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## Legislative Organization and Administrative Redundancy

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# ARTICLES

## LEGISLATIVE ORGANIZATION AND ADMINISTRATIVE REDUNDANCY

MICHAEL DORAN\*

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*Congress regularly enacts legislation providing for redundant administrative programs. For example, there are more than one hundred federal programs for surface transportation, eighty-two programs to ensure teacher quality, eighty programs to promote domestic economic development, and forty-seven programs to provide employment and job-training services. Recent high-profile legislation – such as the financial-industry reform measure and the health care reform measure – add new programs without repealing existing ones directed at the same policy goals. Prior academic analyses*

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*generally have not considered why Congress pursues redundancy. This Article addresses that question through both theoretical and institutional analysis.*

*The Article first constructs an organizational theory that attributes redundancy in administrative programs to the congressional committee system. Specifically, the Article demonstrates that two critical components of the existing committee system – fragmented jurisdictions and parliamentary prerogatives – systematically bias legislative outcomes in favor of redundancy. Building on leading theoretical accounts of congressional committees from political science, the Article then presents a cost-benefit analysis of this tendency toward redundancy. It shows that redundancy allows legislators to increase distributive favors for constituents and interest groups but that redundancy is also linked to the desirable pursuit of informational efficiency. Thus, the institutional structures facilitating redundancy have mixed effects.*

*Consequently, the Article describes and analyzes specific institutional reforms that trade off these distributive costs and informational benefits. One approach would subject more legislative decisions to external advisory processes such as that used to close unneeded military facilities. A second and more promising approach would preserve existing committee jurisdictions but would scale back committees' parliamentary prerogatives, thereby encouraging redundancy in program design but discouraging redundancy in program implementation.*

#### INTRODUCTION

This Article addresses the puzzle of federal legislation that establishes and maintains redundant administrative programs. When pursuing a policy objective, Congress seldom uses a single program administered by a single agency. A Government Accountability Office (GAO) report issued in early 2011 identified program redundancy in the areas of “agriculture, defense, economic development, energy, general government, health, homeland security, international affairs, and social services.”<sup>1</sup> The report found that the federal government currently has more than one hundred programs concerning surface transportation, eighty-two programs to ensure teacher quality, eighty programs to promote domestic economic development, and forty-seven

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<sup>1</sup> U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-11-318SP, OPPORTUNITIES TO REDUCE POTENTIAL DUPLICATION IN GOVERNMENT PROGRAMS, SAVE DOLLARS, AND ENHANCE REVENUE 2 (2011) [hereinafter GAO REPORT]. The report is the first annual report under section 21 of the Statutory Pay-As-You-Go Act of 2010, which states that the

Comptroller General of the Government Accountability Office shall conduct routine investigations to identify programs, agencies, offices, and initiatives with duplicative goals and activities within Departments and governmentwide and report annually to Congress on the findings, including the cost of such duplication and with recommendations for consolidation and elimination to reduce duplication identifying specific rescissions.

Pub. L. No. 111-139, § 21, 124 Stat. 8 (to be codified at 31 U.S.C. § 712 note).

programs to provide employment and job-training services.<sup>2</sup> More than a dozen federal agencies share responsibility for food safety,<sup>3</sup> and seven agencies work to meet the water needs of the U.S.-Mexico border region.<sup>4</sup> Eight different cabinet departments maintain a total of eighty programs to provide transportation services to individuals,<sup>5</sup> and, in the recent past, the government maintained more than 125 federal programs to assist families with children.<sup>6</sup>

Although Congress has long been aware of pervasive redundancy,<sup>7</sup> it has continued the trend in recent legislation. Despite sharp criticism that regulatory fragmentation and overlap contributed to the recent crisis in the financial-services industry, the financial reform measure passed by Congress in 2010 added to the redundancy by layering new agencies and programs on old ones.<sup>8</sup> The health care reform legislation, also passed in 2010, followed the same approach. Federal law already provided numerous programs for the delivery of health care to different segments of the population; the new legislation left those programs largely in place and added ambitious new programs to the mix.<sup>9</sup> And the increased attention over the last decade to federal counter-terrorism efforts has produced a bewildering amount of fragmentation, overlap, and duplication in executive agencies and administrative programs.<sup>10</sup>

Administrative redundancy is particularly prominent in fiscal policy. Congress often channels duplicative subsidies to favored activities and

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<sup>2</sup> GAO REPORT, *supra* note 1, at 42-45, 48-49, 140-41, 144-47.

<sup>3</sup> *Id.* at 8; *see also* Richard A. Merrill & Jeffrey K. Francer, *Organizing Federal Food Safety Regulation*, 31 SETON HALL L. REV. 61, 90-92 (2000).

<sup>4</sup> GAO REPORT, *supra* note 1, at 52.

<sup>5</sup> *Id.* at 135.

<sup>6</sup> DAVID C. KING, *TURF WARS: HOW CONGRESSIONAL COMMITTEES CLAIM JURISDICTION* 140-41 (1997).

<sup>7</sup> *See, e.g., Duplication, Overlap, and Fragmentation in Government Programs: Hearing Before the S. Comm. on Governmental Affairs*, 104th Cong. 1 (1995) (statement of Sen. William Roth, Chairman, S. Comm. on Governmental Affairs) (discussing GAO findings that “despite efforts to downsize, streamline, and reinvent the Federal bureaucracy, massive duplication, overlap, and fragmentation remain rampant throughout the government”).

<sup>8</sup> *See, e.g., Dodd-Frank Wall Street Reform and Consumer Protection Act* § 1011, Pub. L. No. 111-203, 124 Stat. 1376, 1964-65 (2010) (creating the Bureau of Consumer Financial Protection).

<sup>9</sup> *See, e.g., Patient Protection and Affordable Care Act of 2010*, Pub. L. No. 111-148, §§ 1321-22, 124 Stat. 119, 186-92 (providing for, among other new programs, “health insurance exchanges” under state control); *Health Care and Education Reconciliation Act of 2010*, Pub. L. No. 111-152, 124 Stat. 1029 (amending the Patient Protection and Affordable Care Act).

<sup>10</sup> *See* Anne Joseph O’Connell, *The Architecture of Smart Intelligence: Structuring and Overseeing Agencies in the Post-9/11 World*, 94 CALIF. L. REV. 1655, 1660-73 (2006) (analyzing fragmentation in U.S. intelligence); Dana Priest & William M. Arkin, *A Hidden World, Growing Beyond Control*, WASH. POST, July 19, 2010, at A-1.

industries through a combination of direct-spending and tax-expenditure programs. The GAO reported that, for fiscal year 2009, Congress maintained “a total of 173 tax expenditures, some of which were of the same magnitude or larger than related federal spending for [particular] mission areas.”<sup>11</sup> Agriculture, education, and poverty relief, for example, receive extensive federal assistance both through annual appropriations and through preferential tax rules.<sup>12</sup> In other cases, Congress provides redundant subsidies through overlapping spending programs (without corresponding tax expenditures) or overlapping tax expenditures (without corresponding spending programs). Whatever the medium, one is not hard pressed in reviewing the federal budget to find correlatives among the many appropriations, entitlements, and tax expenditures. Why does Congress do this? Why does Congress pursue its policy objectives through legislation that generates, preserves, or increases administrative redundancy?<sup>13</sup>

Academic accounts generally have ignored that basic question and, instead, have examined redundancy exclusively as a normative matter. The dominant position in the academic literature argues that policymakers should reduce redundancy as much as possible. Milton Friedman, for example, maintained that government could provide less expensive and more effective poverty relief by collapsing its overlapping anti-poverty programs into cash grants to the poor.<sup>14</sup> Similarly, legal scholars have long debated the choice between direct-spending programs and tax-expenditure programs as interchangeable policy

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<sup>11</sup> GAO REPORT, *supra* note 1, at 75.

<sup>12</sup> Thus, in 2009, Congress provided (1) over \$43 billion in direct spending to support agriculture through numerous Department of Agriculture programs (excluding food stamps) and another \$6.5 billion to support agriculture through a tax credit for alcohol fuels (in addition to other agriculture-related tax preferences); (2) over \$66 billion in direct spending to provide poverty relief through the food-stamp program and another \$52.8 billion to provide poverty relief through the earned-income tax credit; and (3) over \$32 billion in direct spending to support education through numerous Department of Education programs and another \$22.4 billion to support education through numerous tax-expenditure programs. OFFICE OF MGMT. & BUDGET, BUDGET OF THE U.S. GOVERNMENT: FISCAL YEAR 2011, at 48-49, 67-68 (2011); STAFF OF J. COMM. ON TAXATION, ESTIMATES OF FED. TAX EXPENDITURES FOR FISCAL YEARS 2009-2013, at 29, 38-40, 43 (Comm. Print 2010). The GAO reports that redundant direct spending and tax expenditures to subsidize ethanol will cost the federal government \$5.7 billion in 2011 and that there are nine direct-spending programs and seven tax-expenditure programs to subsidize post-secondary education. GAO REPORT, *supra* note 1, at 59-60, 75.

<sup>13</sup> As used in this Article, the terms “administrative redundancy” and “redundancy” refer to redundancy in administrative programs effected by legislative action; they exclude redundancy in administrative programs effected by independent action within the executive branch. For examples of the latter, see Jonathan R. Macey, *Organizational Design and Political Control of Administrative Agencies*, 8 J.L. ECON. & ORG. 93, 104-08 (1992).

<sup>14</sup> MILTON FRIEDMAN, CAPITALISM AND FREEDOM 192-93 (1962).

instruments.<sup>15</sup> Underpinning their debate is the implicit assumption that, in pursuing any particular policy objective, Congress should choose *either* direct spending *or* a tax expenditure – but not both. Thoughtful participants in the debate note the high cost of coordinating redundant programs, and they point out that poorly coordinated programs not only waste fiscal resources but also undermine legislative objectives.<sup>16</sup>

Others, however, have constructed a qualified defense of redundancy. Drawing on work in political science and public administration, certain legal scholars argue that redundancy can improve the reliability of administrative programs, thereby providing an important failsafe when policy stakes are high.<sup>17</sup> As engineers have long recognized, the use of redundant components having independent risks of failure exponentially increases the prospects of system success; thus, commercial aircraft that can fly with a single engine typically have two, three, or even four engines.<sup>18</sup> Similarly, the argument in the legal literature runs, Congress rationally might establish multiple administrative programs aimed at a single policy objective – such as food stamps and the earned income tax credit, both of which deliver poverty relief. Because the success or failure of the food-stamps program should be independent of the success or failure of the earned income tax credit, Congress can increase the reliability of its overall anti-poverty efforts by maintaining both programs.

This Article takes a different approach. Rather than address the normative point in isolation, this Article considers the etiological question – examining the *source* of redundancy – before turning to the normative question. The inquiry focuses on Congress as an institution and aims to identify the specific organizational structures within Congress that account for administrative redundancy. This Article makes two key assumptions: first, that Congress ordinarily does not deliberate about the merits of redundancy or choose redundancy for its own sake;<sup>19</sup> second, that the internal structures of Congress

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<sup>15</sup> These scholars generally have followed the lead of Stanley Surrey, who fixed the parallelism of direct spending and tax expenditures firmly within the tax catechism. See, e.g., Stanley S. Surrey, *Tax Incentives as a Device for Implementing Government Policy: A Comparison with Direct Government Expenditures*, 83 HARV. L. REV. 705, 706 (1970).

<sup>16</sup> See, e.g., Daniel Shaviro, *The Minimum Wage, the Earned Income Tax Credit, and Optimal Subsidy Policy*, 64 U. CHI. L. REV. 405, 409 (1997).

<sup>17</sup> See, Nancy Staudt, *Redundant Tax and Spending Programs*, 100 NW. U. L. REV. 1197, 1222-30 (2006); David A. Weisbach, *Tax Expenditures, Principal-Agent Problems, and Redundancy*, 84 WASH. U. L. REV. 1823, 1839-43 (2006).

<sup>18</sup> Staudt, *supra* note 17, at 1222-23. For the military's F-35 Joint Strike Fighter, Congress even authorized the production of redundant engines by different manufacturers. Christopher Drew, *House Votes to End Alternate Jet Engine Program*, N.Y. TIMES, Feb. 17, 2011, at B1. The House of Representatives recently voted to end funding for one of the two engines, largely because of concerns about distributive costs. *Id.*; see *infra* Part II.A (discussing distributive costs of administrative redundancy).

<sup>19</sup> This assumption is not intended to be categorical. Certainly there are cases in which

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affect legislative outcomes.<sup>20</sup> As shown here, the institutional analysis reveals that redundancy is the product of a stubborn preference in both the Senate and the House of Representatives to legislate through standing committees that have overlapping jurisdictions and that benefit from extensive parliamentary prerogatives. The congressional committee system, by accident rather than by design, accounts for administrative redundancy.

The first contribution of this Article, then, is to set out a legislative-organization account of redundancy. Every congressional committee has strong incentives to protect and expand its jurisdiction, both through new legislation and through oversight of executive-branch agencies. The establishment and maintenance of administrative programs, even if duplicative of other programs, enable a committee to exercise its existing jurisdiction and to stake new jurisdictional claims. From the perspective of committee members, that outcome is unquestionably good. In Congress, as in the bureaucracy, turf is everything.<sup>21</sup> No less importantly, standing committees enjoy substantial parliamentary prerogatives in both chambers of Congress. These prerogatives – such as the power to block floor amendments and the power to dominate the bicameral conference committees – effectively prevent chamber majorities from moving legislation unacceptably far from the policy positions preferred by the standing committees. The legislative-organization account set forth here contrasts with prior attempts to connect redundancy with the congressional committee system.<sup>22</sup> As argued below, those attempts rely on incomplete and inadequate descriptions of the legislative process.<sup>23</sup>

The Article's second contribution is to re-examine the normative arguments for and against redundancy in light of the legislative-organization account. Contemporary political theory provides two principal explanations of the congressional committee system – one grounded in distributive theory and one grounded in informational theory. Although neither has examined the question of administrative redundancy, both the distributive account and the informational account posit credible rationales for the committee system that, in turn, inform the evaluation of redundancy. More specifically, the distributive account supports the dominant criticism of redundancy as wasteful and undesirable; indeed, the distributive account adds a particularly invidious interest-group dimension to that criticism. Informational theory, however, implies that the institutional determinants of redundancy usefully facilitate specialization by legislators and improve the quality of instrumental

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Congress chooses to establish redundant administrative programs.

<sup>20</sup> This assumption is a standard point of contemporary political theory.

<sup>21</sup> KING, *supra* note 6, at 1, 143.

<sup>22</sup> See, e.g., Staudt, *supra* note 17, at 1204-08, 1214-22. The connection between redundancy and the committee system actually was identified many years before Staudt's article. See Melvin Anshen, *The Program Budget in Operation*, in PROGRAM BUDGETING: PROGRAM ANALYSIS AND THE FEDERAL BUDGET 353, 359 (David Novick ed., 1965).

<sup>23</sup> See *infra* Part I.B.

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knowledge available to Congress. On this view, redundancy is a desirable by-product of a system that improves the quality of legislative decisions. The distributive costs and informational benefits are illustrated through a case study of the redundant federal programs for retirement security.<sup>24</sup>

The Article's third contribution is to outline and assess specific institutional reforms. The conventional normative analysis of redundancy – which either condemns redundancy as wasteful or praises it for improving reliability – fails to consider the broader effects on the legislative process of the institutional changes necessary to produce less or more redundancy. This Article, by contrast, draws from the legislative-organization account to identify specific institutional reforms that would improve the trade-off between the distributive downside and the informational upside of the congressional committee system. One approach would formally incorporate outside policy expertise into the legislative process, in the manner used to determine domestic military base closings and realignments. A second approach would promote redundancy in program design but would curtail redundancy in program implementation by curbing the parliamentary prerogatives of congressional committees.

The Article proceeds as follows. Part I sets out the legislative-organization theory of redundancy. This Part demonstrates how the congressional committee system facilitates the establishment and maintenance of redundant programs, and it sharpens the contrast between this organizational theory and previous analyses of redundancy in the legal literature. Part II discusses the distributive and informational accounts of the committee system provided by political theory, reconsiders the normative arguments about redundancy in light of the distributive and informational accounts, and illustrates those points with a case study. Part III examines institutional reform in light of the analyses in Parts I and II.

#### I. A LEGISLATIVE-ORGANIZATION THEORY OF REDUNDANCY

This Part argues that administrative redundancy should be attributed to the congressional committee system. Political scientists have studied congressional committees extensively, but they have largely ignored the connection between the committee system and redundant administrative programs. Building on insights about legislative organization from the political science literature, Part I.A demonstrates that redundancy is a contingent but almost inevitable consequence of the institutional decision to organize Congress around committees that have overlapping jurisdictions and strong parliamentary prerogatives. Part I.B contrasts this legislative-organization account with prior treatments of administrative redundancy in the legal literature. No claim is made here that the legislative-organization account set forth in Part I.A provides a complete explanation of administrative redundancy. Legislative organizational structures are an important source of redundancy, but there no doubt are other sources.

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<sup>24</sup> See *infra* Part II.C.



A. *Redundancy as a Function of the Committee System*

The House and the Senate share an enduring commitment to the use of standing committees – “the lifeblood of the congressional system”<sup>25</sup> and “the nerve ends of Congress”<sup>26</sup> – as the principal vehicle for producing legislation.<sup>27</sup> Noting this, Woodrow Wilson famously remarked, “[I]t is not far from the truth to say that Congress in session is Congress on public exhibition, whilst Congress in its committee-rooms is Congress at work.”<sup>28</sup> Still, the role of the standing committees has not been uniform across chambers or across time. Under the rules, norms, and practices that govern Congress, committees historically have been stronger in the House than in the Senate.<sup>29</sup> Within the House, institutional reforms in the early 1970s transferred considerable authority from full committees to leadership, subcommittees, and the rank and file, thereby ending the “committee era.”<sup>30</sup> More ephemeral reforms of the middle 1990s further consolidated the power of leadership at the expense of the standing committees.<sup>31</sup> And each committee always remains subject to the important but rarely used power of the House or Senate floor to strip the committee of its jurisdiction or to disband the committee entirely.<sup>32</sup>

But even at the lowest ebb of their influence, the committees exercise primary authority over legislation within their respective jurisdictions.<sup>33</sup> The formal rules of the House and the Senate provide that each bill or resolution introduced in the chamber must be referred to the standing committee of jurisdiction,<sup>34</sup> that committee then has the exclusive authority to report or not

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<sup>25</sup> S. REP. NO. 103-215, vol. 2, at 7 (1993) [hereinafter JOINT COMMITTEE REPORT].

<sup>26</sup> H.R. REP. NO. 93-916, pt. II, at 9 (1974) [hereinafter FINAL BOLLING COMMITTEE REPORT] (select committee chaired by Rep. Bolling). For a working draft of the Final Bolling Committee Report, see H. SELECT COMM. ON COMMITTEES, COMMITTEE STRUCTURE AND PROCEDURES OF THE HOUSE OF REPRESENTATIVES: WORKING DRAFT OF REPORT OF THE SELECT COMMITTEE ON COMMITTEES (1973) [hereinafter DRAFT BOLLING COMMITTEE REPORT].

<sup>27</sup> See CHRISTOPHER J. DEERING & STEVEN S. SMITH, COMMITTEES IN CONGRESS 225-28 (3d ed. 1997). Except where specifically indicated otherwise, any reference in this Article to legislative committees includes, *mutatis mutandis*, reference to subcommittees.

<sup>28</sup> WOODROW WILSON, CONGRESSIONAL GOVERNMENT 79 (1885).

<sup>29</sup> RICHARD F. FENNO, JR., CONGRESSMEN IN COMMITTEES 147 (1973).

<sup>30</sup> DEERING & SMITH, *supra* note 27, at 33-39.

<sup>31</sup> *Id.* at 47-52.

<sup>32</sup> *Id.* at 10.

<sup>33</sup> *Id.* at 6-10; see Rules of the House of Representatives, R. X.1, H.R. Doc. No. 110-162, at 426-537 (2009) (defining organization and jurisdiction of House standing committees); Standing Rules of the Senate, R. XXV.1, S. Doc. No. 110-1, at 25-37 (2008) (defining organization and jurisdiction of Senate standing committees).

<sup>34</sup> Rules of the House of Representatives, R. X.1, R. X.11, R. XII.2, H.R. Doc. No. 110-162, at 426, 524-25, 603-09; Standing Rules of the Senate, R. XVII.1-XVII.3, R. XXV.1, S. Doc. No. 110-1, at 16-17, 25-37.

to report the measure for consideration on the floor.<sup>35</sup> There are, of course, exceptions to this basic process: House or Senate leaders sometimes bring a measure directly to the floor without committee consideration;<sup>36</sup> leaders occasionally change the substantive content of a measure after it has been reported out of committee;<sup>37</sup> and, in the House, the Rules Committee may extract a measure from another committee, or a floor majority may discharge a measure from committee by petition.<sup>38</sup> Use of those end-run procedures, however, remains exceptional.

Normal legislative process therefore makes each committee effectively sovereign over matters within its jurisdiction. No tax legislation can move through the House, for example, without the approval of the Ways and Means Committee. Even if a measure directly implicates the jurisdiction of another committee, the Ways and Means Committee can veto the measure by refusing to report it to the House. Thus, the American Clean Energy and Security Act of 2009<sup>39</sup> (commonly known as the “cap-and-trade” bill) was written primarily by the House Energy and Commerce Committee, which by rule has jurisdiction over the “[e]xploration, production, storage, supply, marketing, pricing, and regulation of energy resources” and, to boot, “[n]ational energy policy generally.”<sup>40</sup> But, as originally written, the cap-and-trade measure included tax preferences intended to offset higher energy costs, and those tax preferences fell within the Ways and Means Committee’s broad jurisdiction over “[r]evenue measures generally.”<sup>41</sup> The Energy and Commerce Committee could not bring the cap-and-trade measure to the House floor on its own; the Ways and Means Committee had the authority to approve or reject the tax provisions before the full House could even begin to consider it.

#### 1. Jurisdictional Fragmentation in the Committee System

Committee jurisdiction, then, is central to the legislative process. Congress produces legislation through its committees, and the committees normally have exclusive authority over the policy matters in their jurisdiction. But jurisdiction over specific policy matters is strikingly fragmented.<sup>42</sup> As a

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<sup>35</sup> DEERING & SMITH, *supra* note 27, at 6-10.

<sup>36</sup> BARBARA SINCLAIR, UNORTHODOX LAWMAKING: NEW LEGISLATIVE PROCESSES IN THE U.S. CONGRESS 17-20 (2007).

<sup>37</sup> *Id.* at 20-23.

<sup>38</sup> DEERING & SMITH, *supra* note 27, at 7-8.

<sup>39</sup> H.R. 2454, 111th Cong. (2009).

<sup>40</sup> Rules of the House of Representatives, R. X.1(f), H.R. Doc. No. 110-162, at 438-39 (2009).

<sup>41</sup> *Id.* R. X.1(t), H.R. Doc. No. 110-162, at 473.

<sup>42</sup> KING, *supra* note 6, at 6. As used in this Article (following King), the term “fragmentation” refers to the breaking up of jurisdiction over a single policy matter across multiple committees. Deering and Smith use the term “fragmentation” differently – to “describe[] the degree to which a committee attracts the attention of outsiders who perceive

formal matter, the rules of the House and the Senate respectively define the jurisdictions of the twenty-one standing committees in the House and the eighteen standing committees in the Senate that have legislative authority, but those formal jurisdictions overlap considerably.<sup>43</sup> In the House, for example, the Ways and Means Committee has jurisdiction over customs, ports of entry and delivery, trade agreements, government bonds, deposits of public monies, and transportation of dutiable goods (in addition to its broad jurisdiction over revenue).<sup>44</sup> That jurisdiction overlaps with the jurisdiction of several other House committees – such as the Energy and Commerce Committee’s jurisdiction over “[i]nterstate and foreign commerce generally,”<sup>45</sup> the Financial Services Committee’s jurisdiction over “[i]nternational finance” and “[m]oney and credit,”<sup>46</sup> the Foreign Affairs Committee’s jurisdiction over “[i]nternational commodity agreements” and “[m]easures to foster commercial intercourse with foreign nations,”<sup>47</sup> and the Homeland Security Committee’s jurisdiction over “[b]order and port security.”<sup>48</sup>

Similarly, the broad grant by rule of energy jurisdiction to the Energy and Commerce Committee sits awkwardly alongside grants of jurisdiction over “[r]ural electrification” to the Agriculture Committee,<sup>49</sup> “[c]onservation, development, and use of naval petroleum and oil shale reserves” to the Armed Services Committee,<sup>50</sup> “[p]etroleum conservation on public lands” to the

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their interests as unrelated to each other.” DEERING & SMITH, *supra* note 27, at 88. To illustrate the difference: One would say that jurisdiction over health care is fragmented in the House, as that term is used by King and by this Article, because several committees – including the Education and the Workforce, Energy and Commerce, and Ways and Means Committees – all claim jurisdiction over it; Deering and Smith would say that the jurisdiction of the Education and the Workforce Committee is fragmented because it includes authority over both schools and labor unions.

<sup>43</sup> Rules of the House of Representatives, R. X.1, R. X.11, H.R. Doc. No. 110-162, at 426-75, 524-25; Standing Rules of the Senate, R. XXV.1, S. Doc. No. 110-1, at 25-37 (2008). Two of the Senate committees with legislative authority – the Indian Affairs Committee and the Select Committee on Intelligence – are not listed in the Senate Rules. See DEERING & SMITH, *supra* note 27, at 17. Also, as Deering and Smith note, the intelligence committees in both the House and the Senate should be regarded as standing committees, even though they are formally designated as “select” committees. *Id.* Several other committees in Congress, such as the Joint Committee on Taxation, do not have legislative authority and are disregarded here.

<sup>44</sup> Rules of the House of Representatives, R. X.1(t), H.R. Doc. No. 110-162, at 473. This list is not exclusive. House Rule X.1(t) also confers jurisdiction on the Ways and Means Committee over other policy matters.

<sup>45</sup> *Id.* R. X.1(f), H.R. Doc. No. 110-162, at 438.

<sup>46</sup> *Id.* R. X.1(h), H.R. Doc. No. 110-162, at 442.

<sup>47</sup> *Id.* R. X.1(i), H.R. Doc. No. 110-162, at 445.

<sup>48</sup> *Id.* R. X.1(j), H.R. Doc. No. 110-162, at 447.

<sup>49</sup> *Id.* R. X.1(a), H.R. Doc. No. 110-162, at 429.

<sup>50</sup> *Id.* R. X.1(c), H.R. Doc. No. 110-162, at 432.

Natural Resources Committee,<sup>51</sup> “[a]ll energy research, development, and demonstration, and projects therefor, and all federally owned or operated nonmilitary energy laboratories” to the Science, Space, and Technology Committee,<sup>52</sup> and “[w]ater power” to the Transportation and Infrastructure Committee.<sup>53</sup> The formal rules of the Senate provide for irregular jurisdictional boundaries as well.<sup>54</sup> As political scientist David King stated, “It is impossible, as students of parliamentary procedure have long noted, to have jurisdictions without ambiguities.”<sup>55</sup> Those ambiguities generate jurisdictional overlap and fragmentation.

The problem only becomes more pronounced as the full scope of committee jurisdictions is considered. King has argued persuasively that significant segments of each committee’s jurisdiction are recognized not by the formal rules of the House and the Senate but by the binding precedents established through referral of particular bills and resolutions.<sup>56</sup> As King has shown, the precedents set through the referral process account for most changes in jurisdictional boundaries: committees use the referral process to expand their jurisdictions interstitially and incrementally, particularly in the case of emerging policy areas<sup>57</sup> – such as retirement-security policy during the 1960s, energy policy during the 1970s, communications policy during the 1990s, and domestic counter-terrorism policy during the 2000s.

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<sup>51</sup> *Id.* R. X.1(m), H.R. Doc. No. 110-162, at 455.

<sup>52</sup> *Id.* R. X.1(o), H.R. Doc. No. 110-162, at 463 (as amended by H.R. Res. 5, 112th Cong. § 9(A) (2011)).

<sup>53</sup> *Id.* R. X.1(r), H.R. Doc. No. 110-162, at 470.

<sup>54</sup> For example, the Banking, Housing, and Urban Affairs Committee has jurisdiction over “[e]xport and foreign trade promotion,” Standing Rules of the Senate, R. XXV.1(d)(1), S. Doc. No. 110-1, at 27 (2008), but the Finance Committee has jurisdiction over “[r]eciprocal trade agreements,” *id.* R. XXV.1(i), S. Doc. No. 110-1, at 30; the Judiciary Committee has jurisdiction over “[n]ational penitentiaries,” *id.* R. XXV.1(l), S. Doc. No. 110-1, at 33, but the Health, Education, Labor, and Pensions Committee has jurisdiction over “[c]onvict labor and the entry of goods made by convicts into interstate commerce,” *id.* R. XXV.1(m)(1), S. Doc. No. 110-1, at 34; and the Energy and Natural Resources Committee has jurisdiction over “[m]ining,” *id.* R. XXV.1(g)(1), S. Doc. No. 110-1, at 29, but the Health, Education, Labor, and Pensions Committee has jurisdiction over “[o]ccupational safety and health, including the welfare of miners,” *id.* R. XXV.1(m)(1), S. Doc. No. 110-1, at 34.

<sup>55</sup> KING, *supra* note 6, at 18.

<sup>56</sup> *Id.* at 6-7, 37-40; *see also* JOINT COMMITTEE REPORT, *supra* note 25, at 19 (“[C]ommittee jurisdictions are not static; they continually evolve through precedent, agreements between committees, and changes in the scope of government policy.”); David C. King, *The Nature of Congressional Committee Jurisdictions*, 88 AM. POL. SCI. REV. 48, 49 (1994).

<sup>57</sup> KING, *supra* note 6, at 15, 19, 37-40; *see also* Bryan D. Jones, Frank R. Baumgartner & Jeffrey C. Talbert, *The Destruction of Issue Monopolies in Congress* 87 AM. POL. SCI. REV. 657, 660 (1993).

By drafting a measure that lies just beyond its established jurisdiction and persuading the chamber parliamentarian to refer the measure to it, a committee can increase its domain, not just for that measure but for all subsequent measures on the same matter.<sup>58</sup> This measure-by-measure expansion of committee jurisdiction normally does not result in one committee wresting established jurisdiction from another committee. Rather, the committees use the referral process to claim jurisdiction over issues that fall in the uncertain regions of jurisdictional overlap, effectively creating concurrent jurisdiction within broad policy areas.<sup>59</sup> There need be no appreciable space between the Energy and Commerce Committee's jurisdiction over "energy policy"<sup>60</sup> and the Science, Space, and Technology Committee's jurisdiction over "energy research [and] development."<sup>61</sup> Both committees can exercise jurisdiction, one measure at a time, over issues within the jurisdictional intersection.

In short, both the formal rules and the referral precedents lead to pronounced jurisdictional overlap and fragmentation. Broad policy areas – such as agriculture, national security, international trade, and poverty relief – are not allocated uniquely to specific legislative committees; instead, multiple committees legitimately claim authority to common domains.<sup>62</sup> In effect, "[t]he complexity and interconnectedness of many contemporary issues almost guarantee that more than one committee will share jurisdiction over legislation."<sup>63</sup> Thus, King observed that more than one hundred different House and Senate committees and subcommittees claimed jurisdiction over defense and veterans matters and that ninety different committees and subcommittees claimed jurisdiction over the Environmental Protection Agency.<sup>64</sup> Additionally, he identified thirteen different House committees

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<sup>58</sup> KING, *supra* note 6, at 8-9, 22-23, 29, 40-41, 105-09; *see also* WALTER J. OLESZEK, CONGRESSIONAL PROCEDURES AND THE POLICY PROCESS 84 (7th ed. 2007).

<sup>59</sup> KING, *supra* note 6, at 37-41; King, *supra* note 56, at 50.

<sup>60</sup> Rules of the House of Representatives, R. X.1(f)(11), H.R. Doc. No. 110-162, at 439 (2009).

<sup>61</sup> *Id.* R. X.1(p)(1), H.R. Doc. No. 110-162, at 463 (as amended by H.R. Res. 5, 112th Cong. § 9(A) (2011)).

<sup>62</sup> *See, e.g.*, FINAL BOLLING COMMITTEE REPORT, *supra* note 26, at 26 ("Too often policy consideration is fragmented and split; a comprehensive view of issues is needed, a rational system for determining what is going on. House committees should be organized to give coherent consideration to a number of pressing policy problems whose handling has been fragmented, e.g. energy resource utilization, research and development, health care, transportation, environmental protection, and foreign affairs.").

<sup>63</sup> OLESZEK, *supra* note 58, at 79; *see also* FINAL BOLLING COMMITTEE REPORT, *supra* note 26, at 18-19 ("In the 28 years since the House was last reorganized, the shape of national problems has changed so dramatically that jurisdictional lines are tangled, workloads unbalanced, and overlap and confusion all too frequent."); *id.* at 55 ("Modern legislation inevitably crosses jurisdictional lines.").

<sup>64</sup> KING, *supra* note 6, at 70-71. Those observations were based on the jurisdictional configurations in 1994.

claiming jurisdiction over the “more than 125 federal programs aimed at helping children and their families.”<sup>65</sup> Similarly, a joint committee on the organization of Congress remarked in 1993 that “drug policy” did not fall solely within the jurisdiction of any one committee: “[M]any committees handle aspects of the issue, including Education and Labor for drug use in schools, Energy and Commerce for health effects of drugs, Foreign Affairs for international drug interdiction, and Judiciary for criminal penalties for drug users.”<sup>66</sup>

The claim here is not that the institutional commitment to the committee system makes extensive jurisdictional fragmentation and overlap inevitable.<sup>67</sup> One can readily conceive of a committee system in which Congress would allocate jurisdiction over established policy areas among different committees and would assign jurisdiction over emerging policy areas to a single committee in each chamber.<sup>68</sup> But the imperfectly defined and inherently unstable committee jurisdictions actually used in the House and the Senate have entrenched jurisdictional fragmentation. Even several rounds of reform since the end of the Second World War have simply written these irregular jurisdictional boundaries into the rules of the House and the Senate.<sup>69</sup> And there should be little doubt as to why. Legislators of course want to participate in legislative activity, and the number of committees on which they can serve is limited.<sup>70</sup> By maintaining a large number of committees with legislative authority, legislators increase their opportunities for desirable committee assignments; by pushing the jurisdictions of their committees outward, they increase the prospects that those assignments will yield desirable legislative work.<sup>71</sup> But, in so doing, legislators also fragment control over specific policy areas.

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<sup>65</sup> *Id.* at 140-41. That observation was based on the jurisdictional configurations in 1997.

<sup>66</sup> JOINT COMMITTEE REPORT, *supra* note 25, at 20-21.

<sup>67</sup> *But see* FINAL BOLLING COMMITTEE REPORT, *supra* note 26, at 4 (“[O]verlap in jurisdiction is likely to continue regardless of committee realignments [sic] . . . .”); DRAFT BOLLING COMMITTEE REPORT, *supra* note 26, at 57 (“Considering the interdependencies of governmental activities, . . . overlapping committee responsibilities will continue to be a fact of life that is not only unavoidable, but in some cases desirable.”).

<sup>68</sup> *See, e.g.*, FINAL BOLLING COMMITTEE REPORT, *supra* note 26, at 20 (recommending that the House “implement a procedure to assure continuous review of jurisdictional assignments and encourage cooperation among committees dealing with related matters”).

<sup>69</sup> *Id.* at 12; KING, *supra* note 6, at 56-77. For reviews of efforts to reform committee jurisdictions since the end of the Second World War, see generally JOINT COMMITTEE REPORT, *supra* note 25, at 9-15, and E. SCOTT ADLER, WHY CONGRESSIONAL REFORMS FAIL: REELECTION AND THE HOUSE COMMITTEE SYSTEM 108-212 (2002). For an analysis of the failure to reform intelligence-oversight jurisdiction after September 11, 2001, see O’Connell, *supra* note 10, at 1671-73.

<sup>70</sup> DEERING & SMITH, *supra* note 27, at 96-108.

<sup>71</sup> Legislators recognize that desirable committee work is a critical objective. *See, e.g.*, FINAL BOLLING COMMITTEE REPORT, *supra* note 26, at 19 (recommending that “[c]ommittee

## 2. Jurisdictional Fragmentation and Committee Preferences

Since Richard Fenno published his study of congressional committees in the early 1970s, it has become commonplace to attribute three basic objectives to legislators: securing reelection, pursuing institutional prestige, and enacting good policy.<sup>72</sup> In most cases, the goals of reelection and institutional prestige lead committees to build up and act on their jurisdiction as much as possible; in many (if not most) cases, the goal of good policy does so as well.<sup>73</sup> The exercise of committee jurisdiction, in turn, regularly manifests itself in legislation that projects committee authority into the executive branch through the establishment, maintenance, or reform of administrative programs. For example, a House member serving on the Education and the Workforce Committee may want to authorize a new college-scholarship program because she believes it will deliver benefits to her constituents and improve her reelection prospects; a member serving on the Ways and Means Committee may want to establish a new retirement-savings program because he believes that the resources needed for oversight of the program will increase the institutional prestige and influence of his committee; and a member serving on the Natural Resources Committee may want to establish a new agency to regulate oil and gas drilling because she believes that such regulation will protect coastal wetlands. King cites a prominent example: “In 1977 [the House] Commerce [Committee] reported a bill creating the Department of Energy, the future oversight of which firmly established the Commerce Committee as a major player in all energy legislation.”<sup>74</sup>

Because committee jurisdictions overlap, the administrative programs that the committees create overlap as well. The Education and the Workforce Committee has the authority to establish a college-scholarship program under the Department of Education;<sup>75</sup> but the Ways and Means Committee can establish a college-expense tax deduction or tax credit administered by the Treasury Department,<sup>76</sup> the Agriculture Committee can maintain agricultural-

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jurisdictions . . . be equalized to afford each Member of the House an opportunity to participate meaningfully in decisions affecting the lives of their constituents”); DRAFT BOLLING COMMITTEE REPORT, *supra* note 26, at 1 (“Committee assignments should provide each Member with an opportunity for meaningful participation in making decisions within a significant public policy field.”).

<sup>72</sup> FENNO, *supra* note 29, at 1; *see also* DEERING & SMITH, *supra* note 27, at 61-62; KING, *supra* note 6, at 2, 25; John W. Kingdon, *Models of Legislative Voting*, 39 J. POL. 563, 569-70, 574-79 (1977).

<sup>73</sup> KING, *supra* note 6, at 20-21. As Fenno put it, “For member satisfaction, a necessary condition would seem to be committee *activity*.” FENNO, *supra* note 29, at 277.

<sup>74</sup> KING, *supra* note 6, at 70.

<sup>75</sup> *See* Rules of the House of Representatives, R. X.1(e)(6), H.R. Doc. 110-162, at 436 (2009) (giving the committee jurisdiction over “[e]ducation or labor generally”).

<sup>76</sup> *See id.* R. X.1(t)(3), H.R. Doc. No. 110-162, at 473 (giving the committee jurisdiction over “[r]evenue measures generally”).

college scholarships administered by the Agriculture Department,<sup>77</sup> and the Science, Space, and Technology Committee can authorize science and engineering scholarships through the National Science Foundation.<sup>78</sup> Similarly, the Natural Resources Committee can set up a new federal agency within the Department of the Interior to oversee coastal-water drilling;<sup>79</sup> but the Energy and Commerce Committee can set up a parallel agency having a parallel function within the Department of Energy,<sup>80</sup> and the Transportation and Infrastructure Committee can do the same within the Department of Transportation.<sup>81</sup> Member goals push committees to enact administrative programs, but nothing about those goals pushes committees to coordinate programs with those established by other committees.<sup>82</sup>

### 3. Committee Preferences, Parliamentary Prerogatives, and Redundancy

Both the House and the Senate confer strong parliamentary prerogatives on their standing committees that generally enable the committees to protect their preferred policy positions in measures that the committees report to the full chamber. These prerogatives, which extend well beyond the basic positive and negative agenda control attributable to committee proposal and gate-keeping power,<sup>83</sup> enable the committees to resist changes that would eliminate or scale

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<sup>77</sup> See *id.* R. X.1(a)(4), (6), H.R. Doc. No. 110-162, at 428 (giving the committee jurisdiction over “[a]gricultural colleges” and “[a]gricultural education extension services”).

<sup>78</sup> See *id.* R. X.1(p)(10), (13), H.R. Doc. No. 110-162, at 464 (giving the committee jurisdiction over the National Science Foundation and “[s]cience scholarships”).

<sup>79</sup> See *id.* R. X.1(m)(15), H.R. Doc. No. 110-162, at 469 (giving the committee jurisdiction over “[m]arine affairs”).

<sup>80</sup> See *id.* R. X.1(f)(6), H.R. Doc. No. 110-162, at 438 (giving the committee jurisdiction over “[e]xploration, production, storage, supply marketing, pricing, and regulation of energy resources, including all fossil fuels”).

<sup>81</sup> See *id.* R. X.1(r)(15), H.R. Doc. No. 110-162, at 455 (giving the committee jurisdiction over “marine affairs, including coastal zone management, as they relate to oil and other pollution of navigable waters”).

<sup>82</sup> Jones, Baumgartner, and Talbert found that committees with overlapping jurisdictions tend not to pursue inter-committee coordination when developing legislation. Jones, Baumgartner & Talbert, *supra* note 57, at 664; see also FINAL BOLLING COMMITTEE REPORT, *supra* note 26, at 58 (“All too often . . . there is little or no communication, either among Members or committee staffs, on questions of mutual concern. Where there should be cooperation, there is more likely to be found competition and a failure to communicate.”). At least in theory, the practice of multiple referrals in the House (under which a single measure may be referred to more than one committee) could mitigate redundancy to the extent that committees considering a single measure coordinate their activities. The norm under multiple referrals, however, is that “committees are strictly limited to working only on issues within their established domain.” KING, *supra* note 6, at 101.

<sup>83</sup> See Kenneth A. Shepsle & Barry R. Weingast, *The Institutional Foundations of Committee Power*, 81 AM. POL. SCI. REV. 85 (1987) (emphasizing ex post veto power and standing committees’ dominance of conference committees).



back proposed administrative programs. Consider first the floor stage. Neither the House nor the Senate has a formal process for reviewing legislation between a committee and the floor,<sup>84</sup> but non-committee members could propose floor amendments to coordinate new programs in pending legislation with programs already in existence, thereby mitigating redundancy. However, committee proposals for redundant administrative programs face limited prospects of meaningful revision on either the House or the Senate floor. As political scientists have long recognized, committees in both chambers enjoy a norm of deference from non-committee members.<sup>85</sup> Legislators may be reluctant to breach the norm, particularly if they believe that committee members have superior expertise over the subject matter of the legislation. Additionally, legislators recognize that the norm is sustained in large part by reciprocity: If one member attacks a program authorized by a second member's bill, the first member exposes herself to a similar attack from the second member.

Even apart from the deference norm, the House is particularly inhospitable to floor amendments. During the committee era, powerful committee chairs discouraged members from offering floor amendments, and overall floor-amendment activity was modest.<sup>86</sup> The number of floor amendments increased sharply after the legislative reforms of the early 1970s and the introduction of electronic voting,<sup>87</sup> but House leadership, at the urging of rank-and-file members, soon began to curb floor amendments through ad hoc resolutions – known as “special rules” – that designate the amendments members can offer to a particular measure or that block members from offering any amendments

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<sup>84</sup> One qualification should be noted: The Congressional Budget and Impoundment Control Act of 1974 does provide for a measure of inter-committee coordination, under the authority of the House and Senate Budget Committees, through annual budget resolutions and the reconciliation process. See 2 U.S.C. §§ 602, 641 (2006); DEERING & SMITH, *supra* note 27, at 193-202. For an analysis of how that process affects aggregate spending, see Dhammika Dharmapala, *The Congressional Budget Process, Aggregate Spending, and Statutory Budget Rules*, 90 J. PUB. ECON. 119 (2006).

<sup>85</sup> Shepsle & Weingast, *supra* note 83, at 87, 100; see also DEERING & SMITH, *supra* note 27, at 203. Shepsle and Weingast explain floor deference to committees through three enforcement mechanisms: punishment, “ex ante defensive behavior” (for example, accommodating reported measures to the floor median), and “ex post defensive behavior” (that is, the ex post veto exercised in conference). Shepsle & Weingast, *supra* note 83, at 88-89. But see Steven S. Smith, *An Essay on Sequence, Position, Goals and Committee Power*, 13 LEGIS. STUD. Q. 151, 173-75 (1988) (arguing that Shepsle and Weingast overstate the effect of ex post veto in protecting committee preferences on the floor).

<sup>86</sup> STEVEN S. SMITH, *CALL TO ORDER: FLOOR POLITICS IN THE HOUSE AND SENATE* 20-24 (1989).

<sup>87</sup> STANLEY BACH & STEVEN S. SMITH, *MANAGING UNCERTAINTY IN THE HOUSE OF REPRESENTATIVES: ADAPTATION AND INNOVATION IN SPECIAL RULES* 27-33 (1988); SMITH, *supra* note 86, at 24-36.

to the measure at all.<sup>88</sup> In the contemporary House, few measures are brought to the floor under open rules, which allow any member to offer any germane amendment. Instead, most controversial measures are offered under closed rules, which prohibit all amendments, or special rules that so greatly restrict amendments as to be effectively closed.<sup>89</sup> Non-controversial measures usually are brought up under unanimous-consent or suspension-of-the-rules procedures, which never allow amendments.<sup>90</sup> Even for measures brought to the floor under open rules, a committee can defend its preferences against hostile amendments through counter-amendments (backed by House rules limiting amendment depth and controlling floor recognition), thereby increasing the likelihood that the measures ultimately will reflect the committee's ideal outcome.<sup>91</sup>

The Senate has no formal process for limiting or blocking floor amendments, but it can reach a similar result through unanimous-consent agreements.<sup>92</sup> These agreements, which are negotiated by the majority and minority leaders and which (as the name implies) cannot be implemented over the objection of any senator, structure the floor debate and amendment process on a measure-by-measure or even day-by-day basis.<sup>93</sup> Although not as strong as the closed rules of the House, unanimous-consent agreements screen out numerous floor amendments that senators would otherwise offer. To the extent that senators' preferences to structure and limit floor consideration of a measure are stronger than their preferences to prevent the measure from establishing or maintaining redundant administrative programs, the unanimous-consent procedure in the Senate – like the closed rule in the House – facilitates the realization of committee preferences and, with those preferences, administrative redundancy.

No less important than the prerogatives on the floor, committees also enjoy de facto veto power after legislation has been passed by their chambers.<sup>94</sup> Members of a committee reporting a measure to the full chamber have disproportionate representation on the conference committee that reconciles differences between the House and Senate versions of the measure. Leadership in each chamber often appoints as conferees the chair and ranking member of the reporting committee and other members whom the chair and

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<sup>88</sup> BACH & SMITH, *supra* note 87, at 50-74.

<sup>89</sup> Michael Doran, *The Closed Rule*, 59 EMORY L.J. 1363, 1387-90 (2010).

<sup>90</sup> *Id.* at 1372-73.

<sup>91</sup> Barry R. Weingast, *Floor Behavior in the U.S. Congress: Committee Power Under the Open Rule*, 83 AM. POL. SCI. REV. 795, 796 (1989); *see also* Barry R. Weingast, *Fighting Fire with Fire: Amending Activity and Institutional Change in the Postreform Congress*, in THE POSTREFORM CONGRESS 142, 161 (Roger H. Davidson ed., 1992).

<sup>92</sup> OLESZEK, *supra* note 58, at 203-12.

<sup>93</sup> *Id.* at 203-04, 208-09.

<sup>94</sup> DEERING & SMITH, *supra* note 27, at 215.

ranking member designate.<sup>95</sup> Stacking the conference committee in this way provides the committee that originates legislation with an opportunity to remove any floor changes made over its objection; the conference committee's report cannot then be amended in either the House or the Senate to reinstate those changes.<sup>96</sup>

Thus, the standing committees in the House and the Senate normally exercise final say, subject to floor ratification in a straight up-or-down vote, over the administrative programs that Congress enacts, whether or not those programs are redundant. Certainly the anticipation of this "ex post adjustment power" influences floor amendment activity when measures are first considered in the two chambers. In both the House and the Senate, legislators generally prefer to offer amendments acceptable to the committee reporting the underlying measure because the legislators know that, in the event a floor amendment passes over the objections of the reporting committee, the committee members serving in conference may strip the amendment out or may refuse to approve the underlying measure.<sup>97</sup> The veto power that standing committees exercise over conference outcomes constitutes "the enforcement mechanism that allows [floor] reciprocity and deference to work smoothly."<sup>98</sup>

Taken together, the committees' parliamentary prerogatives skew legislative outcomes toward committee policy preferences. Those preferences often involve the establishment and maintenance of administrative programs, and jurisdictional overlap among the committees all but ensures redundancy among those programs. Moreover, the parliamentary prerogatives facilitate administrative redundancy even in cases not involving jurisdictional overlap. For example, members of the House and Senate education committees – acting on the usual motivations involving reelection, prestige, and policy – may want to provide new subsidies for post-secondary education that are redundant with other subsidy programs that fall within their own jurisdiction. The parliamentary prerogatives make it difficult for other legislators to block the new subsidies or even to coordinate the new subsidies with existing subsidies over the committees' objections. In short, the congressional committee system facilitates redundancy both by reason of multiple committees exercising overlapping jurisdictions and by reason of a single committee exercising its own jurisdiction.

These features of the committee system are general; consistent with that, redundancy is observed in a wide array of policy settings.<sup>99</sup> But two additional

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<sup>95</sup> *Id.* at 215-18; Shepsle & Weingast, *supra* note 83, at 97-100.

<sup>96</sup> DEERING & SMITH, *supra* note 27, at 218.

<sup>97</sup> Shepsle & Weingast, *supra* note 83, at 86, 89-90, 93-97.

<sup>98</sup> *Id.* at 90. For debate over the argument that the conference-based ex post veto grounds the institutional power of the standing committees, see Smith, *supra* note 85, and Keith Krehbiel, Kenneth A. Shepsle & Barry R. Weingast, *Why Are Congressional Committees Powerful?*, 81 AM. POL. SCI. REV. 929 (1987).

<sup>99</sup> See GAO REPORT, *supra* note 1; Staudt, *supra* note 17, at 1203; Weisbach, *supra* note

factors contribute to a particularly strong tendency toward redundancy in the formation of fiscal policy. First, as tax scholars have long noted, virtually any direct-spending program can be replicated through a tax-expenditure program. Broadly conceived, the legislature can fund federal programs through transfers (whether in-cash or in-kind) or through tax preferences.<sup>100</sup> Thus, subsidies for post-secondary education can be delivered through tax deductions,<sup>101</sup> tax credits,<sup>102</sup> and non-taxable savings accounts,<sup>103</sup> wage subsidies for the working poor can be delivered through refundable tax credits,<sup>104</sup> and subsidies for manufacturers,<sup>105</sup> farmers,<sup>106</sup> producers of “alternative energy,”<sup>107</sup> and other industrial and commercial activities can be provided through tax exclusions, deductions, credits, or preferential timing rules.

Second, the traditional stature, power, and ambition of the congressional tax-writing committees make the possibility of such duplication particularly likely. The Ways and Means Committee, one of four prestige committees in the House,<sup>108</sup> has a reputation for asserting broad jurisdictional claims,<sup>109</sup> and House rules and practices have long privileged the Ways and Means Committee when its claims conflict with those of another committee.<sup>110</sup> The Finance Committee is perhaps less prominent within the Senate than the Ways and Means Committee is within the House. But the Finance Committee’s traditional focus on gratifying constituents underscores its institutional bias in favor of the enactment and preservation of tax expenditures, including tax expenditures that duplicate existing direct-spending programs.<sup>111</sup> And both committees engage in high levels of legislative activity. Congress has amended the tax code every year during the last half century, and there has been a substantial item of tax legislation in more years than not since President

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17, at 1828-29; David A. Weisbach & Jacob Nussim, *The Integration of Tax and Spending Programs*, 113 Yale L. J. 955, 963 n.15 (2004).

<sup>100</sup> Surrey, *supra* note 15, at 706; *see also* STANLEY S. SURREY & PAUL R. MCDANIEL, *TAX EXPENDITURES* 99 (1985).

<sup>101</sup> *See, e.g.*, 26 U.S.C. §§ 221-22 (2006) (tax deductions for interest on certain student loans and for certain education expenses).

<sup>102</sup> *See, e.g., id.* § 25A (Hope Scholarship Credit, American opportunity tax credit, and Lifetime Learning Credit).

<sup>103</sup> *See, e.g., id.* §§ 529-30 (tax exemptions for qualified tuition programs and for Coverdell education savings accounts).

<sup>104</sup> *See, e.g., id.* § 32 (earned income tax credit).

<sup>105</sup> *See, e.g., id.* § 199 (tax deduction for domestic production activities).

<sup>106</sup> *See, e.g., id.* § 263A(d) (special tax cost-recovery rule for farmers).

<sup>107</sup> *See, e.g., id.* § 45K (tax credit for production of fuel from a “nonconventional source”).

<sup>108</sup> *See, e.g.*, DEERING & SMITH, *supra* note 27, at 64 tbl.3-1.

<sup>109</sup> OLESZEK, *supra* note 58, at 83 (describing the Ways and Means Committee as a jurisdictional “octopus”).

<sup>110</sup> KING, *supra* note 6, at 98.

<sup>111</sup> FENNO, *supra* note 29, at 156-57, 182-83.

Reagan took office.<sup>112</sup> The tax-writing committees thus have frequent opportunities to promote tax expenditures that overlap with direct spending.<sup>113</sup>

B. *Prior Accounts of Redundancy*

The only prior argument in the legal literature identifying the congressional committee systems as a source of redundancy provides an incomplete account. Nancy Staudt attributed redundancy to the fragmentation of committee jurisdictions and predicted that, because of committee protectiveness of existing jurisdictions, efforts to mitigate redundancy would not be politically feasible.<sup>114</sup> In this, she echoed Melvin Anshen, who argued more than four decades ago that the “interested counterpart[s] in the House and Senate Committee structure” likely would frustrate efforts to eliminate “wasteful duplications, overlaps, and inconsistencies” among agencies of the executive branch.<sup>115</sup> But Staudt focused almost exclusively on committee gate-keeping

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<sup>112</sup> See, e.g., Economic Recovery Tax Act of 1981, Pub. L. No. 97-34, 95 Stat. 172; Tax Equity and Fiscal Responsibility Act of 1982, Pub. L. No. 97-248, 96 Stat. 324; Subchapter S Revision Act of 1982, Pub. L. No. 97-354, 96 Stat. 1669; Social Security Amendments of 1983, Pub. L. No. 98-21, 97 Stat. 65; Deficit Reduction Act of 1984, Pub. L. No. 98-369, 98 Stat. 494; Tax Reform Act of 1986, Pub. L. No. 99-514, 100 Stat. 2085; Omnibus Budget Reconciliation Act of 1987, Pub. L. No. 100-203, 101 Stat. 1330; Technical and Miscellaneous Revenue Act of 1988, Pub. L. No. 100-647, 102 Stat. 3342; Omnibus Budget Reconciliation Act of 1990, Pub. L. No. 101-508, 104 Stat. 1388; Omnibus Budget Reconciliation Act of 1993, Pub. L. No. 103-66, 107 Stat. 312; Uruguay Round Agreements Act, Pub. L. No. 103-465, 108 Stat. 4809 (1994); Small Business Job Protection Act of 1996, Pub. L. No. 104-188, 110 Stat. 1755; Taxpayer Relief Act of 1997, Pub. L. No. 105-34, 111 Stat. 788; Internal Revenue Service Restructuring and Reform Act of 1998, Pub. L. No. 105-206, 112 Stat. 685; Economic Growth and Tax Relief Reconciliation Act of 2001, Pub. L. No. 107-16, 115 Stat. 38; Job Creation and Worker Assistance Act of 2002, Pub. L. No. 107-147, 116 Stat. 21; Jobs and Growth Tax Relief Reconciliation Act of 2003, Pub. L. No. 108-27, 117 Stat. 752; American Jobs Creation Act of 2004, Pub. L. No. 108-357, 118 Stat. 1418; Pension Protection Act of 2006, Pub. L. No. 109-280, 120 Stat. 780; American Recovery and Reinvestment Act of 2009, Pub. L. No. 111-5, 123 Stat. 115; Patient Protection and Affordable Care Act, Pub. L. No. 111-148, 124 Stat. 119 (2010); Health Care and Education Reconciliation Act of 2010, Pub. L. No. 111-152, 124 Stat. 1029; Tax Relief, Unemployment Insurance Reauthorization, and Job Creation Act of 2010, Pub. L. No. 111-312, 124 Stat. 3296.

<sup>113</sup> Ordinarily, one would worry that the type of argument set out in Part I.A risks what Edna Ullmann-Margalit (following Karl Popper) called the “conspiracy fallacy.” EDNA ULLMANN-MARGALIT, *THE EMERGENCE OF NORMS* 181-82 (1977). Congressional institutional arrangements, however, are endogenous to Congress: The majority can set and re-set those arrangements to suit its preferences. It seems relatively safe, then, to attribute the favorable outcomes that legislators secure through legislative organization to the deliberate efforts of the legislators themselves.

<sup>114</sup> Staudt, *supra* note 17, at 1204-08, 1214-22; see also O’Connell, *supra* note 10, at 1711.

<sup>115</sup> See Anshen, *supra* note 22, at 359.

and proposal power at the pre-floor stage and all but ignored the outsized committee influence and control at the floor and post-floor stages.<sup>116</sup> Thus, Staudt demonstrated why committees *propose* redundant programs, but she failed to show why Congress *enacts* those proposals.

An explanation of committee power that does not account for the floor and post-floor stages of the legislative process is inadequate. On Staudt's model, committees might report measures proposing redundant administrative programs, but those committees would be powerless to push their policy preferences through to actual legislative outcomes. After all, "if gatekeeping and proposal power fully characterized committee power, . . . committees would not be terribly powerful"<sup>117</sup> because the floor simply would roll the committees. Additionally, Staudt's model cannot account for administrative redundancy unrelated to jurisdictional fragmentation and overlap – such as the redundancy that occurs when the education committees in Congress authorize subsidies for post-secondary education that are duplicative of subsidies already authorized by those committees. By contrast, the legislative-organization account set out in Part I.A builds on a comprehensive view of the legislative process – one that incorporates the influence and control that congressional committees exercise beyond the pre-floor stage. The institutionalization of strong parliamentary prerogatives at the floor and post-floor stages, along with the more familiar gate-keeping and proposal powers, systematically biases legislative outcomes in favor of committee preferences. Only by taking the full scope of those parliamentary prerogatives into account does it become clear how committee proposals for redundant programs are realized in law.

Other academic accounts of administrative redundancy have been purely normative. The dominant position among them, articulated most forcefully by Milton Friedman, condemns redundant administrative programs as patently wasteful. In his landmark book on economic and political freedom, Friedman observed that the amounts spent by the government "on direct welfare payments and programs of all kinds [–] old age assistance, social security benefit payments, aid to dependent children, general assistance, farm price support programs, public housing, etc." – would be adequate, if paid out as cash grants, to raise the income of the bottom ten percent of American households above the median income for all American households.<sup>118</sup> Plainly,

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<sup>116</sup> Staudt briefly considers the floor deference enjoyed by committees. See Staudt, *supra* note 17, at 1237-38.

<sup>117</sup> Krehbiel, Shepsle & Weingast, *supra* note 98, at 936 (Shepsle and Weingast's response to Krehbiel). For an argument that proposal power is sufficient to enable committees to secure disproportionate returns in distributive legislation, see David P. Baron & John Ferejohn, *The Power to Propose*, in *MODELS OF STRATEGIC CHOICE IN POLITICS* 343, 348 (Peter C. Ordeshook ed., 1989). But even Baron and Ferejohn argue that proposal power, if not backed by certain parliamentary prerogatives favoring committees, "will not be an important source of committee power." *Id.* at 365.

<sup>118</sup> FRIEDMAN, *supra* note 14, at 193. For a similar point, see Weisbach, *supra* note 17, at 1856 ("The data we have to date indicate that if the total federal housing budget were

Friedman reasoned, the amounts paid out under the government's redundant welfare programs were badly misspent, and he argued for replacing direct-spending programs with a negative income tax under which low-income households would receive a single cash payment from the government.<sup>119</sup>

In the same vein, Daniel Shaviro demonstrated that the income phase-outs of redundant assistance programs for low-income households often work at cross-purposes, producing irrational and counter-productive outcomes.<sup>120</sup> Like Friedman, Shaviro argued for replacing such programs with demogrants and a negative income tax.<sup>121</sup> The tax-expenditure literature has shared this rejection of redundancy. In his familiar argument for the general superiority of direct spending, Stanley Surrey attacked tax expenditures for providing subsidies that increase as taxpayer income increases (so-called "upside-down" subsidies), for inappropriately narrowing the tax base, for increasing the complexity of federal tax law, and for locating non-tax policy questions beyond the jurisdiction of legislative committees and executive agencies having relevant expertise.<sup>122</sup> In generally preferring direct-spending programs to tax-expenditure programs, Surrey implicitly rejected administrative redundancy, at least for fiscal policy.<sup>123</sup>

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maintained but all of the money currently in active production programs was shifted to vouchers, millions more people could be provided with housing.").

<sup>119</sup> FRIEDMAN, *supra* note 14, at 191-93.

<sup>120</sup> See Shaviro, *supra* note 16, at 409-10, 424-27, 466, 469.

<sup>121</sup> *Id.* at 410, 469-73. Other scholars have drawn similar conclusions about the redundancy of federal anti-poverty programs. See, e.g., JONATHAN B. BENDOR, *PARALLEL SYSTEMS: REDUNDANCY IN GOVERNMENT* 16-20 (1985); Robert H. Haveman, *Introduction: Poverty and Social Policy in the 1960s and 1970s – An Overview and Some Speculations*, in *A DECADE OF FEDERAL ANTIPOVERTY PROGRAMS: ACHIEVEMENTS, FAILURES, AND LESSONS* 1, 14-16 (Robert H. Haveman ed., 1977).

<sup>122</sup> Surrey, *supra* note 15, at 720-26, 728-32; see also Stanley S. Surrey, *Federal Income Tax Reform: The Varied Approaches Necessary to Replace Tax Expenditures with Direct Governmental Assistance*, 84 HARV. L. REV. 352 (1970). Surrey also argued that neither the legislative branch nor the executive branch adequately took account of the budget effect of tax expenditures. Surrey, *supra* note 15, at 729-32. With the annual publication of the costs of tax expenditures and the formal incorporation of those costs into the federal budget, however, that concern has been overtaken by events (as the bureaucrats would say). For a more recent re-examination of the problem of tax expenditures, see CHRISTOPHER HOWARD, *THE HIDDEN WELFARE STATE: TAX EXPENDITURES AND SOCIAL POLICY IN THE UNITED STATES* 176-92 (1997).

<sup>123</sup> STANLEY S. SURREY, *PATHWAYS TO TAX REFORM: THE CONCEPT OF TAX EXPENDITURES* 148-49 (1973). Surrey's implicit rejection of redundancy in direct-spending and tax-expenditure programs runs throughout the tax expenditure literature. Although tax scholars rarely frame the issue in terms of redundancy, they regularly argue that *either* a direct-spending program *or* a tax-expenditure program is optimal to address a given policy problem. One might conclude that tax scholars uniformly overlook the possibility that the combination of *both* direct spending *and* tax expenditures would be optimal. Far more plausible, however, is the conclusion that, like Surrey, they implicitly reject redundancy.

In contrast to this general anti-redundancy position, the legal literature more recently has borrowed a prominent defense of redundancy from political science. This heterodox analysis, which Martin Landau initiated more than forty years ago, identifies redundancy as a potential solution to reliability and agency problems. Landau observed that engineers routinely depend on redundant mechanisms having independent risks of failure to improve the reliability of mechanical, electrical, and other systems.<sup>124</sup> He offered the example of redundant safety features on commercial aircraft to illustrate the basic point that redundancy can sharply improve overall dependability.<sup>125</sup> As he observed, a simple arithmetic increase in the number of independent mechanisms exponentially increases the prospects of overall system success – a “principle [that] lies at the foundation of the theory of redundancy.”<sup>126</sup>

Landau’s insight was that the reliability benefit of redundancy could appropriately be extended to the design and implementation of administrative programs, such as “the defense departments, or the several independent information-gathering services of the government, or the large number of agencies engaged in technical assistance, or the various antipoverty programs, or the miscellany of agencies concerned with transportation.”<sup>127</sup> Arguing against the “cardinal doctrine in public administration” that “duplication and overlap are wasteful,”<sup>128</sup> Landau maintained that legislators might rationally assign redundant programs to separate administrative agencies in order to increase the overall prospect that at least one of the programs would succeed: “It can be hypothesized that it is precisely such redundancies that allow for the delicate process of mutual adjustment, of self-regulation, by means of which the whole system can sustain severe local injuries and still function creditably.”<sup>129</sup> He did not, of course, argue that redundancy always works.<sup>130</sup> But he maintained that, by increasing flexibility and adaptability, “redundancy

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<sup>124</sup> Martin Landau, *Redundancy, Rationality, and the Problem of Duplication and Overlap*, 29 PUB. ADMIN. REV. 346, 349 (1969).

<sup>125</sup> Landau, *supra* note 124, at 346. Landau explained in a subsequent article:

If, with respect to a particular system, the probability of failure is 1 in 100, what would the probability of simultaneous failure be if there were 2 such systems, each statistically independent, each rated equally? What would the probability of simultaneous failure be for 3 such systems; for four, etc.? For 2, the probability would be 1 in 10,000; for 3, 1 in a million; for 4, 1 in a hundred million.

Martin Landau, *Federalism, Redundancy and System Reliability*, 3 PUBLIUS 173, 187 (1973) [hereinafter Landau, *Federalism*].

<sup>126</sup> Landau, *Federalism*, *supra* note 125, at 187.

<sup>127</sup> Landau, *supra* note 124, at 351.

<sup>128</sup> Martin Landau, *On Multiorganizational Systems in Public Administration*, 1 J. PUB. ADMIN. RES. & THEORY 5, 11 (1991); *see also* Landau, *supra* note 124, at 348-49, 354-55.

<sup>129</sup> Landau, *supra* note 124, at 351.

<sup>130</sup> *See* Landau, *Federalism*, *supra* note 125, at 191.



serves many vital functions in the conduct of public administration”<sup>131</sup> – in many cases making “the whole . . . more reliable than any of its parts.”<sup>132</sup>

Staudt and Weisbach separately applied Landau’s argument to the redundancy of direct-spending and tax-expenditure programs. They argued, for example, that implementation of overlapping programs for poverty relief may reduce the chance that the needy poor will not receive assistance.<sup>133</sup> To the extent that the bureaucratic implementation of a direct-spending program fails to deliver assistance to certain individuals, the bureaucratic implementation of a tax-expenditure program may succeed. They cautioned that this analysis depends on the risk of failure for the tax-expenditure program, administered by the Treasury Department, being wholly independent of the risk of failure for the direct-spending program, administered by the Department of Health and Human Services or another executive-branch agency.

Other scholars have questioned Landau’s endorsement of redundancy. Michael Ting, another political scientist, assumed strategic decision-making both by legislative principals and by administrative agents to determine the conditions under which legislators rationally would enact redundant administrative programs.<sup>134</sup> Ting argued that Landau’s “classic redundancy

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<sup>131</sup> Landau, *supra* note 124, at 356. O’Connell identifies several other potential benefits of redundancy: reducing “group think,” reducing agency capture, and increasing inter-agency competition. O’Connell, *supra* note 10, at 1676-78. As with Landau’s “failsafe” analogy, these other benefits all point toward enhanced performance by administrative agencies implementing redundant administrative programs.

<sup>132</sup> Landau, *Federalism*, *supra* note 125, at 190. Jonathan Bendor, one of Landau’s students, argued that redundant systems do not have to be completely independent in order to increase overall reliability. See BENDOR, *supra* note 121, at 44-49. For an argument distinguishing two different types of redundancy (duplication and overlap) and three different methods of implementing redundancy, see Allan W. Lerner, *There Is More than One Way to Be Redundant: A Comparison of Alternatives for the Design and Use of Redundancy in Organizations*, 18 ADMIN. & SOC. 334, 336 (1986). For the development of normative criteria in assessing organizational redundancy, see Dan S. Felsenthal, *Applying the Redundancy Concept to Administrative Organizations*, 40 PUB. ADMIN. REV. 247 (1980). For an early attempt to find empirical support for improved reliability under conditions of redundancy, see Dan S. Felsenthal & Eliezer Fuchs, *Experimental Evaluation of Five Designs of Redundant Organizational Systems*, 21 ADMIN. SCI. Q. 474 (1976). For an argument that the redundancy of parallel systems is inadequate to maximize system reliability in administrative programs, see C. F. LARRY HEIMANN, ACCEPTABLE RISKS: POLITICS, POLICY, AND RISKY TECHNOLOGIES (1998); C. F. Larry Heimann, *Understanding the Challenger Disaster: Organizational Structure and the Design of Reliable Systems*, 87 AM. POL. SCI. REV. 421 (1993). For an analysis of redundancy in the delivery of local-government services, see Rowan Miranda & Allan Lerner, *Bureaucracy, Organizational Redundancy, and the Privatization of Public Services*, 55 PUB. ADMIN. REV. 193 (1995).

<sup>133</sup> See Staudt, *supra* note 17, at 1222-30; Weisbach, *supra* note 17, at 1839-43.

<sup>134</sup> Michael M. Ting, *A Strategic Theory of Bureaucratic Redundancy*, 47 AM. J. POL. SCI. 274, 275 (2003).

model” is “not robust to the introduction of strategic agents.”<sup>135</sup> He found that, because of collective-action problems among multiple agents, redundancy increased overall reliability only when, for each agent, the probability of success was moderate and the cost of exerting effort was low.<sup>136</sup> Ting also argued that Congress would be attracted to the competition that redundancy generates among bureaucratic agents when the preferences of the agents lie far from those of Congress but that redundancy may add no value in the case of agents sharing the objectives of legislators.<sup>137</sup> In fact, he concluded, collective-action problems among redundant agents in such cases may actually reduce overall reliability (at least until the number of agents increases substantially).<sup>138</sup>

By contrast, William Niskanen argued for redundancy as a solution to agency problems. Niskanen modeled a legislature and a bureaucratic agency as parties in a bilateral monopoly with asymmetric information that gives the agency “the overwhelmingly dominant monopoly power.”<sup>139</sup> He showed that the agency – which, unlike its legislative principal, knows the cost of providing the services demanded by the legislature – seeks the largest budget that the legislature is willing to provide, as long as the budget covers the agency’s cost of meeting the legislature’s demands.<sup>140</sup> That, in turn, leads the agency to supply too much, relative to the social optimum, of the agency’s services.<sup>141</sup> Niskanen argued that competition among agencies for administrative programs – which presupposes redundancy – would improve agency performance and reduce the budgets provided by the legislature for a given level of agency output.<sup>142</sup>

Others, in turn, have challenged Niskanen’s conclusions. Gary Miller and Terry Moe refined Niskanen’s model by assuming different ranges for the

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<sup>135</sup> *Id.* at 277.

<sup>136</sup> *Id.*

<sup>137</sup> *Id.* at 276, 286-87. Ting found that the traditional control mechanism of retaining the power to terminate the agent would improve reliability; he called this “latent redundancy” – in effect, pitting the agent against itself in seriatim competition. *Id.* at 276, 287.

<sup>138</sup> *Id.* In an earlier article, Ting devised a game-theoretic model for the allocation of agency jurisdiction that, unlike the argument in Part I.A., does not depend on the congressional committee system. See generally Michael M. Ting, *A Theory of Jurisdictional Assignments in Bureaucracies*, 46 AM. J. POL. SCI. 364 (2002).

<sup>139</sup> WILLIAM A. NISKANEN, JR., *BUREAUCRACY AND REPRESENTATIVE GOVERNMENT* 30 (1971).

<sup>140</sup> *Id.* at 45-52.

<sup>141</sup> *Id.* at 49-50.

<sup>142</sup> *Id.* at 195-201; see also William A. Niskanen, *Bureaucrats and Politicians*, 18 J. L. & ECON. 617, 640-43 (1975). Interestingly, Niskanen added the Landau reliability point to his argument for program redundancy: “One other effect of the competition among bureaus is likely to be a greater diversity of production processes, and this can be very important for services like national defense to insure against the catastrophic failure of any one process.” NISKANEN, *supra* note 139, at 198.

distribution of information and power between the bureaucratic agency and the legislative principal.<sup>143</sup> Their approach yielded a wider range of outcomes, with cases of over-supply, under-supply, and optimal supply of agency services.<sup>144</sup> Still, Miller and Moe generally found that the effects of competition among bureaucratic agencies – again, presupposing redundancy – “are uniformly beneficial.”<sup>145</sup> By contrast, Weisbach argued that Niskanen’s analysis likely does not account for redundancy in direct spending and tax expenditures.<sup>146</sup> He argued that the Treasury Department does not willingly compete with other agencies for non-tax programs and, in any event, “cannot break out [and, therefore, cannot reveal] the costs of administering most tax expenditures.”<sup>147</sup>

In sum, the conventional approach to administrative redundancy in the academic literature generally has divided into two broad normative strands. The Friedman strand provides reasons for Congress to reject redundancy and, in the case of fiscal policy, either to prefer direct spending over tax expenditures or to prefer tax expenditures over direct spending. The Landau strand offers reasons for Congress to choose redundancy, at least under certain conditions. In both strands, analysis of Congress as an institution is orthogonal: The relevant point is to determine the optimal output of redundancy given existing institutional structures.<sup>148</sup> But the legislative-organization account set out in Part I.A implies that both strands of the

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<sup>143</sup> Gary J. Miller & Terry M. Moe, *Bureaucrats, Legislators, and the Size of Government*, 77 AM. POL. SCI. REV. 297, 301 (1983). More specifically, Miller and Moe assumed “two polar modes of legislative oversight” – a “demand revealing” mode (consistent with Niskanen’s assumption) and a “demand concealing mode” (not consistent with Niskanen’s assumption). *Id.* Another approach to the problem of relations between the legislature and bureaucratic agencies assumes that the principal (Congress) dominates the agents (bureaus). See Randall L. Calvert, Mathew D. McCubbins & Barry R. Weingast, *A Theory of Political Control of Agency Discretion*, 33 AM. J. POL. SCI. 588, 589 (1989); Mathew D. McCubbins, Roger G. Noll & Barry R. Weingast, *Structure and Process, Politics and Policy: Administrative Arrangements and the Political Control of Agencies*, 75 VA. L. REV. 431, 433-34 (1989); Mathew D. McCubbins, Roger G. Noll & Barry R. Weingast, *Administrative Procedures as Instruments of Political Control*, 3 J.L. ECON. & ORG. 243, 243-44 (1987).

<sup>144</sup> Miller & Moe, *supra* note 143, at 302-05. Even in cases of over-supply of agency services, however, the amount of over-supply derived by Miller and Moe is smaller than that derived by Niskanen. *Id.* at 309.

<sup>145</sup> *Id.* at 311. The benefits of such redundancy and competition decrease, however, as legislative demand for the agency’s services increases. *Id.* at 316.

<sup>146</sup> Weisbach, *supra* note 17, at 1843-45. For related criticisms, see O’Connell, *supra* note 10, at 1679-82 (arguing that redundant structures may increase costs, decrease agency reliability, undermine the quality of agency decision-making, prevent cooperation, and generate agency errors).

<sup>147</sup> Weisbach, *supra* note 17, at 1845.

<sup>148</sup> See, e.g., Jacob E. Gersen, *Overlapping and Underlapping Jurisdiction in Administrative Law*, 2006 SUP. CT. REV. 201, 214.

conventional approach incorrectly assume away the underlying source of redundancy. The institutional structures that facilitate the enactment of redundant legislation are embedded deeply within the congressional committee system, which implies that the assessment of administrative redundancy should incorporate a better understanding of congressional committees as a phenomenon of legislative organization.

## II. CONGRESSIONAL COMMITTEES, DISTRIBUTIVE COSTS, AND INFORMATIONAL BENEFITS

In recent years, political scientists have developed sophisticated accounts of the congressional committee system. These accounts grew out of a renewed focus on institutionalism that itself developed in response to questions about the source of stability under majoritarian rule. Most prominently, distributive theory and informational theory identify the committee system as an anchor of structural stability within Congress.<sup>149</sup> But neither distributive theory nor informational theory has taken up the problem of administrative redundancy. Political theorists have not specifically considered the implications of redundancy for the distributive-theory account or the informational-theory account of the committee system. Likewise, legal scholars have not considered the implications of informational theory or distributive theory for redundancy.<sup>150</sup> This Part draws out those implications to assess the costs and benefits, in terms of legislative organization and process, of the institutional structures that support and facilitate redundancy.<sup>151</sup>

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<sup>149</sup> Kenneth A. Shepsle & Barry R. Weingast, *Positive Theories of Congressional Institutions*, in POSITIVE THEORIES OF CONGRESSIONAL INSTITUTIONS 10-21 (Kenneth A. Shepsle & Barry R. Weingast eds., 1995). Readers familiar with the literature may argue that political scientists have offered other theories of legislative organization. See, e.g., Gary W. Cox & Mathew D. McCubbins, *Theories of Legislative Organization*, APSA-CP NEWSLETTER (Am. Political Sci. Ass'n, Washington, D.C.), Winter 2004, at 9 (surveying partisan and non-partisan theories of legislative organization); ERIC SHICKLER, DISJOINTED PLURALISM: INSTITUTIONAL INNOVATION AND THE DEVELOPMENT OF THE U.S. CONGRESS 5-12 (2001) (surveying theories of legislative organization in connection with different "collective interests"). However, informational theory and distributive theory provide the most traction on legislative committees. For a theory of congressional committees arguing that committee preferences serve as counterweights to executive branch preferences, see David Epstein & Sharyn O'Halloran, *Legislative Organization Under Separate Powers*, 17 J.L. ECON. & ORG. 373 (2001).

<sup>150</sup> In her study of redundancy, Staudt briefly notes three theories of legislative organization (distributive, informational, and partisan) and their explanations of the committee system; she does not, however, develop the implications of the theories for redundancy or the implications of redundancy for the theories. See Staudt, *supra* note 17, at 1215.

<sup>151</sup> The analysis in this Part is similar to Anne O'Connell's excellent analysis of the congressional-committee oversight of intelligence agencies. See O'Connell, *supra* note 10, at 1691-99. O'Connell evaluates the costs and benefits of legislative organizational

A. *Distributive Costs*

Viewing the congressional committee system through distributive theory implies, consistent with the Friedman strand, that administrative redundancy effects inefficiency and waste. Under distributive theory, the committee system forms the basis for institutionalized logrolling and the production of interest-group legislation. Redundancy, by extension, provides grease for bad legislative outcomes. Indeed, the prevalence of redundancy implies that the interest-group legislation produced through legislative logrolling is worse than political theory otherwise suggests: it implies that Congress enacts redundant administrative programs specifically to spread the political benefits of constituent-favorable legislation as widely as possible throughout the House and the Senate.

In broad terms, the distributive theory of legislative organization argues that legislators organize Congress to produce benefits such as “pork barrel projects, . . . expenditures targeted to their districts, and policy outcomes desired by favored constituents.”<sup>152</sup> The theory reasonably assumes that legislators have heterogeneous policy preferences, that few such preferences are held by a majority of legislators, and that legislators may secure gains from trade by exchanging support across different measures.<sup>153</sup> The “spot market” for trading votes, however, presents problems of enforceability and long-term stability; for example, an exchange of votes might involve benefits having different temporal streams, or the exchange itself might require asynchronous voting.<sup>154</sup> Legislators therefore seek out institutional structures to facilitate both the formation and the enforcement of deals that deliver benefits to their constituents.<sup>155</sup>

Distributive theory argues that Congress addresses the enforcement problems and the transaction costs of vote-trading by maintaining a system of committees that have independent jurisdictional authority and extensive

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structures primarily in terms of agency outcomes, and this Part evaluates the costs and benefits of such structures primarily in terms of legislative outcomes. However, the two are obviously interrelated.

<sup>152</sup> Shepsle & Weingast, *supra* note 149, at 7-8; *see also* C. Lawrence Evans, *Legislative Structure: Rules, Precedents, and Jurisdictions*, 24 LEGIS. STUD. Q. 605, 608-09 (1999). The preeminent account of the committee system under distributive theory is Barry R. Weingast & William J. Marshall, *The Industrial Organization of Congress; or, Why Legislatures, Like Firms, Are Not Organized as Markets*, 96 J. POL. ECON. 132 (1988).

<sup>153</sup> Weingast & Marshall, *supra* note 152, at 133, 136-37.

<sup>154</sup> Shepsle & Weingast, *supra* note 149, at 10-11; Weingast & Marshall, *supra* note 152, at 135, 138-42.

<sup>155</sup> Shepsle & Weingast, *supra* note 149, at 12-13; Weingast & Marshall, *supra* note 152, at 142-43; *see also* Barry R. Weingast, *A Rational Choice Perspective on Congressional Norms*, 23 AM. J. POL. SCI. 245, 246 (1979). King characterizes distributive theory as showing “how a majoritarian institution (like Congress) with a strong committee system (like Congress) can produce nonmajoritarian policies (like pork-barrel projects benefiting the few at the expense of the many).” KING, *supra* note 6, at 4.

agenda control.<sup>156</sup> This committee system allows members to sort themselves according to the interests of their constituents.<sup>157</sup> Legislators representing farming constituencies seek membership on the agriculture committees; legislators from the western states seek membership on the natural resources committees; legislators from the rust belt seek membership on the commerce committees or the labor committees.<sup>158</sup> Within any particular committee, legislators can make readily enforceable deals without the need to trade votes across separate measures.<sup>159</sup> Additionally, each committee holds almost unchecked agenda control – both positive and negative – over all matters within its jurisdiction.

Distributive theory thus regards the committee system as “the formal expression of a comprehensive logrolling arrangement.”<sup>160</sup> But the arrangement is not a market exchange of votes; rather, it is an exchange of institutional, committee-based rights.<sup>161</sup> As described by distributive theory, “a legislator on committee *i* gives up influence over the selection of proposals in the area of committee *j* in exchange for members of committee *j*’s giving up their rights to influence proposals in area *i*.”<sup>162</sup> For example, the Health, Education, Labor, and Pensions Committee in the Senate may produce measures that advance the interests of organized labor at the expense of employers (or vice versa), thereby also advancing the reelection, prestige, or policy objectives of the legislators serving on that committee. Similarly, the Armed Services Committee in the Senate may produce measures that advance the interests of defense contractors, thereby securing advantages for the legislators on that committee. But the committee system prevents the Health, Education, Labor, and Pensions Committee from bringing to the floor any defense measure not approved by the Armed Services Committee and, likewise, prevents the Armed Services Committee from bringing to the floor

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<sup>156</sup> Weingast & Marshall, *supra* note 152, at 143-48.

<sup>157</sup> *Id.* at 145-46. The theory does not claim, however, that the committee-assignment process consists entirely of self-selection by legislators.

<sup>158</sup> Others find only limited support for that conclusion. See, e.g., KEITH KREHBIEL, INFORMATION AND LEGISLATIVE ORGANIZATION 117-22, 125-34 (1992).

<sup>159</sup> Weingast & Marshall, *supra* note 152, at 143-8.

<sup>160</sup> Shepsle & Weingast, *supra* note 149, at 11-12 (quoting Morris Fiorina, *Alternative Rationales for Restrictive Procedures*, 3 J.L. ECON. & ORG. 337, 338 (1987)); see also John Ferejohn, *Logrolling in an Institutional Context: A Case Study of Food Stamp Legislation*, in CONGRESS AND POLICY CHANGE 223, 224-25 (Gerald C. Wright, Jr. et al. eds., 1986).

<sup>161</sup> Weingast & Marshall, *supra* note 152, at 148.

<sup>162</sup> *Id.* at 145. Note, however, that overlapping committee jurisdictions potentially weaken the exchange of committee-based rights. To the extent that the jurisdictions of committee *i* and committee *j* overlap, the commitment by committee *i* not to legislate in the jurisdiction of committee *j* and the corresponding commitment by committee *j* not to legislate in the jurisdiction of committee *i* become less valuable.

any labor measure not approved by the Health, Education, Labor, and Pensions Committee.<sup>163</sup>

The committees' parliamentary prerogatives greatly strengthen this formalized logrolling arrangement. Once a measure has left a committee's direct control, floor amendments could undo intra-committee deals and resurrect the general enforceability problems of measure-by-measure vote trades. But the parliamentary prerogatives stabilize ultimate legislative outcomes in favor of committee preferences. When modeled as a simple divide-the-dollar game (an obvious exemplar for distributive politics), a committee's proposal power and gate-keeping power allow the committee to secure outsized returns.<sup>164</sup> The advantage to the committee is increased by its disproportionate representation in conference with the other chamber.<sup>165</sup> By allowing committee chairs the authority to manage their committee's legislation on the floor, by limiting, discouraging, or disallowing floor amendments, and by stacking the conference with members of the reporting committee, both the House and the Senate make it difficult for legislators not serving on the committee of jurisdiction to change a measure over the objection of that committee.

This all implies a pessimistic view of administrative redundancy. If the committee system institutionalizes logrolling for the production of interest-group legislation, redundancy appears particularly objectionable – more objectionable, arguably, than even the Friedman strand implies. Prior work in distributive theory, which has not taken redundancy into account, may actually understate how well the legislative process systematically advances interest-group legislation. Whether the legislative process is viewed from the demand side or the supply side, examination of redundancy reveals that the congressional committee system readily accommodates pressure for as much distributive legislation as possible. These are the distributive costs of a committee system that produces redundancy.

Consider the demand side first. Public-choice theory, of course, has produced many theoretical and empirical accounts of interest groups seeking rents through the legislative process. Distributive theory builds on those accounts by identifying the committee system as the institutional structure that legislators use to meet the rent-seeking demands of their constituents. But the jurisdictional overlap and fragmentation that facilitate redundant programs

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<sup>163</sup> That statement is true as to both the Senate and the House, but, in the case of the Senate, the absence of a germaneness rule allows any individual senator to offer a floor amendment that affects policy in almost any area on almost any pending measure (subject to the contrary terms of a unanimous consent agreement).

<sup>164</sup> See Baron & Ferejohn, *supra* note 117, at 353-65. Proposal power without gate-keeping power yields markedly smaller returns to the committee. *Id.*; see also David P. Baron, *A Noncooperative Theory of Legislative Coalitions*, 33 AM. J. POL. SCI. 1048, 1081-82 (1989).

<sup>165</sup> Shepsle & Weingast, *supra* note 83, at 86.

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provide interest groups with multiple opportunities to seek rents. From the perspective of an interest group, the presence of several committees in each chamber that can exercise jurisdiction over policy areas important to the interest group allows that group to shop among committees. If one committee turns down a request for favorable legislation, a rival committee might be persuaded to grant the request in a different form through a different program.

Colleges and universities, for example, might seek an increase in federal assistance for students enrolled at their institutions (working on the plausible assumption that the schools will capture any increased student aid through higher tuition and fees or through higher enrollment). The education lobbyists might first approach the Education and the Workforce Committee on the House side and the Health, Education, Labor, and Pensions Committee on the Senate side. If the lobbyists find that those committees are not disposed to be helpful, they might turn to the Science, Space, and Technology Committee in the House and the Commerce, Science, and Transportation Committee in the Senate to ask for an increase in science and engineering scholarships (reasoning that federal subsidies are fungible, after all). Should that strategy fail, the lobbyists might approach the Agriculture Committee in the House and the Agriculture, Nutrition, and Forestry Committee in the Senate to request additional assistance for the colleges' and universities' agricultural programs. Even failure there should not be the end of the effort: The Ways and Means Committee in the House and the Finance Committee in the Senate have the authority to provide tax deductions, tax credits, and tax-exempt savings accounts to subsidize the costs of post-secondary education.<sup>166</sup>

That would be the worst case for an interest group – to have to shop among different committees with overlapping jurisdictions in search of one that will provide a federal subsidy that another committee has denied. A better case would be to shop among the committees to obtain a fiscal program redundant to one that another committee has already provided. Nothing about the legislative process prevents an interest group from double dipping in the federal treasury, and the prevalence of redundancy confirms that the practice is routine.<sup>167</sup> The lobbyists for colleges and universities may not have to choose, then, among general scholarships from the education committees, science and engineering scholarships from the science committees, agricultural scholarships from the agriculture committees, and educational tax preferences from the tax committees.<sup>168</sup> Skillful advocacy may set up success in several

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<sup>166</sup> For discussions of jurisdictional fragmentation and committee shopping, see KING, *supra* note 6, at 106, 143, and Staudt, *supra* note 17, at 1217-18.

<sup>167</sup> See, e.g., GAO REPORT, *supra* note 1, at 59-60 (concluding that redundant direct-spending and tax-expenditure subsidies for ethanol will waste \$5.7 billion of federal revenues in 2011).

<sup>168</sup> During the early 1970s, the Select Committee on Committees in the House did consider moving jurisdiction over agricultural colleges and science scholarships from the Agriculture Committee and the Science and Technology Committee to the Education and



committees, producing redundant subsidy programs. And, if the lobbying efforts persuade multiple committees to advance favorable measures, the committees' parliamentary prerogatives make it unlikely that the floor of either chamber will scale back or eliminate the redundant programs over committee objections.<sup>169</sup>

Consider next the supply side. The overlapping jurisdictions that facilitate committee shopping by interest groups also increase the opportunities for legislators to accept or extract cash or other benefits from those interest groups.<sup>170</sup> Many legislators rely on campaign contributions, not only from the residents of their home states and districts but also from political action committees, trade associations, and lobbyists representing industries or activities that have no direct connection to their actual constituents. Such interest-group contributions generally follow committee assignments. A legislator serving on the Health, Education, Labor, and Pensions Committee in the Senate, for example, could justifiably anticipate direct or indirect financial contributions from organizations such as AARP, AHIP, the AMA, the NEA, the AFL-CIO, the SEIU, ABC, ERIC, ASPA, NAM, USCC, the BRT, ACLI, and many others.<sup>171</sup> If the contributions from such an organization do not satisfy the legislator's expectations, the legislator may find it expedient to

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Labor Committee. DRAFT BOLLING COMMITTEE REPORT, *supra* note 26, at 11, 39.

<sup>169</sup> Elizabeth Garrett's argument about interest-group competition for appropriated funds is not inconsistent with the double-dipping point. She argues that certain constraints of the federal budget process force interest groups to compete for discretionary spending and for tax expenditures. Elizabeth Garrett, *Rethinking the Structures of Decisionmaking in the Federal Budget Process*, 35 HARV. J. ON LEGIS. 387, 397-401 (1998). She also argues, however, that there is very limited coordination of direct spending and tax expenditures across different policy areas (what she generally refers to as "budget functions"). *Id.* at 406-32. For an argument contrary to the argument made in the text (that is, for an argument that redundancy may *decrease* opportunities for capture of congressional committees), see O'Connell, *supra* note 10, at 1692-93.

<sup>170</sup> The paradigmatic form of transfer from an interest group to a legislator may be the campaign contribution, but an interest group and a legislator chafing under the legal limits for campaign contributions can arrange for the group to fund, without limit, a college or university endowment honoring the legislator. See Eric Lipton, *Lawmakers Linked to Centers Endowed by Corporate Money*, N.Y. TIMES, Aug. 6, 2010 at A1.

<sup>171</sup> AARP is a trade association representing middle-aged and elderly Americans; AHIP is a trade association representing employers providing health insurance to their employees; the AMA is a trade association representing physicians; the NEA is a labor union for primary- and secondary-school teachers; the AFL-CIO and the SEIU are associations of labor unions; ABC and ERIC are trade associations representing employers providing retirement and health plans to their employees; ASPA is a trade association representing retirement-plan actuaries; NAM and USCC are trade associations representing business; the BRT is a trade association representing chief executive officers of public companies; and ACLI is a trade association representing life insurance companies.

propose unfavorable legislation as a means of focusing the organization's attention.<sup>172</sup>

Representative Barney Frank's fund-raising strategy illustrates how a legislator can readily convert a committee position into contributions from interest groups having business before the legislator's committee. Representative Frank's geographic constituency is the Fourth District of Massachusetts, a horn-shaped district running from the southern coast of Massachusetts into a narrow neck that curves through the central part of the eastern state.<sup>173</sup> The district includes the towns of New Bedford, Taunton, Newton, and Brookline; it does not extend into the City of Boston.<sup>174</sup> Representative Frank appears to be very popular in the Fourth District; he won reelection in 2008 with more than two-thirds of the vote,<sup>175</sup> and he won in the more challenging 2010 elections with a comfortable eleven-point margin.<sup>176</sup> But he is also very popular with financial-services companies and other financial institutions, few of which are resident in the Fourth District. The reason is that Representative Frank was until recently the chair of the Financial Services Committee in the House.<sup>177</sup> He made no apology for the connection between his position and the cash he receives. While still chair of the committee, he stated flatly: "Financial services companies are inclined to give to me because I'm chairman of the committee important to their interests."<sup>178</sup>

Fragmenting jurisdiction over one policy area across multiple committees increases the number of legislators in Representative Frank's position. In the absence of jurisdictional fragmentation, interest groups might concentrate their cash on the members of only one committee in the House and one committee in the Senate, but fragmentation ensures that interest-group contributions instead are spread across many committees. Insurance companies fall under the jurisdiction of the Financial Services Committee, but, with jurisdictional fragmentation, those companies may also find themselves affected by legislation from (among others) the Education and the Workforce Committee, the Energy and Commerce Committee, the Judiciary Committee, the Small

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<sup>172</sup> See, e.g., J. Mark Ramseyer & Minoru Nakazato, *Tax Transitions and the Protection Racket: A Reply to Professors Graetz and Kaplow*, 75 VA. L. REV. 1155, 1158 (1989) (arguing that legislators use tax-reform proposals to extract rents from interest groups).

<sup>173</sup> Congressman Barney Frank, HOUSE.GOV, <http://www.house.gov/frank/district/index.html> (last visited Oct. 14, 2011).

<sup>174</sup> *Id.*

<sup>175</sup> Campaign 08 Massachusetts Results, BOSTON.COM, [http://www.boston.com/news/politics/2008/election\\_results/massachusetts\\_results](http://www.boston.com/news/politics/2008/election_results/massachusetts_results) (last visited Oct. 14, 2011).

<sup>176</sup> Eric Moskowitz, *After Defeating Bielat on Tuesday, Barney Is Back to Being Barney*, BOS. GLOBE, November 7, 2010, at B-3.

<sup>177</sup> See Jim Puzanghera & Richard Simon, *Republicans Tussle over House Post*, L.A. TIMES, November 09, 2010, at B-1.

<sup>178</sup> Jeffrey H. Birnbaum & John Solomon, *Democrats Offer up Chairmen for Donors; Party's Campaigns Had Faulted GOP for "Selling Access,"* WASH. POST, Feb. 24, 2007, at A1.

Business Committee, the Veterans' Affairs Committee, and the Ways and Means Committee. Although the trade associations and lobbyists representing insurers may contribute disproportionately to members of the Financial Services Committee, they also have good reason to contribute to members of other committees.<sup>179</sup>

The supply-side advantages of redundancy are particularly pronounced in the case of the Ways and Means Committee and the Finance Committee. Although tax policy is not the only area within their jurisdictions, it is arguably preeminent; in any event, it disproportionately contributes to the committees' institutional stature. In the absence of tax expenditures, exercise of the committees' tax jurisdiction would consist principally of setting marginal tax rates, shutting down tax shelters, and closing loopholes. That policy repertoire seems unlikely to attract the level of contributions that interest groups make to other standing committees holding the power to authorize federal subsidies. By regularly enacting, repealing, expanding, contracting, and otherwise modifying tax expenditures, however, the two tax committees attract the lobbying attention and the contributions of a very broad spectrum of interest groups.

Consider the case of health care. A tax code without tax expenditures would have little, perhaps nothing, to say about health care, and congressional activity on health care reform probably would bypass the tax committees entirely. But, even before the enactment of health care reform in 2010, the tax code had prominent tax preferences and dispreferences for health care – including an exclusion for employer-provided health insurance,<sup>180</sup> a deduction for health insurance purchased by self-employed individuals,<sup>181</sup> an exclusion for health-insurance benefits,<sup>182</sup> a deduction for unreimbursed medical expenses,<sup>183</sup> exempt savings accounts for health care,<sup>184</sup> and penalties for employer-provided health plans that fail to meet any of numerous regulatory requirements.<sup>185</sup> Those rules and the existing jurisdiction that they reflect made the tax committees key players in the recent congressional effort to reform health care. Senator Max Baucus of Montana, the chair of the Finance Committee, leveraged that position into extensive interest-group contributions.<sup>186</sup>

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<sup>179</sup> See also O'Connell, *supra* note 10, at 1706 ("Members [of Congress] may decline to eliminate redundancy in the administrative state in order to retain 'pork' for which they can claim credit . . .").

<sup>180</sup> 26 U.S.C. § 106 (2006).

<sup>181</sup> *Id.* § 162(l).

<sup>182</sup> *Id.* § 105.

<sup>183</sup> *Id.* § 213.

<sup>184</sup> *Id.* §§ 220, 223.

<sup>185</sup> *Id.* §§ 4980B, 9801-03, 9811-12.

<sup>186</sup> Dan Eggen, *Industry Cash Flowed to Drafters of Reform; Key Senator Baucus Is a Leading Recipient*, WASH. POST, July 21, 2009, at A1.

These supply-side benefits for the Ways and Means Committee and the Finance Committee also help to explain why tax expenditures themselves tend to be redundant with respect to other tax expenditures. By the most recent count of the Joint Committee on Taxation, for example, the tax code provides eight different tax preferences for agriculture, seventeen different tax preferences for education, and more than two dozen different tax preferences for energy.<sup>187</sup> Unlike non-entitlement spending programs, which require regular authorization by the standing committees of jurisdiction and appropriations by the appropriations committees, tax-expenditure programs generally remain in effect until repealed. Thus, the non-tax committees have cyclical opportunities to pursue distributive legislation by authorizing spending programs and making appropriations for those programs. The tax committees, by contrast, face the problem of limited opportunities to provide legislative benefits to favored constituents and interest groups. The Ways and Means and Finance Committees address that problem by making certain tax expenditures temporary.<sup>188</sup> The opportunity to extend expiring tax expenditures makes those expenditures work like the direct-spending programs that require regular authorization and appropriations. Better still – from the perspective of both the tax committees and the interest groups that seek favors from them – the tax committees also promote redundant tax expenditures, thereby renewing opportunities to confer benefits on groups that have secured past favors from the tax committees.

In sum, distributive theory generally tells a pessimistic story about the legislative process. Factoring administrative redundancy into the distributive-theory account only makes a bad story worse, both from the demand side and from the supply side. Distributive theory argues that Congress maintains its committees as a system of institutionalized logrolling so that legislators can provide legislative benefits to their constituents. The addition of redundancy underscores the absence of any inherent limit to these negative-sum transfers. Fragmentation and overlap of committee jurisdiction allow interest groups, at worst, to shop among different committees for legislative benefits and, at best, to dip multiple times into the federal treasury; the parliamentary prerogatives of the standing committees then protect redundant interest-group legislation from meaningful change on the floor or in conference.

#### B. *Informational Benefits*

The informational-theory account of the congressional committee system suggests a much more optimistic view of administrative redundancy. Although it does not specifically address redundancy, informational theory generally implies that Congress enacts redundant programs as a consequence of pursuing

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<sup>187</sup> STAFF OF J. COMM. ON TAXATION, 111TH CONG., ESTIMATES OF FED. TAX EXPENDITURES FOR FISCAL YEARS 2009-2013, at 29-40 (Comm. Print 2010).

<sup>188</sup> See George K. Yin, *Temporary-Effect Legislation, Political Accountability, and Fiscal Restraint*, 84 N.Y.U. L. REV. 174, 239-40 (2009).

informational efficiency. Informational theory argues that the congressional committee system serves the important purpose of providing legislators the opportunity and the incentive to invest in the acquisition of policy expertise. Thus, the theory implies that redundancy, as a by-product of the committee system, is an epiphenomenon of the broad institutional effort to improve decision-making in the legislative process. Where distributive theory implies that redundancy is a downside of legislative organization, informational theory implies that redundancy is part of the organizational upside.

Developed principally by political scientist Keith Krehbiel, informational theory asserts that the House and the Senate organize themselves into committees so that committee members can acquire and maintain policy expertise.<sup>189</sup> The theory stands on two basic assumptions. First, it assumes that institutional structures in Congress, including the committee system, are subject to the general principle of majoritarianism<sup>190</sup> – in other words, that “institutional features are . . . selected by majorities, are subject to change by majorities, and therefore presumably serve the interests of majorities.”<sup>191</sup> Second, the theory assumes that legislators act under conditions of uncertainty about the instrumental relationship between legislative policies and non-legislative (“real world”) outcomes.<sup>192</sup> To address this informational problem,

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<sup>189</sup> For the definitive statement of informational theory, see generally KREHBIEL, *supra* note 158. For earlier papers constructing the theory, see Thomas W. Gilligan & Keith Krehbiel, *Asymmetric Information and Legislative Rules with a Heterogeneous Committee*, 33 AM. POL. SCI. REV. 459 (1989) [hereinafter Gilligan & Krehbiel, *Asymmetric Information*]; Thomas W. Gilligan & Keith Krehbiel, *Collective Choice Without Procedural Commitment*, in MODELS OF STRATEGIC CHOICE IN POLITICS 295 (Peter C. Ordeshook ed., 1989) [hereinafter Gilligan and Krehbiel, *Collective Choice*]; Thomas W. Gilligan & Keith Krehbiel, *Collective Decisionmaking and Standing Committees: An Informational Rationale for Restrictive Amendment Procedures*, 3 J.L. ECON. & ORG. 287 (1987) [hereinafter Gilligan & Krehbiel, *Collective Decisionmaking*]; Thomas W. Gilligan & Keith Krehbiel, *Organization of Informative Committees by a Rational Legislature*, 34 AM. J. POL. SCI. 531 (1990) [hereinafter Gilligan & Krehbiel, *Organization of Informative Committees*]. For a different informational theory of legislative organization (which yields results that differ in certain cases from those of Gilligan and Krehbiel), see David P. Baron, *Legislative Organization with Informational Committees*, 44 AM. J. POL. SCI. 485, 485-86 (2000).

<sup>190</sup> KREHBIEL, *supra* note 158, at 15-19. Krehbiel calls this the “majoritarian postulate” – that “[o]bjects of legislative choice in both the procedural and policy domains must be chosen by a majority of the legislature.” *Id.* at 16.

<sup>191</sup> Shepsle & Weingast, *supra* note 149, at 14. For criticism of Krehbiel’s assumption about majoritarianism, see David W. Rohde, *Parties and Committees in the House: Member Motivations, Issues, and Institutional Arrangements*, in POSITIVE THEORIES OF CONGRESSIONAL INSTITUTIONS 119-29 (Kenneth A. Shepsle & Barry R. Weingast eds., 1995). For a case study supporting majoritarian control through the floor median, see Keith Krehbiel, *Committee Power, Leadership, and the Median Voter: Evidence from the Smoking Ban*, 12 J.L. ECON. & ORG. 234 (1996).

<sup>192</sup> KREHBIEL, *supra* note 158, at 20. Krehbiel calls this the “uncertainty postulate” – that “[l]egislators are often uncertain about the relationship between policies and their

the theory argues, the legislature organizes itself into committees and grants the committees parliamentary prerogatives.

The reasoning is straightforward. Congress as a whole benefits from “informational efficiency” – that is, the “reduction of uncertainty in the course of the choice process.”<sup>193</sup> But legislative pursuit of informational efficiency encounters the usual collective-action problems. Policy expertise is costly to acquire and, once acquired by any one legislator, is potentially available to all legislators. Thus, the “benefits of policy expertise will be realized only if institutional arrangements are such that some legislators have strong incentives to specialize and to share their expertise with their fellow legislators.”<sup>194</sup> By assigning individual legislators to specific committees with independent jurisdictions, Congress provides those legislators with the opportunity to develop expertise in particular policy areas.<sup>195</sup> For example, members of the Ways and Means Committee, who exercise jurisdiction in the House over revenue matters, and members of the Education and the Workforce Committee, who exercise jurisdiction in the House over labor-management relations, can acquire much greater expertise in tax law and in labor law, respectively, than other legislators not serving on those committees. By establishing and maintaining committees that cover the entire policy spectrum, the House and the Senate each attempt to create an institutional reservoir of specialized knowledge.<sup>196</sup>

Committee members, however, rationally may not want to reveal their policy expertise to the full chamber.<sup>197</sup> In a heterogeneous legislature, the ideal point of the committee’s median member may differ from the ideal point of the floor’s median legislator,<sup>198</sup> and committee members may be concerned that the floor will use the committee’s revealed expertise to move a policy position away from that preferred by the committee.<sup>199</sup> The floor can attempt

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outcomes.” *Id.* at 20. For a more detailed discussion of Krehbiel’s distinction between policy and outcome, see *id.* at 66-68.

<sup>193</sup> *Id.* at 74; *cf. id.* at 269 (“Informational efficiency refers to the precision of the inference the legislature draws from the committee’s equilibrium behavior, that is, the clarity of the received signal.”).

<sup>194</sup> *Id.* at 64.

<sup>195</sup> *Id.* at 68-69; Gilligan & Krehbiel, *Organization of Informative Committees*, *supra* note 189, at 546 (“[T]he [legislative] committee is superfluous when it possesses no special expertise.”); see also FINAL BOLLING COMMITTEE REPORT, *supra* note 26, at 25 (“The committee system is used to provide division of labor and specialization to bring added competence to the Members.”); DRAFT BOLLING COMMITTEE REPORT, *supra* note 26, at 81 (rejecting mandatory rotation of legislators among committees because “mandatory rotation reduces the expertise of Congressmen”).

<sup>196</sup> KREHBIEL, *supra* note 158, at 66-81; see also Shepsle & Weingast, *supra* note 149, at 15-16.

<sup>197</sup> KREHBIEL, *supra* note 158, at 69.

<sup>198</sup> *Id.* at 77-78, 81-82.

<sup>199</sup> Gilligan & Krehbiel, *Organization of Informative Committees*, *supra* note 189, at 547.

to read the committee's positions on particular legislative measures as signals about its expert evaluation of those measures, but the signals can be deceptive.<sup>200</sup> Informational theory argues that, to overcome these difficulties and to encourage committee members to reveal their policy expertise, Congress grants the committees parliamentary prerogatives.<sup>201</sup> Thus, if the House floor provides a closed rule for a tax measure reported favorably by the Ways and Means Committee, the floor effectively commits not to turn any information revealed by the committee to the committee's disadvantage, such as by amending the measure to strip out tax preferences for the constituents of committee members.<sup>202</sup> The prerogatives increase the prospects that the committee will "credibly transmit[] private information to get a [floor] majority to do what is in the majority's interest."<sup>203</sup>

This implies that redundancy – as a function of the jurisdictional overlap and the parliamentary prerogatives embedded in the congressional committee system – contributes to better legislative decision-making. Consider again the example of multiple committees in the House reporting legislation to establish subsidy programs for post-secondary education. The Education and the Workforce Committee authorizes a general college-scholarship program administered by the Department of Education; the Science, Space, and Technology Committee authorizes a science-scholarship program administered by the National Science Foundation; the Agriculture Committee authorizes an agricultural-college-scholarship program administered by the Agriculture Department; and the Ways and Means Committee authorizes a college-expense

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<sup>200</sup> KREHBIEL, *supra* note 158, at 69-70, 269 n.16.

<sup>201</sup> *Id.* at 90-92, 109 n.1; Gilligan & Krehbiel, *Asymmetric Information*, *supra* note 189, at 462-63, 476-81, 486; Gilligan & Krehbiel, *Collective Choice*, *supra* note 189, at 310; Gilligan & Krehbiel, *Collective Decisionmaking*, *supra* note 189, at 290, 317-25. For an argument that committee specialization is sustained by committee expectations of floor deference, see Daniel Diermeier, *Commitment, Deference, and Legislative Institutions*, 89 AM. POL. SCI. REV. 344, 344 (1995).

<sup>202</sup> KREHBIEL, *supra* note 158, at 97-98. That said, informational theory generally predicts that Congress grants parliamentary prerogatives such as the closed rule more readily to heterogeneous committees comprising non-outlier members. *Id.* at 97-99.

<sup>203</sup> *Id.* at 76. Krehbiel argues that informational theory has both a "distributional logic" and an "informational logic" to account for the parliamentary prerogatives granted to committees. *Id.* at 91-92. The distributional logic centers on the straightforward claim that granting parliamentary prerogatives to committees allows those committees to take a disproportionate share of the resources under their jurisdictions. *Id.* at 91-92. The informational logic is more problematic. Here, Krehbiel argues that "everyone in the legislature benefits from revelation of policy expertise, independent of the distributional properties of realized outcomes." *Id.* at 92. Thus, "[c]ommittees not only may get the distributional bonus if they specialize; they also share the common good of informational efficiency." *Id.* That, however, simply raises the familiar collective-action problem: Why would committee members bear the disproportionate burden of developing specialized policy expertise only to draw a proportionate share of its benefits?

tax deduction or tax credit administered by the Treasury Department. The Friedman strand in the conventional account would consider the four programs to be a paradigmatic example of wasteful duplication. At a minimum, the science-scholarship program and the agricultural-college-scholarship program could be collapsed into the general college-scholarship program; better still, the education tax preferences could also be folded into the general scholarship program (or vice versa).

Informational theory's explanation of the committee system suggests instead that redundancy follows from a legislative structure aimed at narrowing the uncertainty between legislative policy decisions and the non-legislative effects of those decisions. The House expects that the Education and the Workforce Committee will develop expertise in general education policy, which positions the committee members to design a scholarship program generally meeting the needs of most college students. But a general scholarship program may not be optimal for technical fields. Perhaps experts believe that subsidies for science, engineering, and agriculture students should be larger than subsidies for other college students in order to attract students to technical disciplines. Perhaps experts believe that subsidies in science, engineering, and agriculture should be granted on the basis of demonstrated technical ability, as rewards for developing promising experimental projects, or on another merit basis. The particularized expertise developed by the Science, Space, and Technology Committee and the Agriculture Committee may put the members of those committees in a better position, relative to the generalists in education policy serving on the Education and the Workforce Committee, to assess the claims of science, engineering, and agriculture experts, to fashion appropriate scholarship programs, and to oversee the administration of those programs through the National Science Foundation and the Agriculture Department. On this interpretation, redundancy is not the pointless waste of resources suggested by the Friedman strand; rather, it is a manifestation of desirable committee specialization.<sup>204</sup>

Interestingly, this account appears somewhat weaker, at least initially, for redundancy involving tax expenditures. The expertise of the House and Senate

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<sup>204</sup> See also O'Connell, *supra* note 10, at 1691 (arguing that redundancy in legislative oversight "may yield a higher chance of success in achieving a particular goal because different committees may have different expertise"); *id.* at 1693 ("Redundancy in the committee system may . . . increase the number of members of Congress with knowledge about the intelligence community."); Staudt, *supra* note 17, at 1205-06 ("By giving responsibility for food stamps to the House Agriculture Committee, . . . Congress enables the group of legislators with the greatest expertise in food production, distribution, and consumption to design the policies intended to guarantee that the poor have food and nourishment. Similarly, the House Education and [the] Workforce Committee members have built up the expertise and knowledge necessary to assure Congress pursues the best policies for school children and laborers."). Of course, like the Landau strand in the conventional account, this informational-theory interpretation does not justify unlimited redundancy.



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tax committees includes tax policy, trade policy, and other areas within their exclusive jurisdiction. But the two committees do not necessarily develop expertise in all the policy areas that they reach through tax expenditures. Tax-policy expertise puts the Ways and Means Committee in a superior position, relative to the other committees in the House, to design a tax deduction or a tax credit, but it does not necessarily put the Ways and Means Committee in a superior (or even comparable) position to design a tax deduction or a tax credit for post-secondary education expenses. A sound tax expenditure for post-secondary education expenses requires (or should require) relevant expertise about education policy, which, under the committee system, resides in the Education and the Workforce Committee.<sup>205</sup>

The great breadth of tax expenditures – covering everything from agriculture to veterans – suggests two possibilities, neither of which sits well with informational theory’s account of the committee system. First, it may be that the Ways and Means Committee and the Finance Committee simply produce tax expenditures covering policy areas in which they have no particular expertise. Thus, when designing a tax deduction or a tax credit for post-secondary education expenses, the tax-writing committees may work on the basis of information no better than that of any other legislator not serving on one of the education committees. Second, it may be that the tax committees in fact develop expertise in the many policy areas reached by tax expenditures. Thus, in addition to becoming expert in tax policy, the Ways and Means Committee and Finance Committee members may also develop specialized knowledge about agriculture, energy, and veterans (among many other topics). Still, it seems implausible that the tax committees would develop expertise comparable to that of the other twenty standing committees in the House and the other seventeen standing committees in the Senate.

Nonetheless, the redundancy of tax-expenditure programs may still serve an important informational purpose. Because the Ways and Means Committee and the Finance Committee have exclusive jurisdiction over tax policy, the other standing committees can deliver subsidies only through direct-spending programs. The Education and the Workforce Committee, the Science, Space, and Technology Committee, and the Agriculture Committee in the House, for example, can authorize general or specialized scholarship programs funded through federal appropriations,<sup>206</sup> but those committees cannot create tax

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<sup>205</sup> Edward Kleinbard argues that “[c]ontemporary tax expenditure practices have elevated the tax-writing committees into a special status [–] a *Congress within the Congress*” – because those committees both raise and spend revenues. Edward D. Kleinbard, *The Congress Within the Congress: How Tax Expenditures Distort Our Budget and Our Political Processes*, 36 OHIO N.U. L. REV. 1, 3 (2010).

<sup>206</sup> This is not to suggest that such committees have sole responsibility for direct spending. In both the House and the Senate, any program authorizations generally require separate appropriations by the appropriations committees. Also, both the authorization process and the appropriation process are subject to the general control of the budget committees.

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preferences for post-secondary education. Although direct-spending and tax-expenditure programs may be similar, they may also differ along several margins, including efficacy, efficiency, and equity. Those differences suggest possible informational benefits from redundancy. By establishing and maintaining redundant direct-spending and tax-expenditure programs – for example, government-provided scholarships and education tax credits – Congress can experiment with different policy instruments in different contexts. If the standing committees incorporate such feedback into their policy expertise, legislative information should improve, and legislative decisions should become better over time.<sup>207</sup>

Even if redundancy contributes to desirable informational efficiency, however, there is a separate question about the amount of redundancy in federal legislation. At first pass, the pervasiveness of redundancy suggests that the House and the Senate may be over-investing in policy expertise: Too many committees have too much jurisdictional overlap and produce too many redundant programs directed at common policy objectives. Although the House legitimately may want the Science, Space, and Technology Committee and the Agriculture Committee to bring their expertise to bear when the House makes decisions about subsidizing education in technical fields, the House may needlessly allow or encourage the committees to develop expertise duplicating that developed by the Education and the Workforce Committee. Similarly, the House may want to experiment with subsidies for post-secondary education through direct spending and tax expenditures, but there is no apparent reason for the Ways and Means Committee to become expert in education policy – as opposed to combining its tax-policy expertise with the Education and the Workforce Committee’s education-policy expertise. Pervasive redundancy initially suggests that Congress does not have too little information about the instrumental effects of its policy interventions; instead, Congress may have too much of that information. If correct, that view would confirm the position, advanced in the Friedman strand, that redundancy is a symptom of government dysfunction.

A second and closer look at the question, however, suggests a different conclusion. The conventional account demonstrates that, quite apart from the number of redundant administrative programs and the amount of resources devoted to them, Congress does a very poor job of rationally coordinating different programs. Friedman showed, for example, that Congress in the early 1960s was spending far more on “direct welfare payments and programs” than was necessary simply to raise the poorest households above the median

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<sup>207</sup> See generally Yair Listokin, *Learning Through Policy Variation*, 118 YALE L.J. 480 (2008). That said, the informational justification of redundant direct-spending and tax-expenditure programs is undermined by the apparent unwillingness of Congress to repeal programs on either the direct-spending side or the tax-expenditure side after Congress has observed which approach better serves its policy objectives.

household income.<sup>208</sup> Shaviro demonstrated that the benefit levels and income phase-outs of certain direct-spending and tax-expenditure programs for poverty relief combined to produce extraordinary marginal tax rates – ranging from a low of negative 26% to a high of 110% – on lower-income taxpayers.<sup>209</sup> These problems are not a function of redundant programs per se; rather, they are a function of badly coordinated redundant programs. The failure to ensure proper coordination among programs implies that Congress invests too little, rather than too much, in policy expertise. No doubt it would be impracticable for legislators themselves to identify and understand inter-program problems such as those analyzed by Friedman and Shaviro. But the standing committees have professional staffs that include lawyers, economists, and policy analysts of high caliber. Those professionals do not lack the intellectual capacity or the technical training to identify coordination problems among different programs – or, at a minimum, to understand the exposition of such problems by academics and executive branch officials.

This suggests that Congress should increase its investment in policy expertise. To guide the legislature toward better policy interventions, the standing committees should understand more than just the instrumental relationship between legislative policies and non-legislative outcomes, and they should understand more than just the parameters of each direct-spending or tax-expenditure program in isolation. To serve the informational needs of the legislature, the committees should also understand how each direct-spending and tax-expenditure program interacts with every other direct-spending and tax-expenditure program in the same policy domain. The apparent fact that committees readily propose, maintain, and oversee fiscal programs but do not understand how those programs mesh with similar programs falling under the jurisdiction of other committees suggests that the legislature as a whole realizes something less than full informational efficiency.

Members of Congress appear to understand this point, at least in the context of particular programs. In addition to several tax deductions<sup>210</sup> and non-taxable savings accounts<sup>211</sup> for education, Congress provides funding for post-secondary education through tax credits administered by the Treasury Department<sup>212</sup> and direct-spending programs administered by the Department

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<sup>208</sup> FRIEDMAN, *supra* note 14, at 193.

<sup>209</sup> Shaviro, *supra* note 16, at 479-80. The irrational results, he said, resembled “something designed by a drunk, or perhaps a chimpanzee.” *Id.* at 469.

<sup>210</sup> *See, e.g.*, 26 U.S.C. § 221 (2006) (tax deduction for interest on certain student loans); *id.* § 222 (tax deduction for certain education expenses).

<sup>211</sup> *See, e.g., id.* § 529 (tax exemption for qualified tuition program); *id.* § 530 (tax exemption for Coverdell education savings account).

<sup>212</sup> *See id.* § 25A (Hope Scholarship Credit, American opportunity tax credit, and the Lifetime Learning Credit).

of Education.<sup>213</sup> The redundancy of these higher-education programs has raised coordination questions. In the American Recovery and Reinvestment Act of 2009 (the economic-stimulus bill enacted shortly after President Obama took office), Congress directed the Secretary of the Treasury and the Secretary of Education to study the interaction of the education tax credits and the federal Pell Grant program and to report to Congress on “how to coordinate the credit[s] . . . with the . . . Pell Grant program . . . to maximize their effectiveness at promoting college affordability.”<sup>214</sup> That approach, which leverages executive-branch policy expertise to improve the information available to congressional tax and education committees, represents a sensible expansion of legislative informational efforts.

A third and still closer look at the problem reveals yet another set of conclusions. Arguably, as Jonathan Bendor maintained, one should distinguish between redundancy in program design and redundancy in program implementation.<sup>215</sup> The establishment and maintenance of redundant direct-spending and tax-expenditure programs may, as Landau’s analysis argues, increase overall reliability and may, as informational theory implies, improve the policy expertise available to congressional committees about program effects. But direct spending and tax expenditures are costly, and, as the Friedman strand demonstrates, they can result in waste, inefficiency, and irrationality. By contrast, redundancy in the *design* of direct-spending and tax-expenditure programs allows multiple committees to cultivate expertise in a single policy area. That potentially sets the committees up to compete against each other, thereby furthering – rather than undermining – the institutional goal of informational efficiency.

Again, Congress seems to understand this point, at least in limited contexts. When the House created the Homeland Security Committee in 2005, for example, House leaders intentionally created jurisdictional overlap between the new committee and other standing committees.<sup>216</sup> The chair of the Rules Committee argued in favor of the arrangement on informational grounds: “We envision a system of purposeful redundancy. By that, we mean . . . more than one level of oversight and an atmosphere in which the competition of ideas is encouraged.”<sup>217</sup> Perhaps that approach should be expanded and improved:

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<sup>213</sup> See, e.g., 20 U.S.C. §§ 1070a to 1070a-1 (2006) (Federal Pell Grant program).

<sup>214</sup> American Recovery and Reinvestment Act of 2009, Pub. L. No. 111-5, § 1004(f)(1)(A), 123 Stat. 115, 315.

<sup>215</sup> Bendor drew the distinction between redundancy in planning and redundancy in operating urban transit systems. See BENDOR, *supra* note 121, at 67-79.

<sup>216</sup> OLESZEK, *supra* note 58, at 85.

<sup>217</sup> *Id.* at 85 (quoting Representative David Drier). King, although not discussing redundancy, drew a similar conclusion about the practice of referring a single measure to multiple committees: “When different aspects of complex issues are handled in multiple committees, the expertise and experience in each committee can be tapped. . . . Some degree of fragmentation may be informationally efficient *because* there are more people at the table when important decisions are being made.” KING, *supra* note 6, at 144 (internal

perhaps Congress should more broadly encourage redundancy in legislative design but avoid redundancy in program implementation.

In sum, informational theory implies that redundancy directly and indirectly serves useful and appropriate legislative ends (although the case is weaker for tax expenditures that draw the tax-writing committees beyond the boundaries of tax policy). As understood through informational theory, the point of the congressional committee system is to achieve informational efficiency by increasing internal policy expertise. To foreclose all administrative redundancy would require a fundamental restructuring of the committee system, which would risk undercutting the informational benefits that the system is intended to achieve. Thus, the enactment and maintenance of redundant administrative programs involves a trade-off between distributive costs and informational benefits. Even if administrative redundancy inevitably produces waste, as members of the House and the Senate spread federal largesse as broadly as possible, it is possible that those costs are outweighed, in certain cases, by improvements in the policy information available to Congress.<sup>218</sup>

### C. *A Case Study of Redundant Retirement-Security Programs*

The various retirement-security programs enacted and maintained by Congress illustrate the distributive costs and informational benefits associated with administrative redundancy. Congress could maintain one comprehensive program to support the material and physical welfare of older Americans. The program could provide annual demogrants to anyone who has attained a designated age. Those payments could be flat for all recipients, or they could vary along any of several dimensions, such as the recipient's health, marital status, income, and wealth. A single federal agency could administer the program, and a single committee within each congressional chamber could oversee that agency's activities. Instead, Congress has divided federal support for older Americans into multiple overlapping programs administered by several agencies, which, in turn, are overseen by multiple committees. Most prominent among these are Social Security, Medicare, and certain tax expenditures and regulatory programs.<sup>219</sup>

Social Security, the federal government's largest wealth-redistribution program,<sup>220</sup> provides retirement benefits (as well as survivor and disability

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quotation marks omitted); *see also* Staudt, *supra* note 17, at 1219 (arguing that “[o]verlapping jurisdictions assure that heterogeneous groups put together proposals for floor votes,” that the multiple-referral procedure “avoids the political biases that can emerge when a single committee has a policy monopoly,” and that “redundant and overlapping control over policy areas fosters communication and consensus within the legislature prior to the time an initiative reaches the floor”).

<sup>218</sup> *Cf.* NISKANEN, *supra* note 139, at 219-20.

<sup>219</sup> This list is not exhaustive.

<sup>220</sup> CONG. BUDGET OFFICE, THE LONG-TERM BUDGET OUTLOOK 19 (2005).

benefits) to 53 million people.<sup>221</sup> Congress finances the program with employment taxes,<sup>222</sup> self-employment taxes,<sup>223</sup> and income taxes on the benefits of certain program participants.<sup>224</sup> Through the payment of cash benefits to program participants and their beneficiaries, Social Security mitigates the risk that retirement, death, or disability will result in lost or reduced income. Retirement benefits are determined as a function of the participant's earnings under a progressive benefit formula.<sup>225</sup> These benefits, which are payable both to the participant and to the participant's spouse,<sup>226</sup> are actuarially adjusted for early or late commencement<sup>227</sup> and are indexed for changes in the cost of living.<sup>228</sup> Survivor and disability benefits generally are determined under modified versions of the benefit formula used for retirement benefits.<sup>229</sup> The taxation side of Social Security is administered by the Treasury Department; the benefits side is administered by the Social Security Administration. In Congress, the Social Security program falls principally within the jurisdiction of the House Ways and Means Committee and the Senate Finance Committee.

The Medicare program provides health insurance and health care benefits to 46.3 million Americans.<sup>230</sup> Financed in part by general revenues and in part by employment taxes<sup>231</sup> and self-employment taxes,<sup>232</sup> Medicare comprises four parts. Part A provides payments for hospital, nursing-home, and hospice care;<sup>233</sup> Part B provides payments for physician, outpatient, and home-health services;<sup>234</sup> Part C, an alternative to Parts A and B, allows individuals to

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<sup>221</sup> THE BOARD OF TRUSTEES, FEDERAL OLD-AGE AND SURVIVORS INSURANCE AND FEDERAL DISABILITY INSURANCE TRUST FUNDS, THE 2010 ANNUAL REPORT OF THE BOARD OF TRUSTEES OF THE FEDERAL OLD-AGE AND SURVIVORS INSURANCE AND FEDERAL DISABILITY INSURANCE TRUST FUNDS, H.R. DOC. NO. 111-137, at 2 (2010) [hereinafter SOCIAL SECURITY TRUSTEES REPORT].

<sup>222</sup> 26 U.S.C. §§ 3101(a), 3111(a) (2006).

<sup>223</sup> *Id.* § 1401(a).

<sup>224</sup> *Id.* §§ 86, 871(a)(3).

<sup>225</sup> 42 U.S.C. § 415(a)-(b) (2006).

<sup>226</sup> *Id.* § 402(b)-(d).

<sup>227</sup> *Id.* § 402(q), (w).

<sup>228</sup> *Id.* § 415(i).

<sup>229</sup> *Id.* §§ 402(d)-(i), 423.

<sup>230</sup> THE BOARDS OF TRUSTEES, FEDERAL HOSPITAL INSURANCE AND FEDERAL SUPPLEMENTARY MEDICAL INSURANCE TRUST FUNDS, 2010 ANNUAL REPORT OF THE BOARDS OF TRUSTEES OF THE FEDERAL HOSPITAL INSURANCE AND FEDERAL SUPPLEMENTARY MEDICAL INSURANCE TRUST FUNDS 5 (2010) [hereinafter MEDICARE TRUSTEES REPORT].

<sup>231</sup> 26 U.S.C. §§ 3101(b), 3111(b).

<sup>232</sup> *Id.* § 1401(b).

<sup>233</sup> Part A is the Hospital Insurance program. MEDICARE TRUSTEES REPORT, *supra* note 230, at 1.

<sup>234</sup> *Id.*

participate in “Medicare Advantage” and similar plans;<sup>235</sup> and Part D provides prescription-drug benefits.<sup>236</sup> The Department of Health and Human Services administers the Medicare program, and several congressional committees claim jurisdiction over it. Most important among these are the Finance and Health, Education, Labor, and Pensions Committees in the Senate and the Energy and Commerce and Ways and Means Committees in the House.

Congress also maintains programs providing less direct support for retirement security, the most salient of which are the tax and regulatory programs under the Employee Retirement Income Security Act of 1974 (ERISA). ERISA comprises a system of federal tax expenditures to subsidize employment-based and individual retirement savings,<sup>237</sup> a system of regulatory protections for employees participating in employer-sponsored retirement plans,<sup>238</sup> and a system of pension insurance to spread the costs of plan failure across all insured plans.<sup>239</sup> Additionally, Congress maintains several stand-alone tax expenditures for older Americans.<sup>240</sup> The retirement provisions of ERISA are administered by three agencies: the Treasury Department, the Labor Department, and the Pension Benefit Guaranty Corporation.<sup>241</sup> Tax expenditures for older Americans are administered by the Treasury Department. Four committees in Congress exercise direct oversight for ERISA and the tax expenditures: the Finance and Health, Education, Labor, and Pensions Committees in the Senate and the Education and the Workforce and Ways and Means Committees in the House.

Social Security, Medicare, and the retirement tax expenditures and regulatory regimes unquestionably overlap in their functions and objectives: Together, they implement redundant federal support for the financial security

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<sup>235</sup> *Id.*

<sup>236</sup> *Id.* Together, Parts B and D constitute the Supplementary Medical Insurance Program. *Id.*

<sup>237</sup> *See, e.g.*, 26 U.S.C. § 25B (2006) (tax credit for contributions to employer-sponsored retirement plans, individual retirement accounts, and individual retirement annuities); *id.* § 219 (deduction for contributions to individual retirement accounts and individual retirement annuities); *id.* §§ 402, 402A, 403 (preferential taxation of employees and beneficiaries covered by employer-sponsored retirement plans); *id.* § 404 (deduction for contributions to employer-sponsored retirement plans); *id.* §§ 408, 408A (tax exemption for individual retirement accounts and individual retirement annuities and preferential taxation of individuals covered by individual retirement accounts and individual retirement annuities); *id.* § 501 (tax exemption for employer-sponsored retirement plans).

<sup>238</sup> 29 U.S.C. §§ 1021-1191C (2006).

<sup>239</sup> *Id.* §§ 1301-1461.

<sup>240</sup> *See, e.g.*, 26 U.S.C. § 22 (tax credit for taxpayers sixty-five and older); *id.* § 63(f) (increased standard deduction for taxpayers sixty-five and older).

<sup>241</sup> Within a few years of enactment, the overlap in ERISA administration became too much even by government standards, and President Carter’s Reorganization Plan No. 4 of 1978 eliminated part of the redundancy between the Treasury Department and the Labor Department. Reorganization Plan No. 4 of 1978, 5 U.S.C. app. (2006).

of older Americans. Perhaps Congress intentionally divides retirement-security support into several programs to capture the reliability benefits suggested by the Landau strand of the conventional account. If an individual fails to make use of the tax expenditures available for private savings, Social Security generally ensures that the individual will not fall below the poverty line; if an individual's private savings and Social Security benefits cannot provide adequate health care, Medicare relieves the burden; and if an individual's post-retirement consumption needs exceed the benefits available under Social Security and Medicare, private savings – subsidized through tax expenditures – may cover the shortfall. More likely, however, the redundancy is a by-product of the congressional committee system. By expanding federal retirement programs beyond tax subsidies and Social Security, both of which fall within the jurisdiction of the tax-writing committees, several other committees – including the Senate Health, Education, Labor, and Pensions Committee, the House Education and the Workforce Committee, and the House Energy and Commerce Committee – have been able to assert legislative authority over a policy domain of immediate concern to many of their constituents.

That legislative authority includes substantial distributive benefits. Direct outlays in 2009 under the Old-Age Supplemental Insurance portion of Social Security – a program controlled by the Senate Finance and House Ways and Means Committees – totaled \$564.3 billion.<sup>242</sup> Direct outlays in 2009 under Parts A, B, and D of Medicare – programs controlled by the Finance and Health, Education, Labor, and Pensions Committees in the Senate and the Ways and Means and Energy and Commerce Committees in the House – totaled \$509 billion.<sup>243</sup> Tax expenditures in fiscal year 2009 for retirement security – controlled by the Senate Finance and House Ways and Means Committees – totaled \$158.6 billion.<sup>244</sup> Collectively, the programs cost \$1.23 trillion – almost one-tenth of the U.S. gross domestic product in 2009.<sup>245</sup> If that sum were simply distributed as cash payments to the approximately 40 million Americans aged sixty-five or over, each would receive \$30,750 – several thousand dollars more than the U.S. per capita income of \$26,530.<sup>246</sup> Additionally, regulation of the private pension system through ERISA – which

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<sup>242</sup> SOCIAL SECURITY TRUSTEES REPORT, *supra* note 221, at 5.

<sup>243</sup> MEDICARE TRUSTEES REPORT, *supra* note 230, at 10.

<sup>244</sup> STAFF OF J. COMM. ON TAXATION, *supra* note 12, at 42-44. This sum includes forgone tax revenue attributable to the exemption of Social Security and Medicare benefits but does not include any revenue effects of traditional individual retirement accounts and individual retirement annuities (because those effects were skewed by unusual circumstances prevailing for 2009).

<sup>245</sup> BD. OF GOVERNORS OF THE FED. RESERVE SYS., FLOW OF FUNDS ACCOUNTS OF THE UNITED STATES: FLOWS AND OUTSTANDING, FOURTH QUARTER 2009, at 13 tbl.F.6 (2010).

<sup>246</sup> CARMEN DEHAVAS-WALT ET AL., UNITED STATES CENSUS BUREAU, INCOME, POVERTY, AND HEALTH INSURANCE COVERAGE IN THE UNITED STATES: 2009, at 13 (2010).



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falls under the jurisdiction of the Finance and Health, Education, Labor, and Pensions Committees in the Senate and the Ways and Means and Education and the Workforce Committees in the House – gives the committees legislative authority over \$5.5 trillion of private savings.<sup>247</sup>

The advantages of retirement-security redundancy for legislators are readily apparent. By exercising authority over programs involving such enormous sums, these five congressional committees ensure that their agendas address matters of importance to their older constituents and command the attention of the trade associations and lobbying firms that represent the individuals and businesses dependent on the status quo. Additionally, by setting the terms under which nearly ten percent of the U.S. gross domestic product flows into the federal government as taxes and out of the government as benefits, the committees also protect their own status and prestige within Congress. Every legislator has elderly constituents, and every legislator takes a genuine interest in retirement-security programs. Whether these programs could be administered more cheaply in non-redundant form would seem beside the point. The redundancy allows multiple committees in each chamber to participate in determining who gets what under the largest component of the government's social welfare system.

But the redundancy of retirement-security programs also brings informational benefits to the lawmaking process. The committees claiming legislative authority over retirement security develop overlapping but nonetheless distinct expertise consistent with the other policy matters within their specific jurisdictions. Thus, the Senate Health, Education, Labor, and Pensions Committee and the House Energy and Commerce Committee specialize in health policy to a greater degree than the other committees; the Senate Finance Committee and the House Ways and Means Committee specialize in taxes, tax expenditures, and cash transfer programs; and the Senate Health, Education, Labor, and Pensions Committee and the House Education and the Workforce Committee specialize in the reporting and disclosure requirements and fiduciary standards applicable to employer-sponsored pension arrangements. By differentiating retirement-security legislation into several programs, Congress is able to leverage the particular expertise of its committees to address specific problems.

Which effect of the retirement-security redundancy is stronger – the distributive costs or the informational benefits? The staggering amounts spent each year by Congress to provide cash payments and health care to older Americans suggest that the distributive costs are considerable. Certainly Congress could meet the legitimate needs of the elderly under a streamlined system costing less than the nearly ten percent of gross domestic product currently devoted to retirement-security support. Whatever portion of the \$1.23 trillion might be saved under a non-redundant approach should be put down to waste and inefficiency. On the other hand, the informational benefits

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<sup>247</sup> BD. OF GOVERNORS OF THE FED. RESERVE SYS., *supra* note 245, at 77 tbl.L.118.

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of retirement-security redundancy are no doubt substantial. Splitting Medicare off from Social Security allows Congress to develop the expertise needed to tailor a federal subsidy program to the particular demands of geriatric medicine; splitting ERISA off from Social Security allows Congress to develop the expertise needed to structure appropriate incentives to induce voluntary private savings. Arguably, the informed design of Social Security, Medicare, and ERISA better serves retirement security than could a non-redundant system of demogrants. The incommensurability of the distributive downside and the informational upside make comparative evaluations difficult. But perhaps it is sufficient to see that redundancy entails both costs that the conventional account generally recognizes and benefits that the conventional account completely overlooks. Redundancy, even when distributively wasteful, reflects the informational goals of the committee system.

### III. REDUNDANCY AND INSTITUTIONAL REFORM

The conventional academic account of administrative redundancy has reform implications markedly different from those of the legislative-organization account developed in Parts I and II. The conventional account generally analyzes redundancy without regard to institutional context and, consequently, proposes reforms without considering the place of congressional structures in those reforms.<sup>248</sup> In short, the conventional account focuses on deriving the optimal level of administrative redundancy from existing institutional structures in Congress. By contrast, the legislative-organization account shows that attempts to change administrative redundancy inevitably require change to the congressional committee system, thereby drawing into play the trade-off between distributive costs and informational benefits. Against that background, this Part considers the possibility of institutional reform that takes the trade-off into account.

Both the anti-redundancy and the pro-redundancy positions in the conventional account effectively assume that legislators can and should make specific policy determinations about the desirable level of redundancy. The Friedman strand implies that Congress should eliminate redundant administrative programs whenever possible. The Landau strand implies that Congress should pursue redundancy in the cases where redundancy yields enhanced program reliability. Both policy prescriptions assume that sufficiently thoughtful analysis will yield workable conclusions about when redundancy is good and when it is not and that those conclusions will provide the basis for policy choices producing better administrative programs. The legislative organizational structures of Congress remain orthogonal; the relevant question for the conventional analysis is simply how much or how little redundancy to produce, given the existing institutional arrangements.

By contrast, the legislative-organization account makes clear that any substantial change in the quantum of administrative redundancy requires

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<sup>248</sup> Important exceptions here are Niskanen and Miller and Moe. *See supra* Part I.B.

institutional reform. Congress generally enacts and maintains redundant administrative programs because the committee system skews policy outcomes in favor of redundancy. Thus, reducing the output of redundancy would require reform of the committee system and its privileged role in the legislative process. This fundamental point has been widely missed in prior analyses. To date, Staudt is the only legal academic to recognize that, once one forms a normative view for or against administrative redundancy, implementation of that view generally requires structural changes within Congress.<sup>249</sup>

Framing administrative redundancy as a problem of institutional reform makes clear that the two accounts of the congressional committee system considered in Part II point the reform project in opposite directions – with the distributive-theory account pointing toward wholesale institutional change and the informational-theory account pointing toward the status quo. One might object that positive theories of legislative organization do not directly support normative positions about institutional reform. But the argument here does not treat distributive theory and informational theory as encompassing normative positions. Instead, the argument lays two normative assumptions on top of those positive theories; neither assumption is implied by the positive theories, but neither should be deeply controversial. First, it is assumed that programs effecting negative-sum transfers from the public to favored constituents and interest groups are, all else equal, less desirable than programs not effecting such transfers. Second, it is assumed that informational inefficiency is less desirable than informational efficiency, again with all else equal.

On the assumption that distributive legislation is generally undesirable, the distributive-theory account of the committee system broadly justifies arguments for reducing administrative redundancy. This conclusion follows regardless of whether the Friedman strand or the Landau strand provides the more accurate view about the effects of redundancy. If the Friedman strand is correct, distributive theory's account of the committee system only makes the story worse. If the Landau strand is correct, redundancy still appears objectionable: Enhancing program reliability is not appealing where the programs are themselves the product of institutionalized logrolling. Either way, the policy prescription would be for institutional reforms that reduce redundancy.<sup>250</sup> Such reforms could include realigning committee jurisdictions

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<sup>249</sup> Staudt, *supra* note 17, at 1214-22, 1239-49. Staudt proposes two institutional changes. First, she proposes a "Select Committee on Social Welfare" to oversee and coordinate most direct-spending and tax-expenditure programs. *Id.* at 1240-43. Second, she proposes the implementation of performance-based budgeting for the review and reform of administrative programs. *Id.* at 1243-49. Both proposals would invade the autonomy of the standing committees: either the new Select Committee on Social Welfare or the Budget Committee would be empowered to overrule the preferences of another committee on matters within that other committee's jurisdiction. In that respect, both proposals are similar to the realignment of committee jurisdiction that Staudt dismisses as "not likely to succeed in the near future, if ever." *Id.* at 1215.

<sup>250</sup> For a similar conclusion, see King, *supra* note 56, at 48 ("If turf is carved out so that

to reduce overlap and fragmentation, weakening committee parliamentary prerogatives, or even scuttling the committee system entirely.

By contrast, on the assumption that improved legislative decision-making is desirable, informational theory implies a more optimistic view of the status quo. Under informational theory, redundancy is a function of pursuing informational efficiency. If the Landau strand is correct, the informational-theory account makes redundancy, as a guarantor of reliability, appear in an even better light. If the Friedman strand is correct, redundancy appears simply as an unfortunate by-product of a system generally aimed at improving the quality of legislative choices. Although it generates waste, inefficiency, and irrationality, some degree of redundancy can be tolerated because of the informational benefits of the system that produces it.

With both distributive costs and informational benefits in the balance, institutional reform should aim to optimize the trade-off. The distributive-theory account pulls toward reform that would compromise the informational efficiency of the committee system; the informational-theory account pushes against changes to the committee system, even if that system yields wasteful, inefficient, and irrational programs. But certain reforms perhaps could both preserve much of the informational benefits and reduce the distributive costs. Two such approaches are set out here – one centered outside the committee system and one centered within it.

#### A. *Incorporating Outside Policy Expertise*

One approach to reducing administrative redundancy would formally incorporate external sources of policy expertise into the lawmaking process. The model here is the highly successful Defense Base Closure and Realignment Commission used in 1991, 1993, 1995, and 2005 to designate specific military facilities for closure.<sup>251</sup> The problem addressed by the base-closure process is essentially one of redundancy. Near the end of the Cold War, Congress determined that the United States had too many domestic military facilities and that maintenance of the excess facilities was wasteful and inefficient.<sup>252</sup> Decisions to close specific facilities presented a problem not of internal policy expertise but of distributive politics.<sup>253</sup> Military facilities serve as centers for civilian economic activity, and closing any facility imposes concentrated costs on the state and congressional district in which the facility

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lawmakers can institutionalize logrolls and make it easier to distribute benefits back home . . . , then many of us might want to undermine those property rights in the name of the public interest.”).

<sup>251</sup> The Defense Base Closure and Realignment Commission was established by the Defense Base Closure and Realignment Act of 1990, Pub. L. No. 101-510, §§ 2901-2926, 104 Stat. 1808, 1808-1824 (codified as amended at 10 U.S.C. §§ 2391, 2687 (2006)).

<sup>252</sup> Edwin R. Render, *The Privatization of a Military Installation: A Misapplication of the Base Closure and Realignment Act*, 44 NAVAL L. REV. 245, 245, 250-51 (1997).

<sup>253</sup> *Id.* at 247-48.

is located.<sup>254</sup> Unable to overcome the distributive obstacles on its own, Congress established a process under which an independent commission, appointed by the President with the advice and consent of the Senate,<sup>255</sup> reviews the Defense Secretary's recommendations for facility closures<sup>256</sup> and submits its own list of specific facilities to the President for approval or disapproval.<sup>257</sup> The President, upon approving the recommendations, presents the list to Congress for approval or disapproval.<sup>258</sup> Thus, recommendations to close specific facilities are made in the first instance by experts outside Congress, and the legislators must adopt or reject the recommendations without change.

The base-closing approach offers several advantages. Most generally, it reduces administrative redundancy while maximizing informational benefits and minimizing distributive costs. Individuals with relevant expertise make the first move in the process by formulating recommendations for the President and Congress. These outside experts become the agenda setters. But the approach largely neutralizes the distributive motivations of individual legislators. Judging from the repeated success of the base-closing process, a legislator who otherwise would resist the concentrated costs imposed by the closure of a specific military facility in her district or state apparently has more to lose from resisting an omnibus proposal to close dozens of military facilities across the country. Even the distributive motivations of the executive branch are minimized. The Defense Secretary compiles the initial list of facilities, but the commission may modify the list before presenting it to the President.<sup>259</sup> Although the President may disapprove the recommendations,<sup>260</sup> that action would entail the political cost of overriding the commission's independent determination and the policy cost of forgoing all base closures and realignments.

Additionally, the procedural posture of the recommendations in Congress skews the outcome strongly in favor of congressional approval. Unless Congress formally rejects the recommendations within forty-five days of receipt from the President, the recommendations have the force of law.<sup>261</sup> That ensures that the recommendations are substantially more authoritative than other expert proposals that legislators routinely receive and routinely ignore.<sup>262</sup>

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<sup>254</sup> *Id.*

<sup>255</sup> Defense Base Closure and Realignment Act of 1990 §§ 2902(c), 2912(d).

<sup>256</sup> *Id.* §§ 2903(c)-(d), 2914(a)-(d).

<sup>257</sup> *Id.* §§ 2903(d), 2914(d).

<sup>258</sup> *Id.* §§ 2903(e), 2904, 2908, 2914(e).

<sup>259</sup> *Id.* §§ 2903(d), 2914(d). As provided in those sections, however, the commission does not have unfettered discretion in making changes to the Defense Secretary's recommendations.

<sup>260</sup> *Id.* §§ 2903(e), 2914(e).

<sup>261</sup> *Id.* §§ 2904, 2908, 2914(e).

<sup>262</sup> Perhaps the most recent example of this is the recommendations of the National

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At the same time, the opportunity for Congress to reject the recommendations provides a political check that, to date, has been sufficiently robust to make the process viable: legislators apparently understand that they have not delegated away all their authority over closing military facilities. This general process – under which an independent commission of policy experts provides take-it-or-leave-it recommendations to the President, who in turn sends the take-it-or-leave-it recommendations to Congress – may be the single most effective approach to addressing problems of administrative redundancy.

There is reason to doubt, however, that Congress would extend the base-closing approach to other policy areas. The base-closing approach requires Congress in general and the committees of jurisdiction in particular to delegate agenda control to non-legislative actors, and it seems unlikely that legislators would surrender that authority for more than a very small number of policy issues. Arguably, base closings present a particularly intractable problem that necessitates recourse to independent experts: the potential costs of base closings are so large and so concentrated that action might be extremely difficult through normal lawmaking. But repealing or scaling back other redundant administrative programs often involves lower stakes. With less to gain, on a legislature-wide basis, the surrender of legislative authority in exchange for fewer redundant programs probably would strike Congress and its standing committees as a bad proposition.

Additionally, the base-closing approach presents the risk that, over time, congressional committees might suffer a degradation of policy expertise. As informational theory argues, the prospect of distributive gains – establishing and maintaining administrative programs valued by constituents and interest groups – gives committee members incentives to invest in policy expertise for matters within their committee's jurisdiction. But the base-closing approach, if broadly applied, would shift much of the authority over administrative programs from the congressional committees to independent commissions. If, for example, a commission of experts were empowered to present to Congress a set of all-or-nothing recommendations for eliminating redundant tax expenditures, the need for tax-policy expertise in the House Ways and Means Committee and the Senate Finance Committee would be diminished. The tax committees might respond by investing as much or even more in their tax-policy expertise, perhaps replacing eliminated tax expenditures with new ones; that, of course, would defeat the purpose of the entire exercise. But the committees instead might respond by reducing their investment in tax-policy expertise, in which case the legislature would become more dependent on the executive branch and interest groups in understanding and forming tax policy.

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Commission on Fiscal Responsibility and Reform, which Congress never seriously considered. *See* THE NATIONAL COMMISSION ON FISCAL RESPONSIBILITY AND REFORM, THE MOMENT OF TRUTH 12 (2010).

B. *Separating Redundancy in Design from Redundancy in Implementation*

A second approach would exploit the distinction, explained above,<sup>263</sup> between redundancy in design and redundancy in implementation. The *implementation* of redundant administrative programs should, if the Landau strand is correct, increase overall program reliability and should, as informational theory implies, improve congressional expertise about program effects. But, if the Friedman strand and distributive theory are correct, the implementation of redundant programs is costly. By contrast, the *design* of redundant administrative programs imposes lower costs but still allows congressional committees to cultivate overlapping policy expertise. Reform, therefore, could encourage redundancy in program design but discourage redundancy in program implementation.

The existing committee system promotes redundancy at both stages. The fragmentation and overlap of committee jurisdictions facilitate redundancy in program design by allowing multiple committees to share proposal power over a single policy area. For example, the Education and the Workforce Committee, the Agriculture Committee, the Science, Space, and Technology Committee, and the Ways and Means Committee all may report legislation in the House providing subsidies for post-secondary education. But it is the parliamentary prerogatives that each chamber confers on its committees that facilitate redundancy in program implementation. Those prerogatives enable the committees to push their proposals through to favorable action on the floor with minimal opportunity for other legislators to modify the proposals over committee objections. Thus, even if the House as a whole would prefer to collapse four separate proposals for post-secondary education subsidies into a single program, the outsized power of the four committees makes that outcome less likely.

Congress potentially could both capture the benefits of redundancy in design and avoid the costs of redundancy in implementation by preserving the jurisdictional boundaries of its committees while weakening the committees' parliamentary prerogatives. That approach would leave committee proposal power unchanged, allowing committees to continue reporting redundant programs consistent with their overlapping jurisdictions. The approach would transfer power beyond the proposal stage from committees to the floor, allowing non-committee members greater opportunity to modify proposed programs over committee objections. All else equal, that reform should lead to the enactment of fewer redundant programs. At its best, the system would continue to produce the informational upside of redundancy in design; pre-enactment competition among committees might even improve the quality of program design. In fact, the system should encourage different committees to put competing program designs on the table simultaneously, improving the prospects that Congress will not have to evaluate redundant programs seriatim.

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<sup>263</sup> See *supra* Part II.B.

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But the system would reduce redundancy in implementation, thereby reducing the downside of administrative waste, inefficiency, and irrationality.<sup>264</sup>

The broad range of committee parliamentary prerogatives presents a number of strategies for realizing this approach. The House, for example, could repeal or modify its prohibition against non-germane floor amendments. Under the existing germaneness rule, floor amendments must address the subject matter of the bill under consideration.<sup>265</sup> That generally limits the ability of legislators to integrate committee proposals with existing administrative programs and, accordingly, limits the ability of the House to address redundancy in program implementation. If the House were unwilling to repeal the germaneness rule, it could modify the rule to provide an exception for non-germane amendments that target redundant administrative programs. Along with repeal or modification of the germaneness rule, the House Rules Committee could report fewer closed rules, thereby opening the gates to anti-redundancy floor amendments.

Those strategies, however, present limitations and potential problems. Most obviously, they would apply only in the House. The Senate has no generally applicable germaneness requirement for floor amendments, and it does not use closed rules to structure floor consideration of pending measures. More importantly, the germaneness rule and the closed rules serve the important purpose of bringing order to an otherwise unruly House floor. With 435 coequal members, an open-amendment process in the House can be extremely time-consuming at best and hopelessly chaotic at worst. To complete their legislative agenda, House managers must have the ability to control floor proceedings, and that has pushed managers in the contemporary Congress to limit – rather than expand – the range of permissible amendments.<sup>266</sup> In short, liberalizing the House amendment process, even if it would reduce administrative redundancy, would impose a genuine cost on the institution as a whole.

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<sup>264</sup> Staudt argues that jurisdictional fragmentation under the existing legislative structure encourages competition among congressional committees, thereby improving legislative information and sparking innovation in program design. *See* Staudt, *supra* note 17, at 1200, 1219-20, 1227-28, 1230, 1235-36. That argument seems misplaced. The parliamentary prerogatives under the existing legislative structure allow committees with overlapping jurisdiction to bring proposals for redundant programs to the floor with little risk of modification through floor amendment. There is, then, no need for committees to compete as long as the parliamentary prerogatives remain in place. If, however, those prerogatives were weakened or removed such that the floor actively winnowed down recommendations for redundant programs, the committees might indeed have to compete in the manner suggested by Staudt.

<sup>265</sup> House Rules XVI.7 provide: “No motion or proposition on a subject different from that under consideration shall be admitted under color of amendment.” Rules of the House of Representatives, R. XVI.7, H.R. Doc. No. 110-162, at 703 (2009).

<sup>266</sup> *See* Doran, *supra* note 89, at 1409-12.



Another – and possibly better – strategy for curbing the parliamentary prerogatives of congressional committees would be to change the composition of the ad hoc conference committees used to reconcile competing measures from the House and the Senate. Under current practice, members of the standing committee that proposed a measure have disproportionate representation on the conference committee.<sup>267</sup> That allows the proposing committee to remove any changes made by the floor over the committee's objection.<sup>268</sup> If they were more representative of the full chamber, conference committees might assert authority to weed out redundant administrative programs. Perhaps even better, the composition of a conference committee could include members of a rival committee with overlapping jurisdiction, and the conference committee could be given a mandate from the full chamber not to report a final bill with redundant programs. For example, a conference committee on any bill expanding tax expenditures or direct spending for post-secondary education could include key members from both the tax committees and the education committees. The conference committee would be instructed by its parent chambers either to resolve any redundancy between the pending measure and existing administrative programs or simply to let the measure die in conference.

Institutional reform aimed at redundancy in implementation is not without potential drawbacks. Even if narrowly targeted, this approach might nonetheless undermine the informational benefits of the committee system. Policy expertise can be complex and nuanced, and it derives in part from the review of ongoing administrative programs. By holding oversight hearings and gathering testimony from executive-branch officials who administer programs and from non-governmental parties affected by programs, legislators gain important information about different approaches to implementing their policy objectives.<sup>269</sup> Redundancy in the implementation of administrative programs allows Congress to experiment with different administrative strategies and to determine, for example, whether particular federal subsidies are better delivered through tax expenditures or through direct spending. Inevitably, part or all of that feedback would be lost under a reform approach that restricts redundancy to program design.

Additionally, curbing the parliamentary prerogatives of congressional committees might also undermine the incentives of committee members to invest in policy expertise. Acquisition and maintenance of specialized knowledge are costly. Informational theory argues that, under the current institutional structure, committee members are willing to invest in policy expertise in part because they can expect outsized returns on matters within their committee's jurisdiction. For example, legislators on the House and

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<sup>267</sup> DEERING & SMITH, *supra* note 27, at 215-18; Shepsle & Weingast, *supra* note 83, at 97-100.

<sup>268</sup> DEERING & SMITH, *supra* note 27, at 218.

<sup>269</sup> *See generally* Listokin, *supra* note 207.

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Senate labor committees acquire superior information about labor-management relations, and they may use that superior information to secure benefits for employees at the expense of employers or for employers at the expense of employees, depending on their electoral and policy goals. But securing those outsized returns requires that the committees effectively shelter their legislative proposals from floor amendments that otherwise would move the proposals away from the committees' preferred positions. The parliamentary prerogatives currently in place help the committees resist unwelcome floor amendments, and weakening those prerogatives may weaken the informational incentives of committee members. That outcome, obviously, would undermine informational efficiency.<sup>270</sup>

There are, however, countervailing considerations. Reducing redundancy in program implementation would reduce information about program operations, but it would not eliminate that information entirely. Legislators could still experiment with different administrative options – they just could not run simultaneous experiments as freely as they do now. Also, the point of institutional reform is to trade off institutional benefits against distributive costs. Reducing program redundancy may involve a loss of useful information, but it also would curtail administrative waste, inefficiency, and irrationality. The objective is to strike the right balance between informational benefits and distributive costs, not to avoid a loss of informational benefits in any event.

The potential for undermining legislator incentives to invest in policy expertise is arguably a more serious concern, but it seems unlikely that those incentives would become weak enough to threaten the informational role of the committee system. Encouraging redundancy in program design but blocking redundancy in program implementation effectively would move committees with overlapping jurisdictions toward a winner-take-all system. Instead of the current structure, under which every committee making a proposal enjoys reasonable prospects of securing benefits for its constituents and favored interest groups, a structure that narrows redundant program proposals to a single enacted program would still provide the opportunity for outsized benefits to whichever committee prevails on the floor. Moreover, if the winning committee's benefits were scaled up, the *ex ante* incentives for the committee members should remain large enough to induce specialization even with a reduction in aggregate program costs.

#### CONCLUSION

Academic accounts generally evaluate administrative redundancy in strictly normative terms: Should legislators pursue or avoid redundancy when establishing and maintaining administrative programs? Those normative accounts, which treat Congress as choosing or rejecting redundancy for its own

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<sup>270</sup> Thanks to Dhammika Dharmapala for raising this point in comments on a draft of this Article.

sake, obscure the etiological relationship between legislative organization and redundancy. Analysis of that relationship identifies redundancy as a non-necessary but highly likely function of the congressional committee system, including the fragmentation and overlap of committee jurisdictions and the extensive parliamentary prerogatives that guarantee committees primary influence over policy outcomes. No less importantly, the legislative-organization account reveals the distributive costs and the informational benefits associated with administrative redundancy and suggests potential institutional reforms aimed at striking a better balance between them.