

FRANCIS LIEBER AND THE SCIENTIFIC STUDY OF LEGISLATIVE POLITICS

A collection of essays by James Wallner



Free markets. Real solutions.

Francis Lieber and the Scientific Study of Legislative Politics

A Collection of Essays

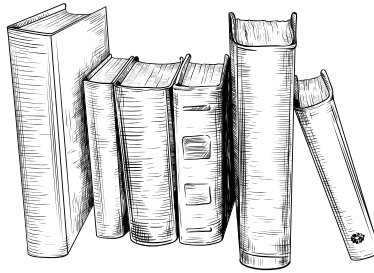
by JAMES WALLNER

A publication of the R Street Institute



TABLE OF CONTENTS

1	Foreword
7	Legislative Studies and the Politics-as-Production Paradigm
11	Toward a General Theory of Legislative Politics
15	Institutionalism That Takes Institutions Seriously
22	Rules Empower Legislators
28	Congress: A Crucible of Conflict
33	Congressional Scholarship Stuck in Time
37	The Path Forward
40	About the Author
41	Endnotes



FOREWORD

If you want to stump a newly minted Ph.D. produced by one of the nation's top political science programs in legislative studies, ask him or her about Francis Lieber.¹ It is a safe bet that most new legislative scholars entering the job market today have never heard of him. This is not surprising given that the political scientists who trained them are likely unfamiliar with Lieber or, at best, uninterested in his work. That so many of today's legislative scholars are in the dark about someone who helped to establish their academic discipline underscores the present precarious state of legislative studies in the United States.

Lieber was born in Berlin at the end of the eighteenth century. He fought for Prussia in the Napoleonic Wars and was severely injured at the Battle of Waterloo. After the war, he earned a Ph.D. in mathematics, studied topography, and wrote poetry and essays on a variety of topics, including politics and education reform. Lieber took up arms again, albeit briefly, in the Greek War for Independence. He also tutored the son of the Prussian ambassador to Rome, Barthold Niebuhr, a prominent historian and one of the founding fathers of historiography.

Lieber had a long and distinguished career in America after emigrating to the country in 1827. He opened the Boston Swimming School and emphasized the close connection between physical fitness and intellectual development in its curriculum. Lieber assisted Alexis de Tocqueville with his work on the American penitentiary system and served as editor of the 13-volume *Encyclopaedia Americana*. His contemporaries considered him one of the leading authorities on the laws of war, along with Hugo Grotius and Emer de Vattel. The Geneva

Convention was modeled on his “Code of War,” which Lieber compiled during the Civil War at the request of Abraham Lincoln. It was the first comprehensive code of military conduct in history.

Lieber was also a leading scholar and college professor for much of his career in America. He wrote pioneering texts on political philosophy and legal jurisprudence that were widely consulted by scholar-statesmen like Supreme Court Justice Joseph Story, John C. Calhoun and Daniel Webster. In the academy, Lieber first served as a history and political economics professor at South Carolina College (now the University of South Carolina). He eventually moved to New York City to take a position as a history and political science professor at Columbia College (now Columbia University). That makes Lieber the first officially designated political scientist in the United States. His successor at Columbia, John W. Burgess, would establish America’s first school of political science in 1880.

Juxtaposing the standardized career path and specialized methodological focus of today’s prototypical political scientist with Lieber’s unorthodox journey before entering the academy highlights some of the underlying problems that currently beset the scientific study of legislative politics. Lieber’s wide-ranging career as a practitioner and educator informed how the nation’s first official political scientist approached the scientific study of politics as a scholar and college professor. The value of that career for Lieber represented something more than merely illuminating the places where he could find datasets unexplored by his fellow academics. It shaped how he understood the world around him and underpinned his conviction that knowledge is interdisciplinary in nature. Lieber’s prior experiences helped him to appreciate the symbiotic relationship between theory and practice.

On the other hand, many of today’s well-trained legislative scholars are methodologically sophisticated, but they have become unmoored from the intellectual inheritance bequeathed to them by Lieber and other early pioneers of their discipline. They search for knowledge in specialized silos that implicitly reject the premise that knowledge is interdisciplinary. In recent decades, legislative scholars in particular have neglected theory in their work. They have focused instead on testing empirical models using high-powered statistical analysis

and game-theoretic mathematical tools to predict what will happen. However, the practice depicted in much of the recent legislative scholarship bears little relation to what happens in Congress these days. Notwithstanding the insights into that practice produced by legislative scholars over the last half-century, the overall trend in legislative studies toward abstraction, quantification, generalization and prediction has created a disconnect between how political scientists think about legislative politics in the academy and its practice in Congress.

In its broadest sense, science is knowledge. Conceived more precisely, science is specialized knowledge. Political science is specialized knowledge about politics, and Lieber appreciated the fact that this kind of knowledge is capacious by its very nature. That is, he understood that scholars cannot study politics successfully without accounting for the intricate web of cultural, economic, historical and social relationships that influence individuals' political activity. Lieber emphasized this point when he delivered his inaugural address as a political science professor at Columbia: "Every earnest scholar," he remarked at the time, "every faithful student of any branch [*of science*], is a catholic lover of all knowledge."² But epistemological trends and professional incentives have led many political scientists to neglect Lieber's capacious outlook and instead to embrace a theoretical orientation that distorts the practice of legislative politics.

While scholars utilize a diverse array of research methods, their work is increasingly based on a shared theoretical foundation that obscures important aspects of how the House and Senate operate in practice. The result is a highly stylized depiction of Congress that does not accurately portray the practice of legislative politics inside it. This, in turn, distorts how students, political scientists, the media and legislators understand congressional dysfunction and the reforms needed to treat it successfully.

How seemingly diverse explanations of lawmaking approach political conflict in Congress highlights their common theoretical foundation and focuses our attention on the disconnect between those explanations and the present practice. For example, legislative scholars explain Congress's present dysfunction in terms of the polarization of its members or the competition between its parties. Polarization and

partisanship are problematic because they generate conflict that makes it harder for legislators to legislate.

While scholars utilize a diverse array of methodological tools to explain polarization and partisanship, their work does not offer a clearer understanding of what happens inside Congress. Generally speaking, that work takes it for granted that legislators are presently acting to achieve their goals. In reality, the observed behavior of legislators demonstrates clearly that ideologically polarized and highly partisan teams are not competing inside Congress in the way that legislative scholars expect. Contrary to their expectations, legislators' behavior often blurs their ideological and partisan distinctions in the rare instances in which they do act. This indicates that polarization and partisanship are not impacting Congress in the way that most political scientists who study the institution currently theorize. Consequently, party-based explanations of lawmaking are insufficient to explain dysfunction.

The present absence of legislative action inside the House and Senate is remarkable. However, it remains unappreciated and understudied by political scientists in the academy because they view the conflict such inaction produces as antithetical to lawmaking. As a result, their theories do not acknowledge the importance of conflict, and their research methods push data that underscores the relationship between conflict and compromise into the shadows. Taken together, legislative inaction—along with its dismissal by scholars—reflects a significant shift in how legislators and the political scientists who study them understand legislative politics. David Mayhew highlights the consequences of this present shift, writing that: “most existing theorizing are not much help.”³ Accordingly, to take full advantage of recent methodological advances in legislative studies requires political scientists to re-think their present assumptions regarding the building blocks of politics: institutions; rules; compromise; and time. It is essential that scholars exhibit a firm grasp of these four building blocks in their work because they are the essential elements of which legislative politics are comprised.

Yet, scholars face significant epistemological hurdles to re-thinking the conventional view in each of these areas. For example, recent literature mostly interprets lawmaking as a product of exogenous

forces that drive endogenous behavior. That outlook minimizes the importance of the institutions wherein lawmaking occurs and distorts how different legislators use rules to achieve their goals. It also leads political scientists to overlook the relationship between conflict and compromise and eliminates political possibility from their thinking. The result is a cadre of scholars who approach the problem of dysfunction and reform by seeking to increase Congress's ability to deliberate by walling it off from the political conflict inherent in the institution's identity as a representative assembly. Implicit in this view, however, is the assumption that conflict and antagonistic cooperation, or deliberation, cannot coexist. This narrow view of politics also produces the common assumption that conflict between legislators must be eliminated in order for compromise to occur. Only then, it is implied, can a rational consensus emerge. But a consensus is not possible when legislators disagree over outcomes. And resolving that disagreement through compromise—not the imposition of a consensus position—is why Congress exists in the first place.

Critically engaging how legislative scholars think about the building blocks of politics highlights how their work can distort contemporary understandings of its practice. Consider the 1953 description of the legislative process by political scientist Bertram Gross, as “one of the methods of untying the Gordian knots created by the growing complexities of a highly organized capitalist society.”⁴ The elemental fact of legislative politics underscored by Gross here can be grasped more readily with an interdisciplinary approach. The philosopher Jacques Derrida described negotiation in similar terms:

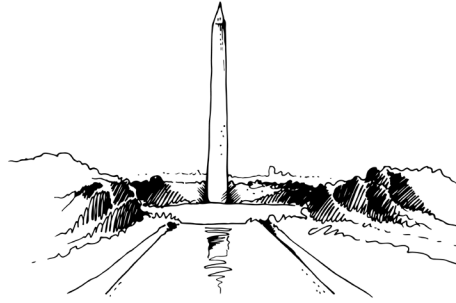
There is a word that keeps coming back to me, and the image of a knot. Negotiation as a knot, as the work of the knot. In the knot of negotiation there are different rhythms, different forces, different differential vibrations of time and rhythm. The word knot came to me, and the image of a rope. A rope with an entanglement, a rope made up of several strands knotted together.⁵

Like individual legislators, those strands are separate and distinct, and indeed it is the practice of tying and untying the knot that binds them that makes compromise possible.

Here, Gross and Derrida channel James Madison in “Federalist 10,” where he observes that faction is sewn into the nature of man and therefore, “the regulation of these various and interfering interests [...] involves the spirit of party and faction in the necessary and ordinary operations of government.”⁶ According to Madison, Derrida and Gross, then, conflict is not incompatible with compromise. Instead, it makes cooperation and legislative compromise possible in the first place. That is, compromise agreements, according to Gross, arise out of the “development of the group struggle itself, for the vicissitudes of this struggle create the conditions that promote cooperation and make it possible.”⁷ In short, the process of disagreeing makes agreements easier to reach. That process also produces stable outcomes by reconciling losers in a debate to the fact that they lost. For example, Richard Russell (D-Ga.) led the effort in the Senate to stop the Civil Rights Act of 1964. But Russell also accepted the outcome as legitimate and urged his fellow southerners to do so as well. In light of this, the discipline’s theoretical foundation needs to be updated to reflect the essential and inescapable presence of political conflict in the practice of legislative politics. Doing this will raise important questions about how Congress actually does work, and those will frame new avenues of future research that, when taken together, will give us a deeper understanding of legislative politics.

To that end, this compilation is a series of short pieces that frame the challenge that presently confronts us. First, I outline four building blocks of politics that legislative scholars need to re-theorize. Using some otherwise excellent work as a foil, my hope is to spark a productive debate that spurs us all to collectively re-think how we approach the study of politics in general and legislative politics in particular. I hope that the resulting discourse will lead to a greater appreciation of the comparative advantages (and disadvantages) of the various research methods that scholars utilize. My goal is that, out of this debate, a new theory of lawmaking will emerge that explains legislative politics better than the existing approaches.

– James Wallner



LEGISLATIVE STUDIES AND THE POLITICS-AS-PRODUCTION PARADIGM

At present, there is a disconnect between how many political scientists think about Congress and what regularly happens inside the institution. This is evident in the prevailing view among scholars that political conflict has a strictly negative influence on legislative deliberation and must be eliminated or, at least minimized, to produce a compromise. Epistemological trends and professional incentives inside the academy have perpetuated this disconnect by encouraging political scientists to adopt highly specialized views of knowledge and to embrace theories and research methods that are better suited to its acquisition than the legal-constitutional analysis pioneered by their earliest forebears like Francis Lieber.

The shift in political scientists' thinking can be traced to the period shortly after World War II. At the time—armed with sophisticated research techniques that they believed could explain legislative behavior and could therefore predict legislative outcomes reliably—scholars produced a body of work that affirmed a politics-as-production view of Congress. The associated behavioralist turn in the discipline altered the architectonic nature of legislative studies by shifting their analytical focus from macro-level phenomena like constitutions to micro-level phenomena like legislator behavior. Heinz Eulau underscored the shift in 1963 when he wrote: “The political behavior of the individual person is the central and crucial empirical datum of the behavioral approach to politics.”⁸

The ‘behavioral revolution’ set off by Eulau and his academic compatriots aspired to illuminate Congress’s micro-foundations. One of the defining features of the so-called “new institutionalism” that

came after it was an effort to bridge the micro-macro divide between the “old institutionalism” of traditional political science and the behavioral approach. In doing so, neo-institutionalist approaches to the study of legislative politics also needed to illuminate Congress’s micro-foundations, as is evident in the early focus of such work on member goals.⁹

Yet, neither behavioralism nor the new institutionalism bridged this divide successfully mainly because most of the existing work in both research traditions implicitly assumes that what exists outside Congress determines legislators’ actions inside it. This view subtly transforms the legislative process into a production process, in which exogenous forces are mechanistically converted into policy outcomes by the predictable behavior of legislators. Accordingly, beginning in the 1980s, legislative scholarship tends to depict legislators merely as cogs working to fabricate legislative widgets, or laws. This view is encapsulated in the highly influential article, “The Industrial Organization of Congress,” which quite literally models the legislative process as a production process by explaining Congress using concepts developed in industrial organization and articulated in the theory of the firm.¹⁰

Embracing such assumptions casts legislators as craftsmen whose work follows an existing blueprint that is designed by someone else in another place and time. This creates a disconnect between theory and practice because legislative politics cannot be understood in terms of the organization of the political means of production, and thus legislators cannot be accurately conceptualized in this way. As former Senate Majority Leader Mike Mansfield (D-Mont.) observed in 1963: “It will be of no avail to install a time clock at the entrance to the Chamber for Senators to punch when they enter or leave the floor.”¹¹ His point, of course, was that installing a time clock would not work because the Senate is not a factory. No one person or factory foreman can, therefore, control the institution and its members. Consequently, outcomes in the Senate (and House) cannot be known in advance. Instead, they are determined by legislators participating in an activity that takes place, for the most part, inside Congress. Legislation passes as a result of the decisions individual legislators make as they act and react to one another.

Perhaps not surprisingly, managing conflict between legislators participating in such an activity is hard. This is why politicians throughout history have tried to find a substitute for politics that does away with the unpleasant realities of political action altogether. One thing these many efforts have had in common is that all such attempts eventually end in the transformation of politics into something else entirely. This is because taking steps to assert control over politics—to make its outcomes predictable, and to shield citizens and their elected representatives from the consequences of their actions—requires the imposition of a standard from outside the legislative process itself, and this naturally restricts legislators’ ability to participate.

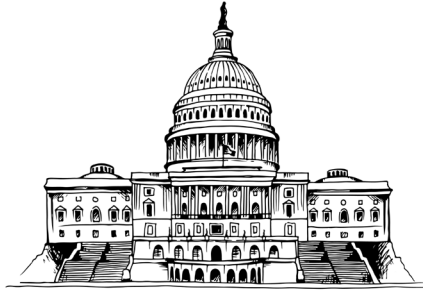
Legislators can compensate for the problems inherent in legislative politics by preserving the faculties of forgiving, and making and keeping promises. When they cannot know with certainty the outcomes of their actions, the ability to forgive is vital. Without it, they are locked in a process of action and reaction, unable to break free from the original deed that set it in motion. Similarly, the ability to make and keep promises in the form of rules and norms, according to the political theorist Hannah Arendt, creates “islands of predictability” and “goalposts of reliability” in politics.¹² These make it possible for legislators to form expectations about how politics will be conducted in the future. This, in turn, makes it easier for them to settle for suboptimal outcomes in the present (i.e., to compromise).

“Legislators can compensate for the problems inherent in legislative politics by preserving the faculties of forgiving, and making and keeping promises.”

Yet, the way many of today’s political scientists think about legislative politics undermines both faculties. By viewing them as a means to a higher end (or, as a widget), they are reduced to merely a function. In the process, conflict is rendered as something against which Congress must be insulated. Once the legislative process is understood this way, it is easier for legislators to rationalize departures from the rules when doing so is believed to be necessary to achieve their ends, but to condemn such departures by their opponents. When coupled with the rising toxicity of our politics, this exacerbates congressional dysfunction.

Legislative Studies and the Politics-as-Production Paradigm

Of course, legislative outcomes cannot be predicted in advance because legislators can act anew to achieve their goals. But, by basing their understanding of Congress on theories that view legislators' actions and reactions as predetermined, or otherwise interpret them as unimportant, scholars merely distort the very institution they endeavor to explain.



TOWARD A GENERAL THEORY OF LEGISLATIVE POLITICS

Political science should be—first and foremost—an exercise in understanding politics. And legislative studies should entail an academic exercise in understanding what happens when senators come together in a specific place to participate in a particular kind of practice. But, previous traditions and their carry over into present day study fail to account for what actually happens when senators legislate. For that reason, they cannot tell us how the Senate works, and this creates a disconnect between how political scientists understand the legislature and how it operates in practice.

For example, existing theories of lawmaking, along with much of the recent work that examines the assumptions and empirical expectations of those theories, suggests that Congress is dysfunctional because of legislators' extreme ideological polarization or partisans' excessive competition for control of the House and Senate. Notwithstanding the many vital contributions of this body of work to our understanding of politics in the past, the theories and schools of thought that it represents nevertheless fail to explain lawmaking today—especially in the Senate.

We know this because the present-day actions of senators inside the institution contradict many of the most popular insights found in the academic literature on legislative politics. This is because the current theoretical orientation causes political scientists inadvertently to treat legislators as interchangeable, to incorrectly interpret their use of legislative procedure, to theorize the legislative process in terms that are static and spatial, and to assume that conflict makes it harder for them to legislate. To remedy the resulting disconnect, then, political

scientists must think differently about the institution and what happens inside it.

To that end, legislative scholars should critically examine existing explanations of lawmaking and the assumptions that underpin the positive political theory upon which they are based. As part of that effort, they should combine the advanced methodological tools that they have borrowed from economics, psychology and sociology with research methods commonly used by legal scholars, historians and philosophers. Such an interdisciplinary approach should then be blended with the traditional methodological emphasis of their discipline on institutions and political theory that is characteristic of the historical-comparative, legal-constitutional analysis pioneered by Lieber and his colleagues at Columbia.

It should be noted that students of legislative politics have been hesitant to adopt such an approach. Gerhard Loewenberg recently observed that “there is little interdisciplinary work on legislatures.”¹³ This must change because a robust and interdisciplinary methodological approach is vital considering the persistent inability to explain phenomena like political conflict, legislative inaction and gridlock.

“Legislative scholars should critically examine existing explanations of lawmaking and the assumptions that underpin the positive political theory upon which they are based.”

Re-theorizing the paradigm requires the adoption of a back-to-basics approach to the study of legislative politics. Indeed, as Hugh Hecllo suggests, legislative scholars will benefit by developing theories and research methods that encourage them to think institutionally “from the inside out.”¹⁴ This will allow them to derive propositions about observable behavior that can then be used to test their theories empirically using whatever research methods are most appropriate for explicating the underlying phenomenon.

This new approach calls for a wide-ranging conversation that Theodore Lowi referred to best as “a kind of public discourse in which few of

us have engaged during the false consensus of our generation.”¹⁵

While Lowi was not describing the current disconnect between theory and practice per se, his sentiment nevertheless captures the state of discourse between rival camps. And, while the prospect of such a discourse may, admittedly, be daunting and unsettling, it is essential to the academic enterprise. The associated advancement of knowledge should encourage all scholars to welcome such a debate, as discourse enables political scientists to pool their different perspectives, insights and strengths, and then to apply them to the task of re-theorizing legislative politics.

To shake off the blinders imposed by the politics-as-production paradigm of Congress, this re-theorization should occur in four broad areas. First, moving forward, theoretical work must be based upon realistic assumptions that are capable of accurately capturing—albeit on a simplified basis—what happens when legislators come together in institutions like the House and Senate to participate in the practice of legislative politics. This will require scholars to shift their analytic focus from abstract policy space to the concrete institutional spaces inside Congress that provide the venue where legislative politics happens.

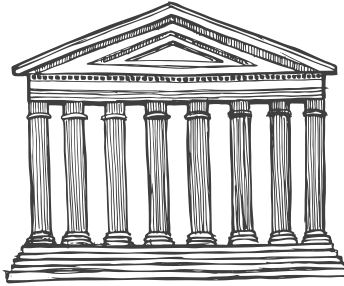
Second, the procedural rules that regulate the practice of legislative politics must also be reconsidered to interpret their operation as leverage instead of as constraints on legislator behavior. Doing so illuminates more clearly the micro-foundations of legislative politics by drawing scholars’ attention to the adverbial influence of procedural rules on what happens inside legislatures.

Attending to what happens inside institutional venues like the House and Senate—and how it happens—highlights the role that conflict plays to facilitate compromise when different legislators use the rules as leverage to achieve their goals. Legislative scholars should therefore articulate more thoroughly that rather than being antithetical, the relationship between political conflict and compromise is a symbiotic one. Assuming conflict as a given—as opposed to seeking to minimize or eliminate it—allows it to be channeled for constructive purposes.

Acknowledging this more accurate relationship underscores the importance of time as the medium in which legislative politics happens. That is, legislators perceive the possibilities that arise out of

Toward a General Theory of Legislative Politics

legislative action by considering the consequences of their actions in the past, present and future. Consequently, legislative scholars should delineate more precisely the changing contours of the temporal spaces where legislative politics occurs. At any rate, scholarship must be based on a different theoretical foundation if it is to advance our knowledge of present-day legislative politics. To build this new foundation, we must be willing to question sacrosanct assumptions and to participate actively in a reinvigorated, lively and contentious discourse.



INSTITUTIONALISM THAT TAKES INSTITUTIONS SERIOUSLY

The present disconnect between current theoretical assumptions and the practice of legislative politics in the House and Senate can be broken down into four areas for the purposes of explication: institutions; rules; compromise; and time. Taken together, small misconceptions in each of these areas have combined to shift how scholars think about Congress toward today's dominant politics-as-production paradigm.

Of these four areas, a re-imagination must begin with an attention to how we study institutions because past theoretical omissions underpin much of the present disconnect between theory and practice in the other three areas. And, indeed, with respect to the study of institutions, there is much to be re-thought. Many legislative scholars get Congress wrong because, despite the early promise of neo-institutionalist approaches, they have not fully appreciated the impact the House and Senate—as physical spaces—have on the lawmaking process. As Larry Evans points out, the two major schools of thought in legislative politics—preference- and party-based lawmaking—conceptualize legislative politics in abstract and spatial terms.¹⁶ Spatial theories depict legislative activity as something that exists in a unidimensional (or multidimensional) policy space. They posit that legislators have fixed policy preferences that predate their involvement in the process and that render what happens inside Congress secondary at best. As such, scholars typically associate spatial theories with preference-based explanations of lawmaking like Keith Krehbiel's Pivotal Politics model.¹⁷

Institutionalism That Takes Institutions Seriously

But there is nothing inherent in spatial models that prevents legislative scholars from also using them to theorize party effects in Congress. This is evident in the increased reliance on such models by proponents of party-based theories to articulate their theoretical assumptions and test their empirical implications.¹⁸ Notwithstanding the advantages legislative scholars gain by using spatial models to study Congress, they are nevertheless ill-suited to explain lawmaking in the House and Senate. This is because their abstract nature does not account for the interplay between the four building blocks of politics.

To compensate for the limitations inherent in spatial models, political scientists need to articulate a theory of lawmaking that shifts their focus away from legislators' ideal points in an abstract policy space (whether unidimensional or multidimensional) to their actions and interactions with one another in institutional spaces, and the ways in which the interpersonal and phenomenological characteristics of those spaces shape what happens there. That is, political scientists should ask questions like: "What is it really like to filibuster a popular bill on the Senate floor?"; "How does peer pressure impact senators decision-making processes and deter them from taking action to achieve their goals?"; and "To what extent does the legislative environment distort what legislators think is possible in debates."

Devotees of the "new institutionalism" have neglected this foundational point in recent decades. For example, rational choice institutionalism emphasizes the study of rational actors in particular institutional settings that exist within formal legislative institutions like the House and Senate. But scholarly work that follows this approach does not typically model those institutions accurately. That is, the empirical analysis of such work is often flawed due to a misguided theoretical assumption that only considers institutional settings (i.e., the rules or institutional structures as they exist on paper). Similarly, while sociological institutionalism considers interactions between legislators within institutions and the ways in which those settings impact their preferences and behavior, its emphasis on critical junctures and institutional socialization treats institutions as byproducts of legislative behavior, rather than as venues where that behavior occurs.

Of course, the rational choice and sociological variants of new institutionalism benefit legislative scholars in important ways. The

Institutionalism That Takes Institutions Seriously

advantages of the “new institutionalism,” in particular, are many. The formal modeling of rational choice institutionalism has made legislative scholarship more rigorous, in part by requiring political scientists to clarify the assumptions that underpin their work. Moreover, its orientation toward equilibrium lends order to the field more broadly, thereby making it understandable to the scholars who study it. Meanwhile, sociological institutionalism has yielded important insights into legislators’ goals and the relationships they form to achieve them in the House and Senate.

Nevertheless, a significant disadvantage of both variants, as well as with behavioralism, is that they minimize the importance of legislatures qua legislatures—and this is apparent in the many meanings scholars attribute to the word “institution” itself. Randall Calvert highlights this variety:

An institution is variously a set of rules of the game that regulate lower-level political activities; a central and widespread species of interest groups [...]; a highly formalized and elaborated type of organization [...]; a method of preference aggregation [...]; and a set of norms, habits, rules of thumb, and other precepts for decision making and behavioral choices with which an organization or political group is endowed.¹⁹

Sue Crawford and Elinor Ostrom have developed a “grammar of institutions” to group these different interpretations into three general categories: institutions-as-equilibria; institutions-as-norms; and institutions-as-rules.²⁰ In so doing, they argue that: “all three approaches offer institutional explanations for observed regularities in the patterns of human behavior. The differences among the approaches relate primarily to the grounds on which explanations for observed regularities rest.”²¹ And, James March and Johan Olsen have observed that institutions may refer to “rules and practices prescribing appropriate behavior for specific actors in specific situations,” “structures of meaning, embedded in identities and belongings” or “structures of resources that create capability for acting.”²²

Institutionalism That Takes Institutions Seriously

Significantly, neither the interpretations acknowledged by Calvert, the categories into which the word is grouped by Crawford and Ostrom, nor the meanings referred to by March and Olsen refer explicitly to the basic fact that institutions like the House and Senate are venues, or institutional spaces, that exist anterior to the internal structures and functions of which they are comprised. Political scientists take this fact for granted when they theorize institutions chiefly in terms of “rules and relations.”²³ Such oversight leads to faulty analysis because it ignores other, vital factors such as legislative effort and interpersonal dynamics.

Nelson Polsby came closest to prioritizing legislative institutions as venues where the practice of legislative politics happens in his groundbreaking 1968 article on the transformation of the House of Representatives and in a sweeping 1975 chapter on legislative institutions around the world.²⁴ But Polsby differentiates the stages of institutionalization within legislatures in terms of the development of their internal structure instead of emphasizing the ontological fact that legislatures are institutional venues where legislators participate in the practice of legislating. This elides the fact that there has never been a time in history when the House has not served as a venue for legislative activity, and in that sense, it has always been institutionalized ontologically. Polsby similarly downplays the legislature’s ontological existence as an “organizational form.”²⁵ He highlights instead an arena-transformative continuum along which scholars can locate specific legislatures based on the sophistication of their internal institutions and the legislature’s location in the broader political system.

The problem with this view is that it overlooks the institutional spaces where legislative politics happens. The internal structures that it emphasizes are meaningful only in relation to the venue where they exist. While the sociological variant of the new institutionalism comes close to this, scholars can give that space theoretical depth by embracing other disciplines beyond the social sciences. Legislative scholars can incorporate this insight into their work on Congress by embracing an interdisciplinary approach. For example, in *Phenomenology of Perception*, the French existentialist philosopher Maurice Merleau-Ponty observes:

Institutionalism That Takes Institutions Seriously

Space is not the setting (real or imagined) in which things are arranged but the means whereby the positing of things becomes possible. This means that instead of imagining it as a sort of ether in which all things float, or conceiving of it abstractly as a characteristic that they have in common, we must think of it as the universal power enabling them to be connected.²⁶

When considered in the context of legislative institutions, Merleau-Ponty's insight indicates that the space in which legislative politics happens gives meaning to things like "rules and relations." Only then is the interaction of such things inside that space capable of influencing what happens there.

Acknowledging this basic fact requires political scientists to distinguish explicitly between legislative institutions (i.e., legislatures) and intra-legislative institutions (e.g., legislative procedure or the committee system). Characterizing institutions as either exogenous or endogenous should therefore be avoided because institutions-as-rules can be both. The critical distinction they should make instead is between institutions-as-venues and institutions-as-everything-else (or greater and lesser institutions). Institutions-as-venues create the space in which legislative politics happens. Institutions-as-everything-else are tools legislators use to achieve their goals in that space by participating in the practice that happens there.

“Institutions-as-venues create the space in which legislative politics happens. Institutions-as-everything-else are tools legislators use to achieve their goals in that space by participating in the practice that happens there.”

Scholars have heretofore not emphasized this distinction in their work because they have been more interested in the search for general equilibria, or stability, in legislative settings. The assumption that lawmaking is possible only in a state of equilibrium and that it is impossible (or at least extraordinarily difficult) in states of disequilibrium is explicit or implicit in most legislative scholarship.

Institutionalism That Takes Institutions Seriously

And it is perpetuated by theoretical assumptions that do not acknowledge institutions as venues.

The consequence of this omission is to distort our understanding of contemporary phenomena like legislative gridlock and the congressional dysfunction that it symbolizes. For example, William Riker defines disequilibrium as “the absence of a decisive winner” in the legislative process.²⁷ There is no outcome in such circumstances because legislators cannot agree on what it should be. In other words, they are gridlocked because disequilibrium states are vulnerable to majority-rule cycling. Kenneth Shepsle and Barry Weingast claim that “there is no natural stopping point” in such states, “so long as losers are not denied access to the agenda.”²⁸ They assert that the legislative process would go on *ad infinitum* as legislators continually took turns offering amendments to better align the underlying policy with their preferences:

Since at any proposal the majority win set is non-empty, it is always in the interests of those who prefer elements of this set to the original point to propose them. And, since nothing in the rules prevents them from doing so, they will.²⁹

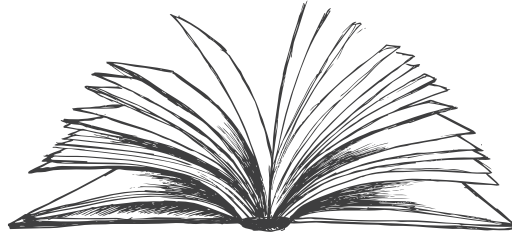
The absurdity of this claim would be readily apparent if scholars made it a habit of distinguishing between institutions-as-venues and institutions-as-everything-else. The problem posed by cycling, and of uncontrollable chaos more generally, disappears if scholars conceptualize legislative politics as an ongoing practice that happens in an institutional venue. In contrast, the equilibrium orientation of the new institutionalism attributes the absence of cycling to intra-legislative institutions that create the necessary conditions for lawmaking by altering the legislative process and structure. According to the theory of structure-induced equilibrium, these institutions prevent cycling by constraining some legislators’ abilities to participate in the practice of legislating while simultaneously advantaging others.³⁰

While intra-legislative institutions regulate the participation of legislators in the practice of lawmaking, their existence is not the proximate cause for the absence of cycling. The legislative institutions themselves ensure that cycling will not occur. This is because the effort

Institutionalism That Takes Institutions Seriously

required of legislators to keep cycling over time in a venue prevents it. Intra-legislative institutions merely regulate that effort, making it easier for some legislators to participate in the practice of legislating while making it harder for others to do so. This is evident in past work on iron triangles, sub-governments and institutional monopolies in Congress, as well as the policy process more generally.³¹

Legislative scholarship that ignores the institutional venues where the practice of legislative politics happens does not illuminate the micro-foundations of lawmaking, nor does it leave us with a firmer grasp of the macro-aspects of legislative politics. Instead, it creates the analytical conditions in which they can be obscured. Discarding the analytical blinders imposed by the politics-as-production paradigm requires a critical examination of the received wisdom that underpins legislative scholarship. Remarkably, that work has largely overlooked the implications of institutional venues like the House and Senate in making legislative politics possible in the first place—which is to say, they exist prior to any subsequent intra-legislative institutions that arise. A continued failure to incorporate institutional space into the study of Congress therefore yields an incomplete understanding of the practice of legislative politics in the House and Senate.



RULES EMPOWER LEGISLATORS

By distinguishing between institutions-as-venues and institutions-as-everything-else, scholars' efforts to understand how individual legislators use rules inside institutional venues will be more fruitful. This is because grounding the study of Congress in an approach that starts with the assumption that the House and Senate are venues where the practice of legislative politics occurs illuminates the adverbial nature of that practice and draws our focus to the actions of different legislators in that space.

As discussed, the present tendency of legislative scholars to theorize Congress in abstract and spatial terms leads them to conceptualize procedural rules as a constraint on legislators' behavior. That tendency is rooted in the equilibrium orientation of most legislative scholarship. By limiting the ability of legislators to act, rules maintain equilibrium in the House and Senate and prevent dysfunctional gridlock. Accordingly, those who hold this view consider procedure crucial to reducing congressional dysfunction more broadly.

Yet, scholars should not conceptualize rules as a constraint on legislative behavior because policy outcomes reflect more than the preferences of individual legislators. The processes they use to aggregate their preferences in the course of making a collective decision also matters. The rules determine how the House and Senate prioritize problems, when and where they consider solutions, and which legislators get to participate in the process. In other words, outcomes are never independent of the process by which they are chosen.

Rules Empower Legislators

This suggests that legislators may skillfully use the rules to advantage their preferred outcomes. By extension, they may also, when needed, attempt to alter the range of possible outcomes by using the same rules to change the process. This logic applies to all legislators, regardless of whether they are in the majority or the minority party, or if they constitute only a minority of the majority party. The fact of being outnumbered numerically on a given question does not necessarily prevent legislators from eventually winning a legislative debate. This is because the preferences of a chamber majority (numerical) are not fixed. According to William Riker: “[...] there just isn’t any true preference of the group. There are various possible outcomes that the different procedures will allow the group to reach.”³² Legislators may, however, find the policy outcomes reached via one process more acceptable than those reached via a different one.

“By limiting the ability of legislators to act, rules maintain equilibrium in the House and Senate and prevent dysfunctional gridlock.”

Given this fact, political scientists should conceptualize rules as a source of leverage that legislators use to achieve their goals. Rules do not constrain legislators’ behavior because they are determined endogenously. That is, legislators decide what rules to follow by following them; by participating in the practice of legislative politics. And, their assent to those rules must be continually affirmed as that practice happens. Consequently, the standard view of rules operating as a constraint cannot account for how those rules preserve equilibrium states while periodically yielding outcomes that are opposed by a majority of legislators.

Margaret Levi hints at the way in which rules operate as leverage when she observes: “The behavioral withdrawal of acquiescence with or consent to current institutional arrangements is one source of institutional change and an important ‘weapon of the weak.’”³³ That is, members choose to follow rules. They are not constrained by them. And members follow rules when doing so helps them achieve their goals in institutional venues like the House and Senate.

Re-theorizing how rules operate in practice requires scholars to come to terms with Levi’s observation and explain why legislators voluntarily

Rules Empower Legislators

comply with institutional constraints on their behavior instead of trying to change them. For example, Chris Murphy (D-Conn.) has denounced Republicans' refusal to schedule gun control legislation in the Senate despite the fact that he has the same power to do so as Majority Leader Mitch McConnell (R-Ky.).³⁴ In this case, the rules do not constrain Murphy's ability to debate gun legislation on the Senate floor. That debate has not occurred because Murphy is unwilling to use those rules to try starting it. By doing so, Murphy would force his colleagues in the Senate to debate his priorities in some fashion.

Legislators generally limit their actions in accordance with the dictates of authorized procedures because they derive benefits from engaging in rule-bound behavior. This understanding of rules gently shifts political scientists' focus away from the role they play in maintaining equilibria states and toward how they empower legislators to achieve their goals in a persistent state of disequilibrium. According to the economist Nicholas Rowe, legislators create new possibilities that did not exist before by pre-committing to follow rules.³⁵ Similarly, in a partial pivot away from his earlier work, Kenneth Shepsle acknowledges that rules may enlarge "the scope for action [...] despite the nominal constraining effects of rules, by imagination and by transgression."³⁶ It should be noted that the processes of imagination and transgression analyzed by Shepsle refer to situations in which legislators use rules to circumvent other rules. From a rules-as-constraint perspective, the idea of rules being used to upend rules is paradoxical. From a rules-as-leverage perspective, the underlying dynamic is clear.

When legislators commit to follow the rules and routinely use the procedures they authorize as leverage to achieve their goals, they buttress the inter-personal space created between themselves when they gather in institutional venues to participate in the practice of legislative politics. In that way, the rules make what happens in those venues dynamic by giving it a temporal dimension. According to Hannah Arendt, the ability of legislators to make and keep promises by adhering to rules to regulate their actions makes legislative politics more predictable and reliable.³⁷ Consequently, the rules make it possible for legislators to form expectations about what will happen in the future and, by extension, makes it easier for them to accept suboptimal outcomes in the present (i.e., to compromise).

Rules Empower Legislators

The rules similarly extend legislators' leverage into the future, thereby increasing their potential influence to impact outcomes (if that leverage is used effectively). Rowe observes:

Imposing the constraint of prior commitments on an agent's choice of action need not lower, but can instead raise his utility: for imposing the constraint paradoxically grants him the freedom to influence other agents' expectations of his future actions, and this influences their actions.³⁸

To the extent that the existence of an equilibrium inside a legislature makes it harder for its members to use existing rules as leverage, equilibria make it harder for legislators to compromise and, consequently, make gridlock more likely to occur. The equilibrium orientation of legislative scholarship, as well as the pervasive tendency of legislative scholars to equate conflict with disequilibrium and gridlock, therefore perpetuate the disconnect between theory and practice.

Distinguishing between institutions-as-venues and institutions-as-everything-else and acknowledging that rules give legislators leverage to achieve their goals in the inter-personal and temporal space created between them when they participate in the practice of legislative politics yields a truly micro-perspective of Congress's foundations. One of the ironies of rational choice institutionalism is that the approach purports to focus on individual legislators while assuming that they all use procedure or behave in exactly the same way (i.e., legislators all have well-defined preferences and seek to maximize their utility). Setting aside the deductive-inductive differences between rational choice institutionalism and behavioralism, ironically, this assumption is a legacy of the behavioral revolution in political science and the emphasis it placed on the law of large numbers to make sense of what happens inside Congress. As Arendt contends of behavioralism more generally:

The laws of statistics are valid only where large numbers or long periods are involved, and acts or events can statistically appear only as deviations or fluctuations. The justification of statistics is that

Rules Empower Legislators

deeds and events are rare occurrences in everyday life and history. Yet the meaningfulness of everyday relationships is disclosed not in everyday life but in rare deeds, just as the significance of a historical period shows itself only in the few events that illuminate it. The application of the law of large numbers and long periods to politics or history signifies nothing less than the willful obliteration of their very subject matter, and it is a hopeless enterprise to search for meaning in politics or significance in history when everything that is not everyday behavior or automatic trends has been ruled out as immaterial.³⁹

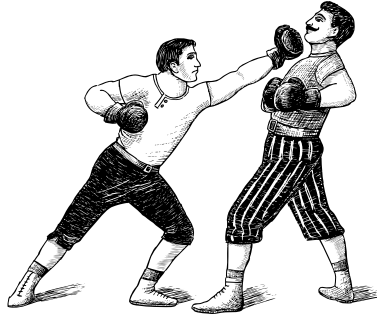
Both behavioralism and neo-institutionalist approaches like rational choice and sociological institutionalism treat legislators as types and not as individuals, or in what Colin Hay calls an “analytically substitutable” way.⁴⁰ In contrast, the existence of different legislators who possess the capacity to act in unique ways is implicit in the view that rules operate as a source of leverage. The essence of legislative politics is what happens when the legislators who choose to behave and those who choose not to behave conflict with one another inside the House and Senate. That struggle animates the legislative process and creates the possibility for compromise and legislative outcomes.

Legislative politics is necessitated by human plurality. Legislators need a venue where they can make collective decisions because they are all equal. However, they are equal only in the sense that they represent separate and distinct constituencies. Moreover, no two individual legislators can be considered the same in any respect other than the fact that they are unique, each possessing their own abilities, characteristics, interests, hopes and fears. And because legislators with different views and priorities participate in the legislative process on the basis of equality, they are equally able to leverage the rules to achieve their goals in it. The recent rush in scholarship to explain ideological polarization and partisan competition inside Congress has largely overlooked this fact. To acknowledge it going forward will help scholars see the disconnect between these views of Congress and its reality.

Rules Empower Legislators

The politics-as-production paradigm and the various theories and empirical models that it underpins nevertheless persist because legislative scholars believe that they help to predict what will happen in legislative politics. From their perspective, the paradigm makes it possible to use sophisticated models to impose order. In the process, however, this generalized approach transforms the process into a production process consisting of two unitary actors (e.g., liberals vs. conservatives; Democrats vs. Republicans) who compete to control the factory.

The effect of this approach to the study of Congress is to collapse both the inter-personal and temporal space that exists between legislators and makes compromise possible. As Kathleen Bawn and Greg Koger point out, this allows political scientists who utilize such methods to “avoid addressing the question of how similarly minded legislators manage to cooperate and to coordinate.”⁴¹ In other words, it allows them to avoid addressing how legislators legislate.



CONGRESS: A CRUCIBLE OF CONFLICT

When it comes to Congress, the standard view is that it is dysfunctional because its members cannot compromise and pass important legislation. According to most scholars, this is because they are polarized ideologically or because the partisan teams of which they are members are locked in a zero-sum competition for majority control. In short, scholars commonly assert that today's legislators lack incentives to cooperate with one another and are instead incentivized to fight.

Underpinning this standard view is the assumption that conflict between legislators makes it harder for them to compromise. However, in contrast to the assumptions implicit in recent work in this area, conflict is a necessary precondition for legislative compromise. The activity of individual legislators inside legislatures inevitably generates conflict in the institutional spaces where they persuade, bargain, negotiate and compromise with one another. This makes conflict between legislators an inescapable—and essential—part of the practice that constitutes legislative politics. To wall-off congressional deliberations from that conflict—the common prescription of many of today's political scientists—may make it easier for legislators to negotiate deals (thereby increasing Congress's legislative productivity in the short term), but doing so also undermines its overall lawmaking capacity over time.

Nevertheless, the assumption that conflict and cooperation—or compromise—cannot coexist is pervasive in the academy. For example, the American Political Science Association (APSA) published a report in 2013 that examined the challenges associated with negotiating agreements in politics.⁴² In a subsequent volume that revised and

expanded the report's findings, Michael Barber and Nolan McCarty call for “a new political science of negotiation that can suggest how mechanisms and protocols that help to ‘get the deal done,’ even in polarized times.”⁴³ Their assumption is that the deal can get done only in spite of conflict, not because of it.

Another suggestion in the follow-on volume is premised on the assumption that “negotiation is possible only in situations in which some potential common ground or zone of possible agreement exists and participants have a genuine desire to achieve a deal.”⁴⁴ However, “some potential common ground or zone of possible agreement” and “genuine desire to achieve a deal” are nebulous phrases. Suffice it to say that a legislator's presence in a legislature and her willingness to expend effort using legislative procedure to achieve her goals in that venue should nevertheless meet the minimum threshold for both criteria. All other considerations are appropriately decided by legislators participating in a practice that may be characterized at times by high levels of conflict.

“To wall-off congressional deliberations from that conflict may make it easier for legislators to negotiate deals, but doing so also undermines its overall lawmaking capacity over time.”

The problem with this sliding-scale characterization of what is necessary for successful legislative negotiations is that it casts the absence of negotiation (or gridlock) as what happens when there is too much conflict (i.e., disagreement). But, the scale does not define precisely what scholars should consider as ‘too much’ conflict. And even if it did, the fact remains that there is no Archimedean point in legislative politics from which scholars can observe the process and determine if conflict in it is good or bad. In a theoretical context, the important consideration is how Americans resolve disagreement (via violence or via politics), not what level of disagreement is good or bad.

Legislative scholars typically overlook the relationship between conflict and compromise because they mistakenly equate the latter with consensus. Absent the practice of legislative politics to resolve conflict inside Congress, the only way to overcome gridlock is

for someone outside of Congress to impose a consensus view on otherwise equal and autonomous legislators who happen to disagree. But, while legislative scholars often use the terms consensus and compromise interchangeably, they are two very different concepts. Consensus implies unanimity among those who are empowered to decide. Compromise implies negotiation and bargaining among those empowered to decide. But, by definition, negotiation is necessary because of the absence of unanimity. While they may agree to support a final compromise agreement, the process by which they arrived at that agreement is very different from the meaning of consensus.

A sliding-scale measure of conflict makes it harder to acknowledge that legislative politics can drive legislators to compromise with one another in the absence of consensus. The effort required for different legislators to prevail in such contests using procedure as leverage inside institutional spaces like the House and Senate also means that a genuine desire for compromise is not a precondition to achieve a deal. Instead, the dynamics of legislative politics organically produce a deal that legislators support as long as they want to win. The practice does so by regularly bringing legislators who want to prevail into conflict with one another over the course of a debate. Perhaps most importantly, the contested nature of legislative politics also serves to reconcile the losers to its outcome.

To overcome these analytical hurdles, legislative scholars should articulate new theories of lawmaking that combine an emphasis on institutional venues with an appreciation of the importance of the conflict that occurs in them to facilitating lawmaking. New work in this area should also incorporate assumptions regarding the effort required on the part of legislators to pass (or defeat) legislation that they support (or oppose). The inaction that is emblematic of the status quo in Congress results when legislators avoid expending such effort and, by extension, adjudicating controversial issues in its phenomenological spaces. In that sense, gridlock signifies the absence of conflict. Conversely, if conflict should then be understood as helping legislators to pass controversial legislation, then legislators acting in ways that conflict with one another implies the absence of gridlock.

Legislative politics is not merely a medium of mechanistic transmission through which forces exogenous to the legislature determine outcomes.

Congress: A Crucible of Conflict

Rather, the debates and confrontations in which legislators participate inside the House and Senate as the process unfolds represent them acting at cross-purposes to prevail over one another. Over the course of a debate on a controversial issue (e.g., civil rights), legislators are reconciled to a single outcome because the dynamic nature of legislative politics generates new options that make a compromise possible where none was previously (e.g., the Civil Rights Act of 1964). To appreciate that conflict is not antithetical to compromise and is instead a necessary precondition for the emergence of compromise agreements whenever legislators disagree.

Conflict facilitates compromise because it entails effort. And increasing the effort required to prevail in a debate imposes costs upon legislators. Those costs accumulate and, in the process, create the space where negotiation and bargaining can occur. It is this bargaining process that makes compromise possible in the first place. After all, bargaining cannot lead to compromise if the legislators in disagreement are equally determined to prevail in the debate. In such a scenario, the only way to avoid gridlock is by fostering consensus among participants.

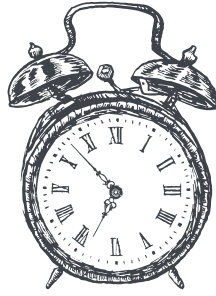
At its most basic level, legislative politics should therefore be conceptualized by political scientists as a war of attrition between two opposing parties.⁴⁵ The revelation of information over the course of a debate determines how it will end for two reasons. First, legislators may cease fighting when they believe that victory is improbable. Second, and related, they may cease fighting when the costs of achieving victory are perceived as unacceptable. The underlying issue in the debate determines the sacrifices that legislators are willing to make in order to prevail. Gridlock ceases when the expenditure of effort required for victory exceeds the value of the underlying issue. Debates characterized by wars of attrition and high levels of legislative conflict—not consensus—appear to be more likely to lead to compromise agreements because the effort required of legislators to obstruct, as well as to overcome that obstruction, reveals important information about their willingness to stick it out long enough to prevail.

Given this dynamic, understanding Congress's dysfunctional status quo requires legislative scholars to reorient their understanding of what happens there to account for the essential role played by

Congress: A Crucible of Conflict

conflict in facilitating the educational nature of the legislative process. Increasing the information available to party leaders, rank-and-file legislators, their constituents and outside advocacy groups during the consideration of important bills can therefore lead to a healthier Congress; one that can fulfill both its representative and deliberative functions while maintaining its legislative productivity.

Re-theorizing legislative politics and rejoining theory and practice in legislative scholarship means jettisoning the blanket assumption that a necessary condition for compromise is that conflict between legislators in the House and Senate must first be eliminated so that a rational consensus can arise in its place. Consensus is not possible when legislators disagree over the underlying issues in a debate. And resolving that disagreement through compromise, not the imposition of a consensus position, is why Congress exists in the first place.



CONGRESSIONAL SCHOLARSHIP STUCK IN TIME

In Kurt Vonnegut's classic novel *Slaughterhouse-Five*, the protagonist, Billy Pilgrim, has a problem. He has come unstuck in time. This condition is problematic for Billy because he "has no control over where he is going next."⁴⁶ Vonnegut tells us that this lack of control puts Billy "in a constant state of fright" because he "never knows what part of his life he is going to have to act in next."⁴⁷

Members of Congress have a lot in common with Billy Pilgrim. Of course, Capitol Hill is not the setting of a science fiction novel. And no Tralfamadorians are roaming its corridors of power. But, like Billy, they possess the capacity to act in whatever situation they find themselves while lacking the ability to determine what those situations look like singlehandedly.

Politics happens whenever different individuals choose to associate with one another. And legislative politics happens whenever legislators gather in a specific place and time to make collective decisions on behalf of their constituents. In such settings, each legislator retains the capacity to act. However, no single action, or legislator, is sufficient to determine what happens in a legislative debate. Instead, how that debate unfolds, how legislators resolve their disagreements in it, and for how long the decisions they make remain settled is determined by their acting and reacting to one another as they try to achieve their goals inside the House and Senate.

These similarities between Congress and Billy Pilgrim underscore the fact that legislative politics is chaotic. It is never-ending. Its outcomes cannot be controlled. Therefore, William Riker was only half-right

Congressional Scholarship Stuck in Time

when he observed that “in the long run, nearly anything can happen in politics.”⁴⁸ In reality, anything can happen in the short run too.

Acknowledging this building block of legislative politics suggests that scholars cannot predict legislators’ behavior reliably in the same way that natural scientists can predict bird migrations, sunrises and ocean tides. To do so would require them to be prophets capable of seeing the future or Congress to be susceptible to their scientific powers of prediction by operating mechanistically. Put differently, it would require the House and Senate to operate like factories that produce products instead of legislative assemblies whose members participate in a practice. Given that political scientists are not prophets, legislative scholarship is required to theorize what happens in the House and Senate statically as a production process that is fixed in time. Doing so is the only way scholars can reliably predict behavior in advance. However, to conceptualize legislative politics in this way reinforces the scholarly disconnect between theory and practice. David Mayhew dubs the static nature of current theories as “time localism” and declares it “a weed that will not go away.”⁴⁹ This disconnect arises because legislative debates do not happen all at once, according to an existing blueprint. They occur over time and follow no master plan.

As Larry Evans and Walter Oleszek note, time is an essential element of legislative life.⁵⁰ As such, it should be taken seriously. Instead, too many scholars treat legislative politics statically in their models even though time limits the applicability of a formal model approach for understanding what happens inside Congress (at least as the models are currently articulated). Their work instead explains legislator behavior by emphasizing binary and non-binary voting procedures that mainly happen all at once. But, these occur at the end of committee and floor debate on amendments and bills after much of what goes into legislative politics has already happened. In this way, unlike Billy Pilgrim and the legislators they study, legislative scholars are stuck in time.

The static orientation of legislative scholarship is due to its focus on datasets comprised of roll-call votes. These are attractive because they are amenable to the kind of quantitative analysis that the discipline’s leading journals appear to prefer. Yet, using datasets such as Voteview and mathematically sophisticated algorithms like DW-NOMINATE

to analyze them more often than not distorts how the inner workings of Congress appear to outside observers.⁵¹ This is because such an approach uses just one kind of evidence, or input, to make inferences about legislators' preferences and the behavior that flows from them: recorded roll-call votes. As such, conclusions gleaned from analyzing such datasets are overly reliant on what issues get recorded roll-call votes. Inferences related to issues that do not receive such votes and to activity related to the process that precedes them—and makes them possible in the first place—are not possible without a more nuanced and dynamic methodological approach.

“Legislative debates do not happen all at once, according to an existing blueprint. They occur over time and follow no master plan.”

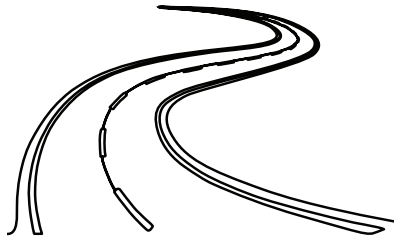
This is why statically analyzing Congress yields an explanation of legislative politics that makes sense only in the context of a politics-as-production paradigm. The present dominance of that paradigm helps to explain why even those scholars who look beyond the roll-call vote record for other quantitative and qualitative data nevertheless persist in statically modeling elements of legislative politics (like preference formation and intensity) that are inherently dynamic. Such research techniques depict what transpires in a legislative debate as separate and distinct stages in a game tree. Using them may make scholars' work intelligible to their colleagues who embrace the present paradigm, but the consequence of doing so is to widen the gap between their findings and how legislators actually behave.

Such modeling limits political scientists' ability to understand the practice in which legislators engage. In doing so, they no longer distinguish between empirical facts and empirical possibilities. This is because a possibility exists only in legislators' imaginations. An empirical possibility is a legislator's mental forecast of what may happen in legislative debate. Empirical possibilities are related to empirical facts in the same way that the future is related to the present. The former is imagined in the context of a present in which it does not yet exist.

Congressional Scholarship Stuck in Time

By looking forward from the present to the future, different legislators can assess how to realize empirical possibilities using legislative procedure as leverage in a debate that happens over time inside legislative institutions. When political scientists conceptualize legislative politics statically based only on a statistical analysis of roll-call votes, however, the very idea of possibility ceases to exist—not to mention legislators' ability to realize it.

The present dysfunction in Congress suggests that the assumption that everything can be known in advance impacts how its members behave and alters what voters expect their elected representatives to do. After all, what is the point of legislators using procedure as leverage to force their colleagues to act on high-profile issues like healthcare, immigration or gun control if Congress's DW-NOMINATE scores and partisan balance of power indicate that their efforts will be futile? Whether legislators or legislative scholars hold this mindset, its effect exacerbates Congress's present dysfunction by shifting the focus of reformers to the electoral arena. On one hand, this shift is understandable because the most straightforward way for voters to alter a Congress's overall DW-NOMINATE score or its partisan balance of power is by voting. But, on the other hand, it distorts how we understand legislative politics as the practice in which legislators adjudicate their and their constituents' concerns, and where hard work, skill, determination and a little bit of luck can change the world. Political scientists must therefore re-theorize legislative politics to account for the importance of time as the medium in which it unfolds. Only by analyzing how a legislative debate happens in time is it possible for scholars to understand legislative behavior and, by extension, to explain how Congress operates.



THE PATH FORWARD

The scientific study of legislative politics has advanced considerably in the 163 years since Francis Lieber became America's first official political scientist in 1857. Departments of political science are now mainstays on college and university campuses across the country. Legislative Studies has become one of the discipline's most popular and dynamic subfields. Its members have developed sophisticated research methods and formal models that deepen our understanding of the House and Senate in increasingly specialized contexts. Lieber, a founding member of the American Social Science Association, would undoubtedly be pleased by the advances political scientists have made, especially in the decades following the Second World War, when the behavioral revolution and neo-institutionalist approaches helped make political science a methodologically sophisticated discipline.

Yet, Lieber would also be dismayed by his discipline's present state. He would be concerned about its balkanization into highly specialized subfields and the growing reliance of scholars on theories and research methods that emphasize abstraction, quantification, generalization and prediction at the expense of explication, qualification, erudition and understanding. Lieber would be dismayed by these developments because he appreciated that political knowledge is interdisciplinary by its very nature and that a broad theoretical and methodological approach is necessary to ascertain it. In contrast, a narrow approach will illuminate only parts of political reality, regardless of the sophistication of its research methods.

Of course, calls to re-theorize Congress are not new. For example, in 2011, David Mayhew ended the concluding chapter of the *Oxford Handbook of the American Congress* by asking: "Is it possible for

a theoretical tradition to evolve into a rut?”⁵² The juxtaposition of scholars’ reliance on spatial theories to explain lawmaking and the present disconnect between much of their work and the practice of legislative politics suggests that the impressive gains in legislative scholarship over the last half-century have indeed led legislative studies into one. The politics-as-production paradigm has replaced what Mayhew calls the “cupboard” tradition of theorizing about Congress.⁵³ Its insufficiency in explaining political reality prompts Mayhew to speculate that “a new behavioral revolution steeped in on-site experience might be in order.”⁵⁴

This series represents my case for how such a revolution should unfold. In short, political scientists must re-theorize Congress because no existing theory or school of thought can fully explain what happens in it today. This is evident in the fact that legislators’ observed behavior in both the House and Senate is inconsistent with scholarly expectations. Their shared theoretical foundation inadvertently treats legislators as interchangeable, interprets incorrectly how they use procedural rules, theorizes the legislative process in terms that are static and spatial, and assumes that the conflict between legislators makes it harder for them to legislate. Given these tendencies, the next generation of legislative scholars should endeavor to think differently about the institution and what happens inside it, specifically in the areas of institutions, rules, compromise and time.

“Political scientists must re-theorize Congress because no existing theory or school of thought can fully explain what happens in it today.”

This is not a new challenge. Political science advanced as a discipline after WWII when confronted with its own limitations. Contentious debates about how best to approach the study of politics were precipitated by reform-minded scholars who perceived a disconnect between the theory and practice of politics and who wanted their colleagues to act. Their innovative efforts to better explain political phenomena expanded the discipline’s traditional scope and methods. For example, William Riker observed in 1962 that “considerable intellectual fervor among political scientists” was due “to the fact that the traditional methods of their discipline seem to have wound

The Path Forward

up in a cul-de-sac.”⁵⁵ Moving forward, Riker believed that the use of traditional methods of political science could produce “neither science nor knowledge.”⁵⁶ To overcome the limitations of conventional political science research methods, Riker set out to articulate “a new political theory for a new political science.”⁵⁷ Spurred on by a similar disconnect between the theory and practice of legislative politics, Keith Krehbiel developed a new lawmaking theory in the 1990s to provide a “precise explanation” of phenomena like legislative gridlock and lawmaking.⁵⁸

These previous efforts suggest that the discipline advances when political scientists attempt to reconcile disconnects between how they think about a phenomenon and its observed behavior in reality. David Rhode summed up this dynamic in 2013, when he explained: “When we observe patterns in the real world that are not consistent with our ideas about causal forces, we are naturally led to wonder why, and that can spur theoretical innovation.”⁵⁹ As Bertram Gross put it more bluntly as early as 1953: “If a theory does not work in a practical situation, it is a bad theory.”⁶⁰

Fortunately, bad theories provide a point of departure for scholarly efforts to develop better ones. A first step in doing so in the context of legislative politics must include a modification of the conventional view of Congress that subordinates the explanatory value of legislators’ actions to forces exogenous to the institution like ideological polarization and partisan competition. Much of the work based on this view claims to illuminate the micro-foundations of legislative politics. However, implicit in it is the assumption that what exists outside of Congress determines the behavior of legislators inside it. That assumption transforms the legislative process into a production one and reduces Congress to a factory.

But, Congress is not a factory and legislators are not workers. In light of this, if we are to escape this present rut, we must emulate Lieber and embrace a more extensive and interdisciplinary approach. We must articulate new theories capable of explaining what happens in Congress better than the existing ones. And specifically, re-theorizing the four key building blocks of legislative politics will turn legislative studies on its head by demonstrating that persistent disequilibrium, permissive rules of procedure that empower individual members, legislative

The Path Forward

conflict and lengthy debates are not antithetical to lawmaking, but rather make it possible.

While Lieber has been largely forgotten, his testament remains, lighting the way for those scholars who dare to follow in his footsteps. Let them all be catholic lovers of knowledge. Let them embrace the diversity of methods needed to learn it. Only then will they reconcile the present disconnect between their theories of legislative politics and its practice in Congress.

ABOUT THE AUTHOR

James Wallner researches and writes about Congress, especially the Senate, the separation of powers, legislative procedure and the federal policy process. He also serves as a professorial lecturer in the Department of Government at American University, and is a fellow at American University's Center of Congressional and Presidential Studies.

Endnotes

1. “Dr. Francis Lieber,” Library of Congress, April 24, 2013. https://www.loc.gov/rr/frd/Military_Law/Lieber_Collection/Items/francisbio.html.
2. Francis Lieber, “History and Political Science Necessary Studies in Free Countries: An Inaugural Address,” Columbia University, Feb. 17, 1858. <https://bit.ly/32O7xcz>.
3. David R. Mayhew, “Theorizing about Congress,” in *The Oxford Handbook of the American Congress*, ed., George C. Edwards III et al. (Oxford University Press, 2011), p. 14. <https://global.oup.com/academic/product/the-oxford-handbook-of-the-american-congress-9780199559947?cc=us&lang=en&>.
4. Bertram M. Gross, *The Legislative Struggle: A Study in Social Combat* (Praeger, 1978).
5. Jacques Derrida, *Negotiations: Interventions and Interviews 1971-2001* (Stanford University Press, 2002).
6. James Madison, “Federalist 10,” *The Federalist Papers* (The Avalon Project, 2008). https://avalon.law.yale.edu/18th_century/fed10.asp.
7. Gross.
8. Heinz Eulau, *The behavioral persuasion in politics* (Random House, 1963), p. 6.
9. See, e.g., Kenneth A. Shepsle and Barry R. Weingast, “Structure-induced equilibrium and legislative choice,” *Public Choice* 37:3 (1981), pp. 503-19. <https://www.jstor.org/stable/30023510?seq=1>; Kenneth A. Shepsle, “Institutional Arrangements and Equilibrium in Multidimensional Voting Models,” *American Journal of Political Science* 23:1 (February 1979), pp. 27-59. <https://www.jstor.org/stable/i310434>; and William H. Riker, “Implications from the Disequilibrium of Majority Rule for the Study of Institutions,” *American Political Science Review* 74:2 (June 1980), pp. 432-46. <https://www.jstor.org/stable/1960638?seq=1>.
10. Barry R. Weingast and William J. Marshall, “The Industrial Organization of Congress; or, Why Legislatures, Like Firms, Are Not Organized as Markets,” *Journal of Political Economy* 96:1 (February 1988), pp. 132-63. <https://www.jstor.org/stable/1830714?seq=1>.
11. Cong. Rec. 22857 (1963), (Statement of Mr. Mansfield).
12. See, e.g., Hannah Arendt, *The Human Condition* (Second edition: University of Chicago Press, 2018).
13. Gerhard Loewenberg, *On Legislatures: The Puzzle of Representation* (Routledge, 2011), p. 6.
14. Hugh Heclo, “Thinking Institutionally,” in *The Oxford Handbook of Political Institutions*, ed. Sarah A. Binder et al. (Oxford University Press, 2008), p. 3.
15. Theodore J. Lowi, *The End of Liberalism: The Second Republic of the United States* (40th anniversary edition: W.W. Norton & Co., 2009), p. 298.
16. See, e.g., C. Lawrence Evans, *The Whips: Building Party Coalitions in Congress* (University of Michigan Press, 2018).
17. Keith Krehbiel, *Pivotal Politics: A Theory of U.S. Lawmaking* (The University of Chicago Press, 1998).
18. See, e.g., Frances E. Lee, “How Party Polarization Affects Governance,” *Annual Review of Political Science* 18 (2015), pp. 261-82; Frances E. Lee, *Insecure Majorities: Congress and the Perpetual Campaign* (The University of Chicago Press, 2016).
19. Randall L. Calvert, “The rational choice theory of social institutions: cooperation, coordination, and communication,” in *Modern Political Economy: Old Topics, New Directions*, ed. Jeffrey S. Banks and Eric A. Hanushek (Cambridge University Press, 1995), pp. 216-17.
20. Sue E.S. Crawford and Elinor Ostrom, “A Grammar of Institutions,” *The American Political Science Review* 89:3 (September 1995), pp. 582-600. https://wtf.tw/ref/crawford_ostrom_1995.pdf.
21. *Ibid.*, p. 582.
22. James G. March and Johann P. Olsen, “Elaborating the ‘New Institutionalism,’” in *The Oxford Handbook of Political Institutions*, ed. Sarah A. Binder et al. (Oxford University Press, 2008), p. 1.
23. *Ibid.*
24. See, e.g., Nelson W. Polsby, “The Institutionalization of the U.S. House of Representatives,” *American Political Science Review* 62:1 (March 1968), pp. 144-68. <https://www.cambridge.org/core/journals/american-political-science-review/article/institutionalization-of-the-us-house-of-representatives/A816E747CB7346D9D997466D0293CD3D>; Fred I. Greenstein and Nelson W. Polsby, “Legislatures,” in *Handbook of Political Science, Volume 5: Governmental Institutions and Processes*, ed. Fred I. Greenstein and Nelson W. Polsby (Addison-Wesley Publishing Company, 1975).
25. Greenstein and Polsby, p. 260.
26. Maurice Merleau-Ponty, *Phenomenology of Perception* (Routledge, 2013), p. 243.

Endnotes

27. "Implications from the Disequilibrium of Majority Rule for the Study of Institutions," p. 435. <https://www.cambridge.org/core/journals/american-political-science-review/article/implications-from-the-disequilibrium-of-majority-rule-for-the-study-of-institutions/EDE4D6D34767C99632B68FC61A082E67>.
28. Shepsle and Weingast, p. 506. <https://www.jstor.org/stable/30023510?seq=1>.
29. Ibid., p. 501.
30. "Institutional Arrangements and Equilibrium in Multidimensional Voting Models," pp. 27-59. <https://www.jstor.org/stable/2110770?seq=1>.
31. See, e.g., James A. Thurber, "Political Power and Policy Subsystems in American Politics," in *Agenda for Excellence: Administering the State*, ed. B. Guy Peters and Bert A. Rockman (Chatham House, 1996), pp. 76-104; Hugh Hecllo, "Issue Networks and the Executive Establishment," in *The New American Political System*, ed. Anthony King (American Enterprise Institute, 1978), pp. 87-125; Andrew S. McFarland, *Cooperative Pluralism: The National Coal Policy Experiment* (University of Kansas Press, 1993); Jacob Hacker, "Privatizing Risk Without Privatizing the Welfare State: The Hidden Politics of Social Policy Retrenchment in the United States," *American Political Science Review* 98:2 (May 2004), pp. 243-60. <https://www.cambridge.org/core/journals/american-political-science-review/article/privatizing-risk-without-privatizing-the-welfare-state-the-hidden-politics-of-social-policy-retrenchment-in-the-united-states/9EE821F912D000130BC9C6094C4B2686>; Matt Grossmann, *Artists of the Possible: Governing Networks and American Policy Change Since 1945* (Oxford University Press, 2014).
32. William H. Riker, *The Art of Political Manipulation* (Yale University Press, 1986), p. 19.
33. Karen Schweers Cook and Margaret Levi, eds., *The Limits of Rationality* (University of Chicago Press, 2008), p. 403.
34. Ana Radelat, "CT lawmakers slam Senate inaction on gun background checks," *The Connecticut Mirror*, June 5, 2019. <https://ctmirror.org/2019/06/05/ct-lawmakers-slam-senate-inaction-on-gun-background-checks>.
35. See, e.g., Nicholas Rowe, *Rules and Institutions* (University of Michigan Press, 1990).
36. Kenneth A. Shepsle, *Rule Breaking and Political Imagination* (The University of Chicago Press, 2017), p. 4.
37. See, e.g., Arendt.
38. Rowe, p. viii.
39. Arendt, pp. 42-43.
40. Colin Hay, "Constructivist Institutionalism," in *The Oxford Handbook of Political Institutions*, ed. Sarah A. Binder et al. (Oxford University Press, 2008), p. 10.
41. Kathleen Bawn and Gregory Kroger, "Effort, Intensity and Position Taking: Reconsidering Obstruction in the Pre-Cloture Senate," *Journal of Theoretical Politics* (January 2008), p. 70. <https://journals.sagepub.com/doi/abs/10.1177/0951629807084040>.
42. See, e.g., Jane Mansbridge and Cathie Jo Martin, eds., "Negotiating Agreement in Politics," *American Political Science Association Task Force Report*, 2013. https://www.apsanet.org/portals/54/Files/Task%20Force%20Reports/MansbridgeTF_FinalDraft.pdf.
43. Michael Barber and Nolan McCarty, "Causes and Consequences of Polarization," in *Political Negotiation: A Handbook* (Brookings Institution Press, 2015), p. 80.
44. Cathie Jo Martin, "Negotiating Political Agreements," in *Negotiating Agreement in Politics*, ed. Cathie Jo Martin and Jane Mansbridge (Brookings Institution Press, 2013), p. 9.
45. See, e.g., Gregory J. Wawro and Eric Schickler, *Filibuster: Obstruction and Lawmaking in the U.S. Senate* (Princeton University Press, 2006).
46. Kurt Vonnegut, *Slaughterhouse-Five* (50th anniversary edition: Modern Library, 1994), p. 25.
- 47 Ibid.
48. "Implications from the Disequilibrium of Majority Rule for the Study of Institutions," p. 446. <https://www.jstor.org/stable/1960638?seq=1>.
49. Mayhew, p. 14. <https://global.oup.com/academic/product/the-oxford-handbook-of-the-american-congress-9780199559947?cc=us&lang=en&>.
50. See, e.g., C. Lawrence Evans and Walter Oleszek, "The Strategic Context of Congressional Party Leadership," *Congress and the Presidency* 26:1 (1999). <https://www.tandfonline.com/doi/abs/10.1080/07343469909507789?journalCode=uctp20&>.
51. Voteview can be found at: <https://voteview.com>.

Endnotes

52. Mayhew, p. 14. <https://global.oup.com/academic/product/the-oxford-handbook-of-the-american-congress-9780199559947?cc=us&lang=en&>.
53. Ibid.
54. Ibid., p. 15.
55. William H. Riker, *The Theory of Political Coalitions* (Yale University Press, 1962), p. *viii*.
56. Ibid.
57. Ibid., p. *ix*.
58. Krehbiel, p. 8.
59. David W. Rhode, "Reflections on the Practice of Theorizing: Conditional Party Government in the Twenty-First Century," *The Journal of Politics* 75:4 (September 2013), p. 850, n. 7. <https://www.jstor.org/stable/10.1017/s0022381613000911?seq=1>.
60. Bertram Myron Gross, *The Legislative Struggle* (Greenwood Press, 1978), p. *ix*.

ABOUT R STREET

The R Street Institute is a nonprofit, nonpartisan, public-policy research organization (“think tank”). Our mission is to engage in policy research and outreach to promote free markets and limited, effective government. In addition to our D.C. headquarters, we have offices in Georgia, Texas, Ohio and California. We work extensively on both state and national policy, focusing on issues that other groups tend to neglect. Our specialty is tackling issues that are complex, but do not necessarily grab major headlines. These are the areas where we think we can have a real impact. We believe free markets work better than the alternatives. At the same time, we recognize the legislative process calls out for practical responses to current problems. Toward that end, our motto is “Free markets. Real solutions.”

INDEPENDENCE STATEMENT

The R Street Institute is committed to producing high-quality research and educating federal, state and local policymakers. Facts, data and staff expertise drive our research. We do not and will not permit the interests of politicians, donors or any other third party to dictate R Street’s research or policy positions. While R Street may solicit input from any number of interested stakeholders, we are solely responsible for our research and related activities. Even where we agree with stakeholders and donors, R Street staff does not and will not represent, lobby or advocate on behalf of any third party.

R STREET INSTITUTE

1212 New York Avenue, NW, Suite 900
Washington, D.C. 20005

(202) 525-5717
feedback@rstreet.org
www.rstreet.org

© 2020 by the R Street Institute, Washington, D.C.

