation objectives. Chevron's demand that Congress speak to "the precise question at issue" seems sensible. Whether courts or agencies should be the ones to flesh out legislative details is a matter we leave to the legions presently engaged in the Chevron battlefield.

79. Pierce, supra note 26, at 305.
81. See Farina, supra note 6, at 460-61: One need not have a deconstructionist’s belief in the indeterminacy of language or a public choice theorist’s conviction in the inevitability of statutory vagueness to appreciate that, if the court’s independent role ends whenever ambiguity is discovered or analogy must be employed, the agency’s judgment will virtually always control the interpretive outcome.
See also Pierce, supra note 26, at 305 ("The general proposition that Congress cannot and does not resolve all the policy issues raised by its creation of a regulatory scheme probably is not at all controversial.").
82. Chevron opponents, moreover, argue that the decision, rather than providing incentives for positive institutional reform, actually raises the costs of effective government by ceding too much power to the executive. See Farber & Frickey, Law and Public Choice, supra note 16, at 92-93. See also Eskridge, supra note 4, at 683-84; Farber & Frickey, Legislative Intent and Public Choice, supra note 16, at 458-59.