THE LAWMAKING CONGRESS

ROGER H. DAVIDSON*

I

INTRODUCTION

Among all the world's national assemblies, the United States Congress is virtually unique in its legislative activism and productivity. Unlike Westminster-style parliamentary bodies, it writes, processes, and refines its own legislative products, relying to a large degree on "in-house" resources of member specialization and staff assistance. Congress's primacy as lawmaker is mandated by the Constitution and validated by historical experience. Focusing upon the legislative work of Congress follows Woodrow Wilson's admonition that we pay attention to "what Congress actually does and how it does it, with all its duties and all its occupations, with all its devices of management and resources of power."[1]

Congress's agenda and workload shape not only the behavior and operations of the Senate and House of Representatives but also the two chambers' relationships with other governmental branches. Articles I and II of the Constitution are devoted largely to outlining the interwoven lawmaking duties of the legislative and executive branches—from initiation ("[The president] shall from time to time . . . recommend to [Congress's] Consideration such Measures as he shall judge necessary and expedient."[2]) to implementation ("[H]e shall take Care that the Laws be faithfully executed . . . ."[3]). Beginning with George Washington, purposeful presidents have always tried to insert themselves into the legislative process. Franklin D. Roosevelt and his successors institutionalized the "legislative presidency";[4] today's chief executives are expected to present legislative agendas to Congress and to provide Capitol Hill allies with guidance and leadership.

Congressional interactions with the judiciary are no less significant. Such encounters are, on the whole, less conspicuous than those between Congress and the White House, and until quite recently have received far less attention from scholars and other serious observers. Yet the judicial branch is in large measure a creature of Congress. Article III of the Constitution contains no less than four grants of congressional discretion. Most importantly, the Supreme Court's structure is left to statutory specification; its appellate jurisdiction is to be

---

Copyright © 1993 by Law and Contemporary Problems

* Professor of Government and Politics, University of Maryland, College Park.

1. WOODROW WILSON, CONGRESSIONAL GOVERNMENT 56 (Johns Hopkins ed., 1981)(1885).
2. U.S. CONST. art. II, § 3.
3. *Id.*
4. STEPHEN J. WAYNE, THE LEGISLATIVE PRESIDENCY (1978).

authorized "with such Exceptions, and under such Regulations as the Congress shall make."[5] Mentioned, though not specified, are other federal courts "as the Congress may from time to time ordain and establish."[6]

The increasing interaction between Congress and the judiciary is now an established phenomenon. Congress is an active partner in shaping the operational meaning of the constitutional text. Its actions frame constitutional issues and produce a significant portion of the courts' casework agenda. Congress or its individual members may participate in litigation as a party or an amicus curiae (a friend of the court). Nor is Congress content to concede to courts the last word on questions of constitutionality. On issues as diverse as child labor, highway safety, flag burning, abortion, affirmative action, and religious liberty, Congress has reacted to court holdings by trying to thwart, sidestep, modify, or nullify them, or by simply ignoring them.[7] Approaching questions of constitutionality or statutory interpretation, judges in turn remain aware of Congress's reactive capacities and anticipated responses.[8]

It is my purpose in this article to offer general guidelines for understanding how this task of framing and reviewing constitutional issues is approached by today's senators and representatives. Several attributes of contemporary congressional decisionmaking are especially relevant to understanding Congress's role as constitutional interpreter. First, although fewer lawmakers have legal backgrounds today, they tend to be careerists who rely on professional staffs to advise them on technical matters. Second, the congressional workload continues to expand in size and complexity. Third, Congress is organized and led by its party organizations and their leaders; longstanding partisan and ideological commitments affect Congress's legislative products. Finally, Congress is a decentralized and pluralistic entity. Its members are motivated by a bewildering variety of constituency and interest-group demands. Its detailed legislative work is conducted mainly in its committee rooms. The committees respond to multiple constituencies, speaking in many voices and sometimes with contradictory messages. These attributes of Capitol Hill decisionmaking not only color congressional consideration of constitutional issues, but also shape congressional-judicial relations generally.

II

PROFESSIONALISM

The leading characteristic of modern legislators is that they tend to be careerists. In the 103rd Congress (1993-1995), the average representative has

---

5. U.S. CONST. art. III, § 2.

6. *Id.* § 1.

7. *See generally* LOUIS FISHER & NEAL DEVINS, POLITICAL DYNAMICS OF CONSTITUTIONAL LAW (1992).

8. On the role of anticipating congressional reactions in statutory interpretations, see Michael E. Solimine & James L. Walker, *The Next Word: Congressional Response to Supreme Court Statutory Decisions*, 65 TEMP. L. REV. 432-33 (1992).

served almost eleven years (5.4 House terms); the average senator has served 11.7 years (nearly two Senate terms).[9] Periodic high-turnover elections (for example, 1964, 1974, 1992) temporarily dilute but do not dissolve the careerism that pervades the contemporary Congress.

The prevalence of careerists on Capitol Hill has several consequences for making laws and monitoring judicial developments. Most important, at any given time, many members have experience with the issue at hand. This is especially true of committee and subcommittee leaders. Second, careerism implies stability: the House and Senate are relatively fixed institutions with strong traditions and elaborate procedures. The presence of sizable numbers of senior members means that sudden or drastic change is usually resisted. Observers and newcomers alike soon learn that the two houses of Congress must be accepted largely on their own terms and that their habitual ways of doing things can be altered only with difficulty. Finally, members' longevity is accompanied by long-standing loyalties to certain political interests and policy outcomes, explaining Congress's tenacity in pursuing favored interpretations in the face of opposition from the courts or the executive branch. Examples of this vigor include both the enactment of child labor provisions in 1938, nearly a generation after the Supreme Court had declared them an unconstitutional exercise of Commerce Clause authority, and the repeated efforts to resuscitate the "fairness doctrine" after the Reagan Administration and the Federal Communications Commission had pronounced it irreconcilable with the First Amendment's "marketplace of ideas."[10]

Although the numbers are on the decline, a plurality of members of Congress are recruited from the legal profession.[11] Lawyers dominate the two chambers' Judiciary Committees. Nonlawyers rarely serve on the House Judiciary Committee. On the Senate panel, however, political qualifications occasionally prevail over a lack of legal experience in filling vacancies. One senator who was offered a seat on the Judiciary Committee, described how then-chairman Strom Thurmond (R-SC) appealed to him:

> Strom Thurmond really wanted me on Judiciary. He offered to set up a subcommittee and let me chair it. I'm not a lawyer. Thurmond said: "You don't have to be a lawyer—you've got common sense. I'll hire you a lawyer. If you don't like him, I'll hire you another one."[12]

---

9. CONGRESSIONAL DIRECTORY 1993-1994, at 367-383 (1993).

10. Key documents in the history of the child labor issue are excerpted in FISHER & DEVINS, *supra* note 7, at 78-85. For a discussion of "fairness doctrine" politics, see Neal Devins, *Congress, the FCC, and the Search for the Public Trustee*, 56 LAW & CONTEMP. PROBS. 145 (Autumn 1993). Both issues are discussed in LOUIS FISHER, CONSTITUTIONAL DIALOGUES: INTERPRETATION AS POLITICAL PROCESS 204-05, 249-51 (1988).

11. John Crawford, *The New Class: More Diverse, Less Lawyerly, Younger*, 50 CONG. Q. WKLY. REP. 9 (1992).

12. C. LAWRENCE EVANS, LEADERSHIP IN COMMITTEE: A COMPARATIVE ANALYSIS OF LEADERSHIP BEHAVIOR IN THE U.S. SENATE 23 (1991).

Following the 1992 elections, Chairman Joseph R. Biden, Jr. (D-DE) was determined to recruit women members for his panel. Ultimately two women were persuaded to serve: Carol Moseley-Braun of Illinois (the only lawyer among the new women senators) and California's Diane Feinstein (a former mayor of San Francisco who had several honorary law degrees but no legal training).

Over the past several Congresses, then, nonlawyers of both parties have served on the Senate committee. Yet the panel, like its House counterpart, is essentially a lawyerly body: only four of its eighteen seats in the 103rd Congress (1993-1995) are held by nonlawyers. This legal expertise influences Congress's decisionmaking. Despite their concern over policy results, lawmakers retain a fascination for procedural aspects of public issues, and often recast those issues in legal language and concepts. Significantly, the primary formal setting for gathering information is the committee hearing, which mirrors (if imprecisely) judicial proceedings, and sometimes even includes oath-taking. Such hearings may vent views on constitutional issues, which in turn may help frame judicial proceedings. Congressional airing of campaign finance problems, for example, will form an important part of the record if and when reform legislation is enacted. The constitutionality of such legislation will turn not only on the Court's prior analyses (primarily in *Buckley v. Valeo*[13]), but "will also be informed by evidence that inadequately regulated campaign-financed practices can subvert the integrity of the political process that is at the heart of our democratic system of government."[14] Evidence on such questions has been, and will be, aired in detail in congressional hearings and floor debates.

Bill drafting is another phase of the legislative process that most clearly draws upon legal expertise, including familiarity with constitutional provisions and concepts. Yet the committees' handling of legal questions illustrates Richard F. Fenno, Jr.'s dictum that "committees differ."[15] The interaction of members' training and the committee subject matter lead committees into taking quite diverse approaches to constitutional issues. In a study of three House committees, for example, Mark E. Miller uncovered varying degrees of regard for court interpretations.[16] Interior and Insular Affairs (now Natural Resources) viewed issues in terms of constituent needs. The policy-driven Committee on Energy and Commerce saw courts as simply another set of political players. The Judiciary Committee's lawyer-members displayed a "lawyer-like culture and deliberative style."[17] Although Miller's findings were drawn from interviews with members and staffs, they indicate that the three committees bring differing philosophical assumptions and decisionmaking premises to bear on the legal

13. 424 U.S. 1 (1974).

14. Gary S. Stein, *The First Amendment and Campaign Finance Reform: A Timely Reconciliation*, 44 RUTGERS L. REV. 743-95 (1992).

15. RICHARD F. FENNO, JR., CONGRESSMEN IN COMMITTEES 280 (1973).

16. Mark C. Miller, *Congressional Committees and the Federal Courts: A Neo-Institutional Perspective*, 45 W. POL. Q. 949 (1992).

17. *Id.* at 961.

aspects of their legislative drafting. Judiciary, for example, displays relatively great deference to court holdings and hesitates to overturn them. In drafting its regulatory statutes, Energy and Commerce, on the other hand, does so fully expecting courts to flesh out its legislative language, and no doubt expects to revisit controversial issues at some later date to endorse, reject, or modify judicial interpretations.

Congress's approach to questions of constitutionality and legal interpretation is conditioned by its members' attributes and career perspectives. The fact that so many senators and representatives have been trained in the law, of course, gives the two branches a common language for conducting a constitutional dialogue. Yet elected lawmakers are apt to perceive questions of law rather differently than do judges, or even lawyers practicing in the particular field in question. Their collective judgments, as reflected in statutes, reports, and other statements of congressional "policy," are primarily result-oriented, constituency driven, and often characterized by vagueness, compromise, and inconsistency—all qualities that complicate the judiciary's tasks of interpretation and application.

III

AGENDAS AND WORKLOADS

Congress today confronts a number and variety of demands unmatched in all but the most turbulent years of the past. In recent years, the legislative workload has become increasingly diverse. Yet, the number of bills and resolutions introduced and processed on Capitol Hill has declined since the peak years of the 1970s. On the other hand, bills, resolutions, and enactments have become longer and more complex. The 81st Congress (1949-1951) produced 906 statutes that averaged 2.5 pages in length; forty years later, the 101st Congress (1989-1991) processed only 650 statutes, but they averaged nearly nine pages and took up nearly twice as much space in the *U.S. Code* as the earlier Congress's handiwork.[18] Other legislative responsibilities—such as overseeing the executive branch, processing nominations, and reviewing executive communications—have also dramatically increased.

An increasingly frequent source of the lawmaking agenda is found in judicial interpretations of existing statutory language. However elaborately they may be structured, congressional enactments often define key public policy concepts in broad terms, leaving it to the courts and executive agencies to apply and elaborate upon them. In turn, judicial and executive readings of legislative language may be examined, questioned, and even reversed in subsequent enactments. There is every reason to believe that this form of lawmaking activity has accelerated in recent years. Only twenty-one judicial rulings were overridden between 1945 and 1957, according to one study.[19] A study of the 1967-1990

18. ROGER H. DAVIDSON & WALTER J. OLESZEK, CONGRESS AND ITS MEMBERS 326 (1994).

19. Note, *Congressional Reversal of Supreme Court Decisions: 1945-1957*, 71 HARV. L. REV. 1324, 1326 (1958).

period, however, found that 121 of the Court's interpretation decisions had been overridden, an average of ten per Congress.[20] The author of the second study concluded that "congressional committees, in fact, carefully monitor Supreme Court decisions," and that Congress is apt to override decisions of a closely divided Court favoring conservative interpretations, decisions that rely on the law's plain meaning, and decisions that clash with positions taken by federal, state, and local governments.[21]

Bills and resolutions, moreover, constitute only part of the overall legislative workload. Congress also receives a large volume of presidential messages and executive reports of various kinds, some of which are mandated by law, others of which are volunteered by the executive in an effort to shape the legislative agenda. The overall trend over the past fifty years, and especially since the 1960s, has been one of dramatic growth, even though the numbers have subsided somewhat in recent years. Because of its special constitutional duties, the Senate historically has received more executive communications than the House, although the gap is closing. Most communications are referred to the committees having jurisdiction over the subject matter in question. Many congressional committees receive almost as many executive communications as they do legislative proposals; some committees receive far more.

Senate committees also have the time-consuming task of confirming numerous federal appointments. The Senate Judiciary Committee considers the growing numbers of law enforcement and judicial appointments, including Justice Department executives, U.S. Attorneys and Marshals, and judges for various federal courts. During the 100th Congress (1987-1989), for example, the Committee considered 194 presidential nominations, or 22 percent of the total nominations sent to the Senate. Fifty-one days of hearings were held, including twelve days concerning Supreme Court nominee Robert H. Bork and three days for Anthony Kennedy, the successor nominee.[22] These congressional-judicial encounters can turn into highly publicized events, as in the contentious confirmation hearings of Supreme Court nominees Bork (1987) and Clarence Thomas (1991). Constitutional issues—abortion, affirmative action, and stare decisis, for example—figure prominently in senators' questioning. Justice Department nominees are subject to similar probes. Such concerns are not confined to the Judiciary Committee: nominees for the Federal Communications Commission (Commerce, Science, and Transportation Committee) expect to be queried about First Amendment and broadcast regulation, and nominees for the Equal Employment Opportunity Commission (Labor and Human Resources Committee) invariably are challenged to give their views of affirmative action.

Implementation and oversight, as well as administrative and judicial rulemaking, are functions that repeatedly prod congressional committees into

---

20. William N. Eskridge, Jr., *Overriding Supreme Court Statutory Interpretation Decisions*, 101 YALE L. J. 331, 338 (1991).

21. *Id.*

22. S. REP. NO. 101-12, 101st Cong., 1st Sess. 25 (1989).

undertaking oversight hearings and investigations. The enactment of a law only begins the policy-making process. Courts and administrative agencies may take over the task of refining the policy, but always under Congress's watchful eye. Louis Fisher observes,

> What is "final" at one stage of our political development, may be reopened at some later date, leading to revisions, fresh interpretations, and reversals of Court doctrines. Through this process of interaction among the branches, all three institutions are able to expose weaknesses, hold excesses in check, and gradually forge a consensus on constitutional issues.[23]

Reauthorizations of agencies and programs are obvious occasions for examining effectiveness and voicing complaints. They also raise constitutional issues—relating to, for example, busing (Justice Department), fetal tissue research (National Institutes of Health), abortion counseling (Health and Human Services), and broadcast license standards (Federal Communications Commission).[24] With the breadth and reach of modern government, oversight remains burdensome even if few new statutes are produced. In any event, this oversight bears a close relationship to lawmaking because it flows from previously enacted statutes and continues to influence how those statutes are implemented and evaluated.

Confronting such a vast subject matter and relentless workload demands, Congress cannot devote systematic or consistent attention to issues raised in the federal establishment, even those that pose constitutional questions. "Most of what agencies do, at the level of the myriad individual actions that comprise the daily life of any department or agency, is simply not knowable by Congress."[25] Thus, as Mathew McCubbins and Thomas Schwartz have argued, Congress's oversight strategy falls short of "police-patrol" scrutiny: systematic, proactive review of agencies' activities.[26] Rather, legislators normally settle for the reactive "fire-alarm" approach, in which their attention is triggered by constituencies through "a system of rules, procedures, and informal practices that enable individual citizens and organized interest groups to examine decisions, . . . to charge executive agencies with violating congressional goals, and to seek remedies from agencies, courts, and Congress itself."[27] The principle applies as much to lawmakers' review of court holdings as to their oversight of administrative actions. The attention Congress devotes to constitutional questions, in other words, depends heavily upon the political and institutional context within which the question is raised.

---

23. FISHER, *supra* note 10, at 275.

24. On FCC application of affirmative action to licensees, see FISHER & DEVINS, *supra* note 7, at 290-91.

25. CHRISTOPHER H. FOREMAN, JR., SIGNALS FROM THE HILL: CONGRESSIONAL OVERSIGHT AND THE CHALLENGE OF SOCIAL REGULATION 19 (1988).

26. Mathew D. McCubbins and Thomas Schwartz, *Congressional Oversight Overlooked: Policy Patrols Versus Fire Alarms*, 28 AM. J. POL. SC. 165 (1984).

27. *Id.*, *supra* note 26, at 166.

IV

PARTISANSHIP

Since the early nineteenth century, members of Congress have tended to be partisan and ideological loyalists, and Congress's chambers have been in large part organized and led by the political parties. Partisanship is alive and well on Capitol Hill; party affiliation remains the strongest single correlate of members' voting decisions, which in recent years has reached surprisingly high levels.[28] Moreover, despite the fact that U.S. political parties are widely regarded as "big tents" covering diverse viewpoints, partisanship in the two chambers is closely linked to durable policy commitments and ideological predispositions.

Since the New Deal era, Congress has been a bastion of Democratic Party control—excepting two Republican Congresses (1947-1949 and 1953-1955) and six years of Senate control (1981-1987). Democratic margins have ranged from overwhelming (1933-1939, 1959-1965, 1975-1981) to relatively close. With Republican control of the White House—and judicial nominations—in the 1969-1976 and 1981-1992 periods, ideological tensions between the legislative and judicial branches were to be expected. This Republican control may help explain a congressional tendency to overturn "conservative" Supreme Court decisions through enactments such as the Civil Rights Act of 1991 and the Religious Liberty Restoration Act of 1993.[29]

Parties control all assignments to the standing committees. Each of the four congressional party caucuses (House and Senate Democrats and Republicans) has a Committee on Committees to assign caucus members to committees. The assignments are ratified by the respective chambers. The majority party names the chairpersons of all committees and subcommittees and enjoys a majority of seats on virtually all panels. The parties' share of committee seats roughly parallels their strength in the full chamber.

Control of committees is critical because these work groups are the gatekeepers of congressional policy making. Few policies are enacted without committee support; those that are enacted bear the framework and language laid down in committee markup sessions. Thus, domination of committees' memberships leads to control of the legislative agenda.[30]

A. The Judiciary Committees and their Parent Chambers

Although by no means the sole arenas of constitutional interpretation, the Judiciary Committees deserve special attention here. Not only do they play

---

28. NORMAN J. ORNSTEIN, THOMAS E. MANN & MICHAEL J. MALBIN, VITAL STATISTICS ON CONGRESS 1991-1992, at 189-90 (1992).

29. Solimine & Walker, *supra* note 8, at 447-50. *See also* Ira C. Lupu, *Statutes in Constitutional Orbit*, 79 VA. L. REV. 1 (1993).

30. EVANS, *supra* note 12, at 60ff.

pivotal roles in authorizing and reviewing judicial bodies, they are also among the most partisan committees on Capitol Hill.

Partisan lines often are sharply drawn in legal and judicial controversies. Because the jurisdictions of the two Judiciary Committees embrace many (though by no means all) of these issues, domination of these panels is a partisan objective. The committees were the arenas for the civil rights battles of the 1950s and 1960s; the House panel in 1974 voted articles of impeachment against President Richard Nixon. Since then, the panels have been the scene of conflicts over such divisive social issues as abortion, affirmative action, school prayer, flag burning, and the rights of criminal defendants. Especially during the years of divided-party control of the government, such issues have focused unprecedented attention upon the Senate's confirmation of judicial nominees.

Not surprisingly, then, the parties take pains to shape the two Judiciary Committees to their divergent policy needs. When making committee assignments, party leaders consider not only members' personal preferences but also the demands of their parties' key constituencies—for example, regional, economic, or ideological lobby groups. The conservative oligarchs who dominated Congress through the mid-1960s tried to maintain the Judiciary Committees as protectors against civil rights legislation; fierce opposition in the Senate Judiciary Committee was the reason early civil rights initiatives were directed toward the Commerce Committees through bills directed at discrimination in interstate commerce. Increasingly, however, liberals were drawn to the Judiciary panels by the prospect of working on civil rights and other progressive legislation.

The Judiciary Committees' attractiveness to policy entrepreneurs declined in the 1980s as issues of constitutional interpretation became increasingly divisive. House Democratic leaders made assignments that assured the Committee would kill constitutional amendments and other measures desired by conservatives on such subjects as school prayer, abortion, budget procedures, and term limits. Party leaders have encountered difficulty in attracting members, and in the early 1980s several members attempted to leave the Committee to escape divisive social issues under its jurisdiction.[31]

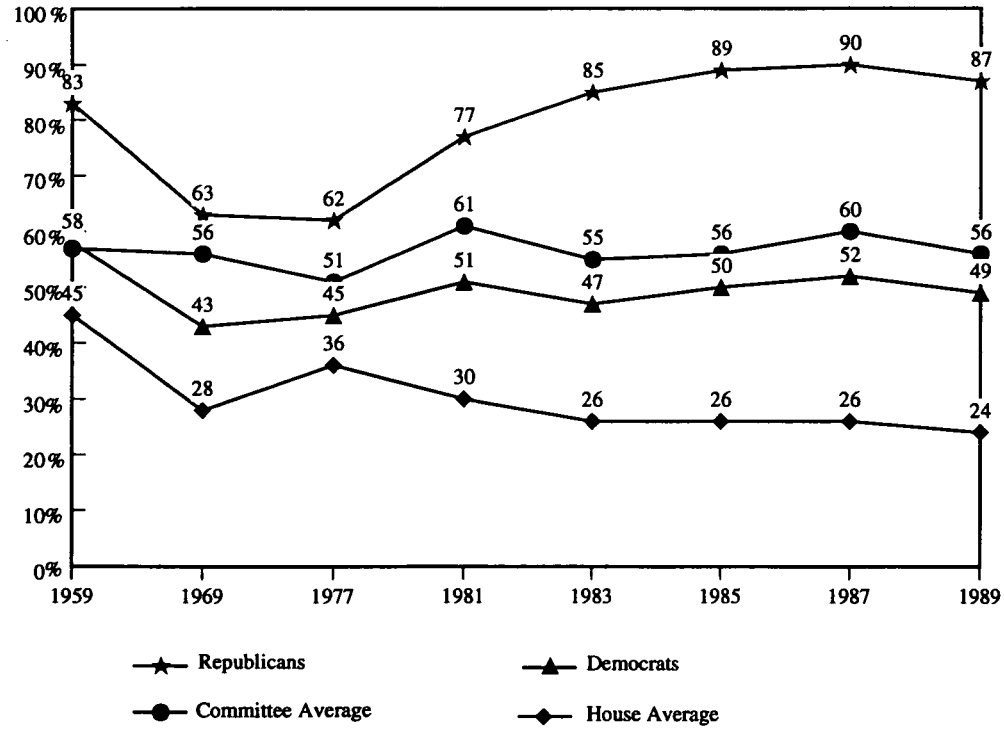
When Republicans captured the Senate in 1981, the Judiciary Committee was a singular target for conservative takeover.[32] By this time one of the more liberal Senate panels, Judiciary was holding up conservative initiatives on busing, school prayer, criminal law, abortion policy, and other social issues. Spurred by fellow conservatives, the new chairman, Strom Thurmond (SC), recruited a conservative majority for his panel. He urged three conservative freshmen to seek seats on the Committee. Then he neutralized a senior Republican liberal, Senator Charles McC. Mathias, Jr. (Md.), by both abolishing one subcommittee

31. STEVEN S. SMITH & CHRISTOPHER J. DEERING, COMMITTEES IN CONGRESS 103 (1990).

32. Roger H. Davidson & Walter J. Oleszek, *Changing the Guard in the U.S. Senate*, 9 LEGIS. STUD. Q. 635, 649 (1984).

the Marylander was in line to chair and shifting the jurisdiction of another on which he served. Constitutional issues were meanwhile safely placed in conservatives' hands. Thurmond's actions pulled the Committee back near the chamber's ideological center, helping him control the Committee's agenda and combat the liberals' delaying tactics. "Because of its ideological complexion and the prevalence of delaying tactics," Evans writes, "the Judiciary Committee was very much a 'microcosm' of the full Senate during the years of Republican control."[33] After Democrats recaptured the Senate in 1987, however, the panel shifted leftward again.

Figure 1:
SUPPORT FOR "CONSERVATIVE COALITION":
HOUSE OF REPRESENTATIVES AND JUDICIARY COMMITTEE



33. EVANS, *supra* note 12, at 148.

B. Intra-Committee Conflicts

Within the Judiciary Committees, the ideological gap is wider than in the two chambers as a whole. Judiciary Democrats tend to be more liberal than their fellow partisans, while Judiciary Republicans are to the right of their GOP colleagues. Self-selection may partially account for this phenomenon: Ideologically committed members are drawn to arenas that allow them to voice their views and pursue their goals. Party leaders add to the polarization by ensuring that "reliable" partisans are given seats on Judiciary.[36] A student of the Senate panel in the 1980s described members' preferences as "polarized and entrenched"; decision making was "often highly partisan and rife with conflict."[37] The same could be said of the House Committee.

Intra-committee polarization persists, as the figures presented in Table 1 indicate.[38] As noted earlier, as long as Democrats hold majorities in the House or Senate chambers, the Judiciary Committees are more liberal than the chambers' membership as a whole. The Republicans, whether in majority or minority, are also careful to ensure the conservative loyalty of their committee members. (Although in recent years the Committees' Republicans have edged nearer to their party's mean, that is no doubt due in part to the party's overall rightward shift.) Within both Committees, therefore, there is a wide ideological gap between the two parties. The gap becomes a yawning chasm in the House Civil and Constitutional Rights Subcommittee, where both parties guard their interests in seeking to influence constitutional amendments. In 1991 subcommittee Democrats gave an average of eleven percent support to the "conservative coalition," while their Republican counterparts gave ninety-three percent. The Judiciary Committees' partisan and ideological character affects the politics of constitutional interpretation, as the examples in Part V illustrate.

---

36. Shepsle found no overall ideological "bias" in House Democrats' assignments, but that does not preclude leadership efforts to shape particular committees to favor clientele groups. *See* KENNETH A. SHEPSLE, THE GIANT JIGSAW PUZZLE: DEMOCRATIC COMMITTEE ASSIGNMENTS IN THE MODERN HOUSE 222-24 (1978).

37. Evans, *supra* note 12, at 60.

38. ORNSTEIN, ET AL., *supra* note 28, at 21.

Table 1[39]

IDEOLOGY ON THE JUDICIARY COMMITTEES:
"CONSERVATIVE COALITION" SCORES OF COMMITTEE MEMBERS

House of Representatives

	1989	1990	1991
Committee Republicans	90%	86%	87%
House Republicans	87	85	90
House Democrats	40	40	41
Committee Democrats	24	19	30

Senate

	1989	1990	1991
Committee Republicans	88%	83%	87%
House Republicans	85	83	84
House Democrats	42	40	43
Committee Democrats	30	27	32

V

INSTITUTIONAL PLURALISM: COMMITTEES AND CONSTITUENCIES

As a policy-making institution, Congress is characterized not only by the scale of its workload and the careerism and partisanship of its members, but also by the number and variety of its structures and procedures. The Constitution confers most internal organizational decisions upon the two chambers. Given this broad conferral of authority, today's elaborate structures are the product of historical evolution.[40] Organizationally, the House and Senate are mature institutions with large bodies of settled rules, procedures, and precedents for conducting their business.

Congress's organizational complexity is demonstrated most dramatically by the two chambers' division of labor through their committee systems. Today

39. "Conservative coalition" scores represent the proportion of votes on which members voted in agreement with the position of the conservative coalition. Conservative coalition votes are those on which a majority of Northern Democrats voted against a majority of Southern Democrats and Republicans, that is, the conservative coalition. *See* ORNSTEIN, ET AL., *supra* note 28, at 201-212 (1992). Scores reported here, which were recomputed to eliminate the effect of absences, were originally reported in Congressional Quarterly. 48 CONG. Q. WKLY REP. 58-60 (Jan. 6, 1990); 48 CONG. Q. WKLY REP. 4192-95, 4218-21 (Dec. 22, 1990); 49 CONG. Q. WKLY REP. 3759-97 (Dec. 28, 1991).

40. U.S. CONST. art. I, § 5.

there are sixteen standing committees in the Senate and twenty-two in the House.[41] This, however, is only the tip of the iceberg. At the beginning of the 103rd Congress (1993-1995), House committees were divided into nearly 117 subcommittees. The House also had a select committee with three subcommittees. The Senate had three select or special committees; its standing committees had eighty-six subcommittees. Congress also had five joint Senate-House committees. In total, there were almost 250 work groups in 1993—not counting party committees, voting blocs, informal caucuses, and the like. Congressional pluralism extends not only to these work groups but to virtually all of its organizational entities. Staff structures, for example, have developed in an uncoordinated fashion, as staff and support agencies have been established over time in response to specific needs. The complexity and pluralism of the congressional establishment often assures a varied response to questions of constitutionality.

Judicial relations are subject to the same pluralism and decentralization that marks so much congressional decisionmaking. The prime responsibilities regarding courts and the legal system, of course, fall to the Senate and House Committees on the Judiciary. Their jurisdictions extend to such matters as judicial proceedings generally, federal courts and judges, civil liberties, constitutional amendments, immigration and naturalization, patents, copyrights, and trademarks, interstate compacts, and claims against the United States.[42]

Proposing a constitutional amendment is the most decisive way of to resolve a judicial-congressional dispute. Historically, no less than seven amendments (Eleventh, Thirteenth, Fourteenth, Sixteenth, Nineteenth, Twenty-Fourth, and Twenty-Sixth) either overturned or effectively nullified prior Supreme Court rulings. Proposed amendments on abortion, flag burning, and school prayer were designed to overturn Supreme Court decisions. Thus the relevant Judiciary subcommittees, including the House Civil and Constitutional Rights Subcommittee, and the Senate Constitution Subcommittee, are inevitably targeted by groups bent on altering the Constitution, preventing such alterations, or affecting its interpretation.

Proposed constitutional amendments rarely succeed because of the difficulty of the constitutional amending process; statutory revisions are a more feasible and frequent response to judicial rulings. In the decade following *Roe v. Wade*,[43] for example, Congress enacted some thirty statutes dealing with abortion—all of them involving restrictions of one form or another. Some merely stated a congressional finding of fact that human life begins at conception; others would have limited federal court power to deal with the issue. Compared with a constitutional amendment, such legislative remedies were

41. 51 CONG. Q. WKLY REP. (May 1, 1993).

42. House Rule X, cl. 1 (m); Senate Rule XXV, cl. 1 (l).

43. 410 U.S. 113 (1973).

relatively cost-free; some were mainly symbolic.[44] The Civil Rights Act of 1991 addressed, clarified, or reversed prior Court rulings in no less than eleven separate cases.[45]

Issues affecting courts and the legal system are not, of course, confined to the Judiciary Committees. The nation's federal statutes, after all, are within the province of every committee of the House and Senate that reports legislation. Committee actions affect not only the content of those laws but also their interpretation and implementation, and the involvement of the legal profession and the workload of federal courts. A number of committees, moreover, have jurisdictional responsibilities that can involve constitutional interpretation. Among these subjects are military law, international law, government regulation of all types, election law, and organization of the executive branch. The 1987 annual defense authorization bill, for example, provided the vehicle for overturning *Goldman v. Weinberger*,[46] in which the Supreme Court upheld an Air Force regulation forbidding an Orthodox Jew from wearing his yarmulke while in uniform. The House and Senate floor debate not only illustrates Congress's responsiveness to constituency pressures but "provides impressive evidence that members of Congress are fully capable of considering constitutional rights and giving greater protection than is available in the federal courts."[47]

Because they differ in personnel, jurisdictions, and constituencies, committees approach constitutional issues with varying decision premises and policy concerns. The Judiciary Committees, because their membership and subject matter are dominated by the legal professions, harbor a special concern for the nuances of constitutional interpretation. In contrast, policy committees (like Energy and Commerce) and constituency-oriented panels (like Interior and Insular Affairs/Natural resources) view constitutional questions in a more practical framework.[48] "The fate of various court decisions in Congress," Miller concludes, "may in fact depend on which congressional committee takes jurisdiction over the issues."[49]

Two cases cited by Miller illustrate how differently two House committees approached First Amendment holdings of the Supreme Court.[50] Energy and Commerce, faced with a June 1989 decision striking down most of a law it had drafted to outlaw so-called dial-a-porn telephone services,[51] acted a month later,

---

44. *See* Roger H. Davidson, *Procedures and Politics in Congress*, *in* THE ABORTION DISPUTE AND THE AMERICAN SYSTEM 30 (Gilbert Y. Steiner ed., 1983). A more recent compilation of selected post-1973 statutes is found in BARBARA HINKSON CRAIG & DAVID M. O'BRIEN, ABORTION AND AMERICAN POLITICS 109-113 (1993).

45. Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1071 (1991). *See* Joan Biskupic, *Civil Rights Act of 1991*, 49 CONG. Q. WKLY REP. 3620-22 (Dec. 7, 1991).

46. 475 U.S. 503 (1986).

47. The commentary is from Louis Fisher, *One of the Guardians Some of the Time*, *in* IS THE SUPREME COURT THE GUARDIAN OF THE CONSTITUTION? 15 (Robert Licht ed., 1993).

48. See Miller, *supra* note 16, at 963.

49. *Id.* at 963.

50. *Id.* at 958.

51. Sable Communications of California v. FCC, 492 U.S. 115 (1989).

with little debate and no hearings, to strangle the industry through regulatory language added to an annual budget reconciliation bill. Judiciary reacted much more cautiously to the Court's July 1989 holding that burning the U.S. flag was protected political speech under the First Amendment.[52] Facing intense political pressure, the Committee nonetheless held five hearings collecting the views of members of Congress, decorated war veterans, and constitutional scholars. These witnesses advocated diverse courses of action: (1) do nothing; (2) amend the constitution; or (3) amend the existing flag desecration statute to conform to the Court's opinion. No more than five weeks after the Court had spoken, the Committee decided upon the statutory option and reported legislation intended to "protect the physical integrity of American flags in a manner consistent with [the Supreme Court's decision]."[53] Before choosing the middle course of action, the panel "followed its usual pattern of carefully considering all sides of an issue and judiciously weighing all the alternatives before attempting to overturn or modify a federal court decision."[54]

A. Authorization versus Appropriation

One form of overlap of Senate and House Committee jurisdictions is between the authorizing committees that have policy and oversight authority over agencies and their programs, and the appropriations committees that recommend funding levels. Policy questions embodying constitutional interpretations may be raised in either arena, even though regular appropriations bills are not supposed to include "legislation." When committees, following *Roe v. Wade*, were slow to include antiabortion provisions in regular authorization or appropriation bills, such provisions were added as floor amendments called "Hyde amendments," after their most prominent advocate, Representative Henry J. Hyde (R-Ill).[55] Applied to various forms of governmental aid and services, such amendments dramatically slashed federal financing of abortions. In upholding the amendments in 1980, the Supreme Court's majority found that the amendments violated neither the Fifth Amendment's due process or equal protection guarantees nor the First Amendment's establishment of religion clause.[56] The decision did not mention an amicus curiae brief filed by over 200 members of Congress arguing that the congressional funding process should be regarded as a separation of powers issue that the Court should avoid.

Constitutional disputes stalled annual Justice Department authorization bills during the 1980s, in several instances forcing the department to operate solely on the authority of its funding bills. The fiscal 1983 authorization, for example, passed the Senate, but with a restrictive antibusing amendment that could not get

52. Texas v. Johnson, 491 U.S. 397 (1989).
53. H.R. Rep. No. 1015, 101st Cong., 1st Sess. (1991).
54. See Miller, *supra* note 16, at 958.
55. *See* Davidson, *supra* note 44, at 37-41.
56. Harris v. McRae, 448 U.S. 297 (1980).

past the House Judiciary Committee.[57] Whereas "legislation" is prohibited in regular appropriations bills, no such restriction applies to emergency funding bills that are continuing resolutions, and which were used frequently in the 1980s. Factions competed to attach Justice Department provisions to these bills through floor amendments, although this route was greatly restricted by a 1983 House rules change.

B. Multiple Referrals to Committees

Substantive jurisdictional overlaps have been accommodated in both chambers by procedures that enable committees to share responsibilities for broad-scale measures. The House of Representatives introduced its present multiple referral procedure in 1975; by the mid-1980s, nearly a quarter of the workload of House committees, on average, consisted of bills and resolutions shared with one or more other panels.[58] The House Judiciary Committee, with its relatively high volume of legislation, receives large numbers of multiply referred measures, although they account for only about twelve percent of the panel's total referrals. Compared to other House committees, the Judiciary Committee's jurisdiction is relatively focused and compartmentalized. At the same time, it lays claim to a variety of generally applicable issues that impinge upon the legal system—for example, antitrust laws, the federal criminal code, and Article III courts. In this area, the Judiciary Committee shares a significant number of major bills with other committees, most notably with Energy and Commerce, Ways and Means, Foreign Affairs, Banking, and Education and Labor. In the Senate, multiple referrals of legislation are less common than in the House, because customs and procedures permit committee cross-fertilization through informal negotiations, floor amendments, and other devices. Small but significant numbers of bills and resolutions, however, are referred by unanimous consent to two or more Senate committees—amounting to roughly five percent of all referrals in recent years.[59] As with its House counterpart, the Senate Judiciary Committee received a sizable number of multiple referrals during the 1980s, although these amounted to no more than three percent of the panel's large volume of legislation. Bills were most often shared with committees on the Budget, Governmental Affairs, and Finance. Judiciary and Finance, for example, shared responsibility over unfair competition in foreign trade through the former's antitrust jurisdiction and the latter's international trade jurisdiction.

A Case Study: The Equal Access Question. Overlapping committee jurisdictions and tactical use of multiple referrals were both illustrated by

57. Nadine Cohodas, *House, Senate Committees Approve Justice Authorization*, 41 CONG. Q. WKLY REP. 967 (1983). For a description of the dispute surrounding the fiscal 1987 authorization, see Nadine Cohodas, *House Panel, Meese at Odds Over '87 Funding*, 44 CONG. Q. WKLY REP. 922 (1986).

58. Roger H. Davidson et al., *One Bill, Many Committees: Multiple Referrals in the U.S. House of Representatives*, 13 LEGIS. STUD. Q. 3 (1988).

59. For relevant figures for the Senate, see Roger H. Davidson, *Multiple Referral of Legislation in the U.S. Senate*, 14 LEGIS. STUD. Q. 375-92 (1989).

procedures invoked in 1984 to pass the so-called "equal access" bill. Equal access refers to the use of public school facilities, before or after class hours, by non-school-sponsored, secular or religious groups. Sometimes called "Son of School Prayer," the bill was a fallback measure favored by those who supported a constitutional amendment permitting prayer in the schools. Given the political complexion of the Judiciary Committees, especially that of the House panel in the 1981-1986 period, a school prayer amendment was unlikely. On March 20, 1984, the Senate rejected a proposed constitutional amendment in part because of expected fierce opposition from liberals on the House Judiciary Committee.

With the constitutional amendment foreclosed, House Education and Labor Chairman Carl Perkins (D-Ky.), and cosponsor Don Bonker (D-Wash.), drafted an alternative remedy[60] written to bypass the Judiciary Committee and fall solely within the jurisdiction of Perkins's committee. Within two weeks, the Perkins bill was reported by his committee in a 30-3 vote.[61] Not only was it endorsed by a broad spectrum of individuals and groups, including many who opposed classroom prayer, but it was "viewed by many in Congress as a political safety net that may protect them from the ire of constituents angered by the defeat of the school prayer amendment."[62]

In a countermove, the chief House Judiciary Committee foe of the bill, Don Edwards (D-Calif.), who chaired the Civil and Constitutional Rights Subcommittee, drafted his own bill,[63] providing access to public schools for any voluntary student group but barring religious services on school grounds, even if they were voluntary. Edwards persuaded Speaker Thomas P. O'Neill (D-Mass.) to delay a floor vote on the Perkins bill and unsuccessfully endeavored to schedule a Democratic Caucus meeting on the issue to delay it further. "They have a lot going for them," he said of Perkins and his allies. "We just had to buy time."[64] Said Perkins of his adversary: "He advocates taking full advantage of the rules, I will not even call it a diversionary tactic."[65] When the vote was finally taken on May 15, Edwards won a temporary victory. Although the House voted 270 to 151 in favor of the Perkins-Bonker bill, that fell eleven votes short of the two-thirds needed to pass the measure under a suspension of the rules—the route Perkins had chosen to obtain an early vote and prevent the addition of any amendments to the bill.

The next episode in the drama occurred in the Senate, where Mark O. Hatfield (R-Ore.) attached an equal access amendment to an uncontroversial bill[66] to upgrade mathematics and science education. On June 27, the 1984 amendment was adopted by an 88-11 Senate vote. When the Senate's

60. H.R. 5345, 98th Cong., 2d Sess. (1984).
61. H.R. REP. NO. 710, 98th Cong., 2d Sess. (1984).
62. *Id.*
63. H.R. 5349, 98th Cong., 2d Sess. (1984).
64. Nadine Cohodas, *Two House Veterans Scrap on Issue of School Access*, 42 CONG. Q. WKLY REP. 1103-04 (1984).
65. *Id.*
66. S. 1285, 98th Cong., 1st Sess. (1983).

nongermane equal access amendment came back to the House, Chairman Perkins moved to go to conference with the Senate. Speaker O'Neill refused to recognize Perkins, explaining that the chair had referred a portion of the Senate amendment to Perkins's committee and to the Judiciary Committee. "In the opinion of the Parliamentarian, as stated to the Speaker, the Committee on the Judiciary has partial jurisdiction over a portion of the Senate Bill. This was a nongermane amendment."[67]

Perkins retorted: "I do not want to see this bill sent to a burial committee."[68] In a one-minute speech, he asserted that the bill did not fall within Judiciary's jurisdiction and threatened to invoke the Calendar Wednesday procedure to take the measure to conference.[69]

Perkins achieved a procedural victory through his threat to invoke Calendar Wednesday procedures to consider the Senate amendment to H.R. 1310, the Emergency Mathematics and Science Act and Education and Jobs Act.[70] After being denied his unanimous consent request for consideration of H.R. 1310 on July 24, 1984, Perkins moved to suspend the rules and agree to a resolution making in order on Wednesday, July 25, 1984, the consideration of the Senate amendment to H.R. 1310. Then-Majority Whip Thomas S. Foley (D-Wash.) requested unanimous consent to postpone the debate and vote until July 25, thereby preserving for Perkins the Calendar Wednesday option.

On July 25, the House adopted H.R. 554 by voice vote without debate, thereby suspending the rules for the purpose of considering Title VIII of the Senate amendment to H.R. 1310. Title VIII, the Equal Access Act, was passed 337-77. The remainder of the bill was approved 393-15, sending the measure to the President, who signed it into law[71] on August 11, 1984. Six years later, the Supreme Court upheld the "equal access" statute.[72]

As demonstrated by the equal access bill, Congress's overlapping committee jurisdictions provide multiple avenues for expressing members' views on sensitive constitutional issues. A frontal assault on the Supreme Court's school prayer doctrine was thwarted by House Judiciary's liberal tilt. The related equal access issue, which was construed as educational policy, offered an alternative way of getting Congress on the record on the matter. The effect was to shift the measure from a legally minded committee to a more result-oriented one, and to transform the issue from one of constitutional doctrine to one of educational policy.

---

67. 130 CONGRESSIONAL RECORD 19770 (June 28, 1984).
68. *Id.*
69. Under House procedures, every Wednesday standing committees may call up measures that they have reported but that have not been granted rules by the Rules Committee. The procedure is rarely used and is routinely dispensed with by unanimous consent. WALTER OLESZEK, CONGRESSIONAL PROCEDURES AND THE POLICY PROCESS 136-38 (3d ed. 1989).
70. H.R. 1310, 98th Cong., 2d Sess. (1984).
71. Education for Economic Security Act, Pub. L. No. 98-377, 98 Stat. 1267 (1984).
72. Board of Education of Westside Community Schools v. Mergens, 496 U.S. 226 (1990).

The equal access bill demonstrated many of the attributes of congressional consideration of constitutional issues. It called into play partisan, ideological, and constituency motivations. It illustrated the differing responses of committees with overlapping jurisdiction—Judiciary's more legalistic approach contrasted with Education and Labor's focus upon policy results. Finally, it stands as a reminder of the range of responses available to Congress in responding to constitutional questions.

VI

CONCLUSION

The attributes of lawmakers and the lawmaking process affect not only Congress's legislative productivity but also how Congress treats constitutional issues. Its pluralistic, uncoordinated, and sometimes contradictory responses to constitutional questions reflect the complexity of Congress's structure. Congress rarely speaks with a single, clear, unambiguous voice.

In approaching such questions, Congress and the courts share a common attribute—namely the prevalence of legal training—but the barriers between the two branches are formidable and seem to be widening. The number of lawyer-legislators in Congress is on the decrease, and, in any event, lawmaking and judging careers seem to follow ever more divergent paths. Although Congress relies heavily upon legal expertise, mainly through committee and support agency staffs, lawmakers tend to be result-oriented, often interpreting constitutional language in terms of its impact on specific constituency interests.

High levels of activity and burgeoning demands dictate congressional response to public issues. As always, lawmakers are torn between the conflicting pressures of Capitol Hill politics and the gravitational pull of their home constituencies. Rising demands from both sectors make it virtually impossible for senators and representatives to devote sustained attention to substantive problems or issues. The two chambers have responded to these burgeoning work loads and scheduling dilemmas by delegating to staff aides the mechanics of legislative research and drafting.

Partisan and ideological allegiances are as divisive as ever and are especially salient in congressional responses to pressing constitutional questions. Committees are the primary processors of legislation and monitors of judicial developments; their jurisdictions are scattered and overlapping. Because their memberships, jurisdictions, and constituencies differ, the committees themselves differ in their approaches to constitutional questions and their degree of deference to judicial interpretations. The committee system also offers multiple points of access, allowing contending factions to choose alternative routes to achieve the same policy objective. Both the committee system's pluralism and its redundancy are illustrated by the case of the equal access bill. Moreover, committees these days are increasingly more likely to combine their efforts to produce legislative packages or omnibus bills.

The bills and resolutions passed by Congress, the reports and other documents it produces, and indeed Congress's responses to constitutional questions, bear all the trademarks of Congress itself: decentralization, partisanship, constituency loyalty, result-mindedness, bicameralism, deliberateness, and a tendency to obfuscate and compromise. These attributes shape the institution's distinctly pluralistic and instrumental approach to the Constitution itself.