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The Wholesale Problem with Congress: The Dangerous Decline of Expertise in the Legislative Process

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ARTICLES

THE WHOLESALE PROBLEM WITH CONGRESS: THE DANGEROUS DECLINE OF EXPERTISE IN THE LEGISLATIVE PROCESS

*Rachel E. Barkow**

It is no surprise to anyone that Congress has become a hyperpartisan battleground where little effort is expended to promote policies that work for Americans. While Congress has always viewed policy issues through the lens of party politics, the role of nonpartisan expertise in the legislative process is at an all-time low. The disrespect for experts is growing across society, but the decline in their use is particularly troubling in Congress because it exacerbates deficiencies that are inherent to the legislative process. Congress passes laws of general applicability and does not sit in judgment of specific applications of the law. Whether Congress does a good job setting those general policies depends on the process it uses for doing so. Sometimes, though increasingly rarely, Congress gathers the relevant facts and arguments about different aspects of a problem before acting. More often, legislators have specific outlier problems or prototypes in mind when they draft legislation, and if there is not an expert fact-finding process in place to study a proposal, cognitive biases may go unchecked.

This Article sets out to document the declining respect for expertise in Congress, the implications for policymaking given the wholesale nature of the legislative process, and some possible ways to account for the decline of expertise in the legislative process. Part I details the role nonpartisan experts have played in the legislative process over time and documents the various ways that experts have fallen out of favor in Congress. Part II explains why this decline of expert involvement in legislation is particularly

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troubling given the way Congress operates as a body making wholesale policy with little individualized feedback on how its policies are applying to real-world scenarios. Part III then turns to the question of what, if anything, could or should be done about it. While Congress could, in theory, shift course, that seems unlikely. Throughout its history, Congress has cared about nonpartisan expertise when it worried about presidential overreach. But with parties dominating the political landscape, there is little likelihood that Congress will care enough about its institutional position relative to the executive. In the absence of legislative reform, Part III therefore considers two additional implications of the decline of expertise in the legislative process. First, the decline of internal expertise in the legislative body places greater weight on the use of administrative agencies to provide that guidance. Ironically, the U.S. Supreme Court may be toying with a revitalization of the nondelegation doctrine at the precise moment that delegation is most urgently needed. Second, courts and other bodies that interpret statutes could consider the relationship between statutory meaning and Congress's consultation with nonpartisan experts to help address statutory ambiguities.

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INTRODUCTION

While Americans seem deeply divided over just about everything, one area of common ground is the view that Congress seems broken.¹ There was a time when legislators reached across the aisle to work together, and many pieces of landmark legislation tackled the most fundamental issues facing

1. Julia Manchester, *Congress Mired in Low Approval Ratings*, HILL (Dec. 14, 2017, 10:15 AM), <http://thehill.com/homenews/senate/364878-congress-mired-in-low-approval-ratings> [<https://perma.cc/24JP-AQXH>] (explaining that 2017 was the eighth year congressional approval ratings remained below 20 percent).

society.² Now, however, bipartisanship is a rarity. Because each party views every election cycle as a possible opportunity to gain or retain majority status in Congress, there is little incentive for cooperation and, instead, partisanship rules the day.³ The role of money in campaigns, and thus legislative decisionmaking, is an order of magnitude greater than in the past.⁴

In this climate of hyperpartisanship, it is perhaps no surprise that members of Congress have lost interest in hearing or researching what nonpartisan subject matter experts have to say about the substance of legislative proposals. This has been particularly true of the Republican Party, which led the charge in reducing the role of expert advisers in Congress.⁵ Both Republicans and Democrats in Congress have shifted away from a model in which their members develop their own areas of expertise so that others in their caucus turn to them for specialized advice. Instead, party leaders have far greater sway than specialized committee chairs or others with relative experience or expertise. While Congress has always viewed policy issues through the lens of party and politics, the role of expertise in the legislative process is at an all-time low.⁶

The decline in the use of experts exacerbates deficiencies that are inherent to the legislative process. Congress passes laws of general applicability and does not sit in judgment of specific applications of the law. Indeed, our

2. SEAN M. THERIAULT, PARTY POLARIZATION IN CONGRESS 4 (2008) (illustrating increased polarization by demonstrating how, in moderate constituencies in the mid-2000s, Democrats voted 25 percent more liberally and Republicans 50 percent more conservatively than their predecessors had in the 1970s); Richard H. Pildes, *Why the Center Does Not Hold: The Causes of Hyperpolarized Democracy in America*, 99 CALIF. L. REV. 273, 277 (2011) (“[M]ost of twentieth century American politics . . . had nothing like the political-party polarization that arose and has endured throughout our era . . .”).

3. FRANCES E. LEE, INSECURE MAJORITIES: CONGRESS AND THE PERPETUAL CAMPAIGN 70 (2016).

4. Drew DeSilver & Patrick van Kessel, *As More Money Flows into Campaigns, Americans Worry About Its Influence*, PEW RSCH. CTR. (Dec. 7, 2015), <http://www.pewresearch.org/fact-tank/2015/12/07/as-more-money-flows-into-campaigns-americans-worry-about-its-influence/> [<https://perma.cc/76QQ-U5WE>] (demonstrating that spending on congressional campaigns has more than quadrupled in the past thirty years and that outside spending has also dramatically increased in the past ten years); *Lobbying Data Summary*, OPENSECRETS, <https://www.opensecrets.org/lobby/> [<https://perma.cc/J63K-WQCQ>] (last visited Oct. 29, 2021) (showing how lobbying expenditures tripled in the past twenty years, from \$1.45 billion in 1998 to \$3.3 billion in 2017). For a history of corporate lobbying in the United States, see generally LEE DRUTMAN, *THE BUSINESS OF AMERICA IS LOBBYING* (2015).

5. See *infra* notes 103–41 and accompanying text.

6. A prominent example was the Republican rejection of the fiscal projections of the nonpartisan Congressional Budget Office for the tax reform legislation in 2017. Philip Klein, *Mick Mulvaney: The Day of the CBO ‘Has Probably Come and Gone,’* WASH. EXAMINER (May 31, 2017, 5:52 PM), <https://www.washingtonexaminer.com/tag/donald-trump?source=%2Fmick-mulvaney-the-day-of-the-cbo-has-probably-come-and-gone> [<https://perma.cc/TZM2-WWET>]. Eight former CBO directors wrote congressional leaders to express their concern about the criticism. Letter from Former CBO Directors on the Importance of CBO’s Role in the Legislative Process to Paul Ryan, Speaker of the House, et al. (July 21, 2017).

Constitution takes pains to make sure that the legislature does not target individuals for specific burdens.⁷ The judicial and executive powers are removed from Congress for precisely that reason, and other constitutional provisions have the same aim of making sure Congress does not pick particular winners and losers.⁸ To be sure, even broadly written laws can have the effect—intended or unintended—of singling out industries or companies or even people for distinct hardship. But in the main, legislative power is about the general, not the specific. This aspect of the legislative branch is often highlighted as a key feature that sets it apart from the executive and judicial branches⁹ and that makes it best suited to establish overall policies.¹⁰

But whether Congress does a good job setting those broad policies depends on the process it uses for doing so. Sometimes, though increasingly rarely, Congress gathers the relevant facts and arguments about different aspects of a problem before acting.¹¹ Other times, legislators tend to have specific problems or prototypes in mind when they draft legislation, and if there is not an expert fact-finding process in place to study a proposal, erroneous or incomplete legislative assumptions may go unchecked.¹² Typically, some concrete event sparks the legislative interest in the first place, such as a high-profile incident, a lobbyist raising a fire alarm about a problem, or other constituents pushing for change.¹³ Whatever provoked legislative interest in an issue can dominate how legislators think about the problem thereafter, unless the process itself is designed to provide a fuller analysis and to push back against any assumptions that lack a factual basis.

In this regard, legislators are no different from anyone else. We all use heuristics (mental shortcuts) or schemas (cognitive frameworks or mental blueprints) that are activated unconsciously and help us organize and

7. See Evan C. Zoldan, *The Equal Protection Component of Legislative Generality*, 51 U. RICH. L. REV. 489, 491–92, 543–44 (2017) (describing the aspects of legislative generality enshrined in the U.S. Constitution).

8. See U.S. CONST. art. I, § 9, cl. 3; *id.* art. I, § 10, cl. 1 (no bills of attainder or ex post facto laws).

9. See THOMAS M. COOLEY, A TREATISE ON THE CONSTITUTIONAL LIMITATIONS WHICH REST UPON THE LEGISLATIVE POWER OF THE STATES OF THE AMERICAN UNION 91 (2d ed. 1874) (“[T]he law is *applied* by the one, and *made* by the other ‘It is the province of judicial power, also, to decide private disputes between or concerning persons; but of legislative power to regulate public concerns, and to make laws for the benefit and welfare of the State.’” (quoting *Merrill v. Sherburne*, 1 N.H. 199, 204 (1818)) (emphasis added)); Karl Loewenstein, *The Balance Between Legislative and Executive Power: A Study in Comparative Constitutional Law*, 5 U. CHI. L. REV. 566, 575 (1938) (arguing that while execution is “the application of the general rule to the individual situation,” legislation is “merely instrumental to the fulfillment of the objectives of general policy prescribed or dictated by the government”).

10. See Jeffrey J. Rachlinski & Cynthia R. Farina, *Cognitive Psychology and Optimal Government Design*, 87 CORNELL L. REV. 549, 564–65 (2002).

11. See *infra* Part II.B.

12. See *infra* Part II.B.

13. See *infra* Part II.B.

interpret incoming information to make decisions.¹⁴ The danger of heuristics and schemas for anyone is that they can also lead us to ignore relevant information and instead reinforce preexisting beliefs even when those beliefs are mistaken or rely on unsubstantiated stereotypes.¹⁵ Schemas are particularly powerful in shaping decisions and information in the absence of individuating information that shows how people vary from the schema's stereotype.¹⁶ In contexts where legislators are getting information on all sides of an issue and have expert bodies to help advise them on sorting through the facts, they are relatively well positioned to make policies. But where legislators lack expert feedback and get information filtered only through partisans, they may end up basing policy on outlier examples and end up with solutions that are ill-fitting to most cases and scenarios. Because members of Congress do not see how their policy choices play out across a range of individual cases, they may not receive sufficient feedback on how statutes are operating across a range of real-world settings in a way that meaningfully alters their thinking. This differs from the executive and judicial branches, which are charged with applying laws to particular cases and therefore getting feedback across a range of fact patterns. The demise of expertise in Congress is thus particularly dangerous because of the patterns of wholesale thinking based on incomplete information that take its place.

This Article sets out to document the declining respect for expertise in Congress, the implications for policymaking given the wholesale nature of the legislative process, and some possible ways to approach the shortcomings. Part I details the various ways that experts have fallen out of the legislative process and why that should concern us. Part II explains why this decline of expert involvement in legislation is particularly troubling given the way Congress operates as a body making wholesale policy with little individualized feedback on how its policies are applying to real-world scenarios. Part III then turns to the question of what, if anything, could or should be done about it. One strategy is to consider the political forces that led to the decline in expertise in Congress to reverse-engineer a resurgence. Because Republicans spearheaded the erosion of information gathering in Congress, it will likely take a Democratic effort to bring it back. With the Democrats recently taking over both houses and the presidency, rebuilding these institutions could help improve policymaking going forward. But the

14. SUSAN T. FISKE & SHELLEY E. TAYLOR, *SOCIAL COGNITION* 98 (2d. ed. 1991). See generally C. Neil Macrae & Galen V. Bodenhausen, *Social Cognition: Thinking Categorically About Others*, 51 *ANN. REV. PSYCH.* 93, 96 (2000); Richard K. Sherwin, *The Narrative Construction of Legal Reality*, 18 *VT. L. REV.* 681, 700 (1994); Amos Tversky & Daniel Kahneman, *Judgment Under Uncertainty: Heuristics and Biases*, 185 *SCI.* 1124 (1974).

15. Kendra Cherry, *The Role of a Schema in Psychology*, *VERY WELL* (Sept. 23, 2019), <https://www.verywell.com/what-is-a-schema-2795873> [<https://perma.cc/9JWS-PLCR>].

16. Jerry Kang et al., *Implicit Bias in the Courtroom*, 59 *UCLA L. REV.* 1124, 1160 (2012); see also Nicole E. Negowetti, *Navigating the Pitfalls of Implicit Bias: A Cognitive Science Primer for Civil Litigators*, 4 *ST. MARY'S J. ON LEGAL MALPRACTICE & ETHICS* 278, 312 (2014).

Democrats' majorities are slim, and it is unclear what they can achieve, particularly if they have only a two-year window to accomplish it. Moreover, the main motivation for expert checks in Congress over the years has been a desire for Congress to check executive overreach. With Democrats currently controlling both Congress and the presidency, the urgency for this reform might not seem pressing.

Assuming Congress does not shift course or takes only limited action, Part III therefore considers two additional implications of the decline of expertise in the legislative process. First, the decline of internal expertise in the legislative body places greater weight on the use of administrative agencies to provide that guidance.¹⁷ Ironically, the U.S. Supreme Court may be toying with a revitalization of the nondelegation doctrine at the precise moment that delegation is most urgently needed.¹⁸ Second, courts and other bodies that interpret statutes could consider the relationship between statutory meaning and Congress's consultation with nonpartisan experts to help address statutory ambiguities.¹⁹

I. THE RISE AND FALL OF EXPERTISE IN CONGRESS

In an idealized version of the legislative process, legislators gather facts about an issue, deliberate thoughtfully, and make an informed decision about the best course of action in the public interest.²⁰ James Madison praised republican government for its ability to "refine and enlarge the public views, by passing them through the medium of a chosen body of citizens, whose wisdom may best discern the true interest of their country, and whose patriotism and love of justice will be least likely to sacrifice it to temporary or partial considerations."²¹ Good government, according to Madison, required two key ingredients: "first, fidelity to the object of government, which is the happiness of the people; secondly, a knowledge of the means by which that object can be best attained."²² Madison further noted, "[n]o man can be a competent legislator who does not add to an upright intention and a sound judgment a certain degree of knowledge of the subjects on which he is to legislate."²³ Wisdom and knowledge were thus central to the Framers' vision, and they believed the republican form of government they created would foster the accumulation of knowledge and wisdom.²⁴

17. *See infra* Parts I.B, III.B.1.

18. *See infra* Part III.B.1.

19. *See infra* Part III.B.

20. Neal Devins, *Congressional Factfinding and the Scope of Judicial Review: A Preliminary Analysis*, 50 DUKE L.J. 1169, 1178–81 (2001).

21. THE FEDERALIST NO. 10, at 51 (James Madison) (Ian Shapiro ed., 2009).

22. THE FEDERALIST NO. 62, at 316 (James Madison).

23. THE FEDERALIST NO. 53, at 274 (James Madison).

24. THE FEDERALIST NO. 62, at 316 (James Madison) ("Some governments are deficient in both [fidelity to the public's happiness and the knowledge of how to achieve it]; most governments are deficient in the first. I scruple not to assert, that in American governments too little attention has been paid to the last. The federal Constitution avoids this error; and

The Supreme Court takes this romanticized view of the legislation process, noting its belief that Congress's "special attribute as a legislative body lies in its broader mission to investigate and consider all facts and opinions that may be relevant to the resolution of an issue. One appropriate source is the information and expertise that Congress acquires in the consideration and enactment of earlier legislation."²⁵ The Court has observed:

A legislative body cannot legislate wisely or effectively in the absence of information respecting the conditions which the legislation is intended to affect or change; and where the legislative body does not itself possess the requisite information—which not infrequently is true—recourse must be had to others who do possess it.²⁶

The Supreme Court's deference to Congress's policy decisions is based on a vision of the legislative process that finds the relevant information necessary to govern so that it makes informed decisions. As the Court has remarked, "[w]e owe Congress' findings deference in part because the institution 'is far better equipped than the judiciary to 'amass and evaluate the vast amounts of data' bearing upon' legislative questions."²⁷

A. The Path Toward Greater Expertise

The reality of congressional process has never lived up to the romanticized version described by the Framers or the Court, but it has been much closer to that ideal than what currently takes place. In the nation's early history, Congress was viewed as "a part-time body with a part-time role in a limited federal government."²⁸ But even with a more limited role and very little staff,²⁹ Congress used standing and investigatory committees to gather information.³⁰ For example, debates over tariff policy in 1827 saw one of the first examples of an investigation being used to proactively shape policy, as legislators recognized they needed accurate information about the

what merits particular notice, it provides for the last in a mode which increases the security for the first.").

25. *Metro Broad., Inc. v. FCC*, 497 U.S. 547, 572 (1990) (quoting *Fullilove v. Klutznick*, 448 U.S. 448, 502 (1980) (Powell, J., concurring)), *overruled by* *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200 (1995).

26. *McGrain v. Daugherty*, 273 U.S. 135, 175 (1927).

27. *Turner Broad. Sys., Inc. v. FCC*, 520 U.S. 180, 195 (1997) (quoting *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 662, 665–66 (1994) (quoting *Walters v. Nat'l Ass'n of Radiation Survivors*, 473 U.S. 305, 331 n.12 (1985))).

28. Susan Webb Hammond, *Life and Work on the Hill: Careers, Norms, Staff and Informal Caucuses*, in *CONGRESS RESPONDS TO THE TWENTIETH CENTURY* 73, 74 (Sunil Ahuja & Robert Dewhirst eds., 2003).

29. While the number of staff slowly increased with the size of the legislature, in 1891 all of Congress was served by just 146 staff members, compared to over 20,000 a century later. *Id.* at 79.

30. HISTORY OF THE UNITED STATES HOUSE OF REPRESENTATIVES, H.R. DOC. NO. 103-324, at 144 (1994) (noting early standing committees that still persist today, such as the Committee on Elections and the Ways and Means Committee).

economic conditions of the country in order to pass effective tariffs.³¹ Then-Representative John Quincy Adams expressed a similar view in 1837 when he commented on the complexity of “banking, exchange, currency, circulation and credits” and noted that “what I want most of all, is counsel, from those who do know something about it, practically.”³² With greater complexity came more committees, and by the mid-1800s, committees had become the default point of entry for new legislation.³³ Lawmakers who serve on committees develop policy knowledge and legislative experience on subject matters relating to their committees.³⁴ In a legislative body concerned with expertise, rank-and-file members would look to committee experts due to their own limited resources and knowledge of substantive policy areas.³⁵ And for much of Congress’s history, that is, in fact, how things proceeded.

The twentieth century saw more dramatic institutional changes, and for most of the century, those changes favored even greater use of expert facts and information. Congressional staffing increased as members realized “that professional help was needed in carrying out congressional responsibilities and . . . duties.”³⁶ Progressive Era reforms and mobilization for World War I required even greater technical knowledge to be successful,³⁷ so Congress delegated more detailed policy implementation to the executive branch and public corporations because of their relative informational advantages.³⁸

Congress also created internal congressional bodies—what Professors Jesse Cross and Abbe Gluck refer to as “the Congressional Bureaucracy”—to provide additional expertise.³⁹ For example, when Congress wanted to better track the enormous expenditures on Progressive-Era initiatives in the

31. James M. Landis, *Constitutional Limitations on the Congressional Power of Investigation*, 40 HARV. L. REV. 153, 171–77 (1926).

32. H.R. DOC. NO. 103-324, at 73.

33. See DAVID C. KING, TURF WARS: HOW CONGRESSIONAL COMMITTEES CLAIM JURISDICTION 90–91 (1997).

34. James M. Curry, *Knowledge, Expertise, and Committee Power in the Contemporary Congress*, 44 LEGIS. STUD. Q. 203, 209 (2019); see also HISTORY OF THE UNITED STATES HOUSE OF REPRESENTATIVES, H.R. DOC. NO. 89-250 at 86 (1963) (“Long service on the same committees develops in the American legislator an expertise that makes him more than a match for the transient department head.”).

35. See Curry, *supra* note 34, at 204 (describing how committees are able to influence other members of Congress).

36. Hammond, *supra* note 28, at 81.

37. See Roger H. Davidson, *The Advent of the Modern Congress: The Legislative Reorganization Act of 1946*, 15 LEGIS. SERIES Q. 357, 359 (1990) (describing the challenges of governing in this era).

38. *Id.*

39. See generally Jesse M. Cross & Abbe R. Gluck, *The Congressional Bureaucracy*, 168 U. PA. L. REV. 1541 (2020). Cross and Gluck include additional internal bodies that assist with legislative drafting and nonpolicy work. Because I am concerned with Congress’s substantive policymaking output here, I focus only on the subset of these bodies that offer expert advice on substantive policy outcomes.

Budget and Accounting Act, 1921,⁴⁰ it created a Bureau of the Budget (now known as the Office of Management and Budget (OMB)) in the executive branch to give budget estimates to the president, while simultaneously creating its own agency, an early iteration of the U.S. Government Accountability Office (GAO), to balance that increased executive control with a source of expertise for Congress.⁴¹ Congress had been keeping track of the country's finances from the country's founding, but that effort largely consisted of various comptroller or auditor offices in different federal departments.⁴² World War I and its costs prompted Congress to push for greater national budgeting and auditing as a response to "public criticism of its inability to bring spending under control."⁴³ Congress thus reorganized several auditing procedures then located in the U.S. Department of the Treasury into a new agency headed by the comptroller general and known as the General Accounting Office, later renamed the Government Accountability Office in 2004.⁴⁴ The GAO serves as the "congressional watchdog," monitoring government spending and issuing legal opinions on the use of public funds.⁴⁵ Congress gave the GAO statutory authority to investigate the entire government regarding the distribution and use of public funds and vested it with broad access to information from all departments and other government entities.⁴⁶ The GAO reports its findings to Congress when ordered by either house or by committees with jurisdictions relating to fiscal matters.⁴⁷ GAO reports, "while sometimes criticized by the offices under investigation, are widely regarded as objective and non-partisan and are often the basis for constructive change."⁴⁸ GAO estimates that its annual

40. Pub. L. No. 67-13, 42 Stat. 20 (current version codified in scattered sections of the U.S.C.).

41. See MAY HUNTER WILBUR, U.S. GEN. ACCT. OFF., AN EARLY HISTORY OF THE GENERAL ACCOUNTING OFFICE, 1921–1943, at 10–12 (1988) (describing the creation of the GAO), <https://www.gao.gov/assets/op-1-hp.pdf> [<https://perma.cc/F3NK-3UDJ>].

42. See *id.* at 1–9 (describing U.S. fiscal history from the Revolution to the late nineteenth century).

43. Thomas D. Morgan, *The General Accountability Office: One Hope for Congress to Regain Parity of Power with the President*, 51 N.C. L. REV. 1279, 1280 (1973).

44. Congress initially proposed a bill in 1920 that would have made the comptroller general removable only by a concurrent resolution of both houses of Congress. See WILBUR, *supra* note 41, at 10–12. This was particularly important because the then-newly created Bureau of the Budget (later OMB) gave the executive much greater powers. FREDERICK M. KAISER, CONG. RSCH. SERV., GAO: GOVERNMENT ACCOUNTABILITY OFFICE AND GENERAL ACCOUNTING OFFICE 3 (2008).

45. *About GAO*, U.S. GOV'T ACCOUNTABILITY OFF., <https://www.gao.gov/about/> [<https://perma.cc/HF5V-GYFE>] (last visited Oct. 29, 2021); *What GAO Does for Congress*, U.S. GOV'T ACCOUNTABILITY OFF., <https://www.gao.gov/about/what-gao-does-for-congress/> [<https://perma.cc/W8ZQ-4JN3>] (last visited Oct. 29, 2021). President Woodrow Wilson vetoed that bill because he believed the removal provision was unconstitutional, so Congress passed a modified version that made the comptroller general subject to removal by a joint resolution that would require the president's approval. WILBUR, *supra* note 41, at 11–12.

46. See KAISER, *supra* note 44, at 3–4 (describing the GAO's statutory authority).

47. See *id.* at 4 (describing the GAO's reporting obligations).

48. Morgan, *supra* note 43, at 1281–82.

reports over the past ten years have saved the federal government \$429 billion.⁴⁹ A 2015 study found that approximately 80 percent of GAO's recommendations to federal agencies were successfully implemented.⁵⁰

In 1926, Congress created the Joint Committee on Taxation (JCT) as part of the Revenue Act of 1926.⁵¹ This body provides expert analysis of tax legislation so Congress can anticipate the revenues that will be generated. As with the GAO, Congress created the JCT because of a concern that, otherwise, the executive had too much control over tax policy.⁵² The JCT and its staff are "essential to Congress's tax process," with one commentator noting that the head of the JCT has had a greater influence on tax legislation "than the President, the Secretary of State, the assistant secretary in charge of taxation, [and] the chairmen of the tax-writing committees in Congress—separately or combined."⁵³

Even bigger changes came with World War II and the New Deal, which greatly increased the size of the national budget and the complexity of government.⁵⁴ Congress organized a Joint Committee on the Organization of Congress to study what changes Congress needed to better handle the demands of modern legislation and supervise the executive branch. The Organization Committee's staff director noted this inquiry was necessary because "members [were] bewildered and harassed by multiplying technical problems and local pressures."⁵⁵ One senator, wary of the outsourcing of expertise to lobbyists and other outside advisers, told the Committee that he felt Congress "should have a staff on our committees and [Congress] should do away with the downtown-loaned experts, who are always biased individuals."⁵⁶ Congress was particularly concerned that it was too reliant on the executive branch for opinions and advice. In a notable floor speech, Representative Everett M. Dirksen urged his colleagues: "Let us spend a

49. U.S. GOV'T ACCOUNTABILITY OFF., 2020 ANNUAL REPORT: ADDITIONAL OPPORTUNITIES TO REDUCE FRAGMENTATION, OVERLAP, AND DUPLICATION AND ACHIEVE BILLIONS IN FINANCIAL BENEFITS (2020), <https://www.gao.gov/assets/gao-20-440sp.pdf> [<https://perma.cc/6NY9-FW8K>].

50. See Daniel Byler et al., *Accountability Quantified*, DELOITTE: INSIGHTS (Feb. 18, 2015), <https://www2.deloitte.com/us/en/insights/topics/analytics/text-analytics-and-gao-reports.html> [<https://perma.cc/NB5B-RCT9>] ("Are GAO recommendations an effective way to drive targeted change within agencies? Yes. Overall, during the period between 1983 and 2008, 81 percent of GAO's recommendations were successfully completed by federal agencies.").

51. Pub. L. No. 69-20, § 1203, 44 Stat. 9, 128 (current version codified in scattered sections of the U.S.C.).

52. George K. Yin, *James Couzens, Andrew Mellon, the "Greatest Tax Suit in the History of the World," and the Creation of the Joint Committee on Taxation and Its Staff*, 66 TAX L. REV. 787, 838–49 (2013).

53. Cross & Gluck, *supra* note 39, at 1580.

54. Davidson, *supra* note 37, at 359–60.

55. *Id.* at 360.

56. Lee Drutman & Steven M. Teles, *Why Congress Relies on Lobbyists Instead of Thinking for Itself*, ATLANTIC (Mar. 10, 2015), <https://www.theatlantic.com/politics/archive/2015/03/when-congress-cant-think-for-itself-it-turns-to-lobbyists/387295/> [<https://perma.cc/3X28-BQQ2>].

little money on ourselves; let us provide legislative tools to get the facts, the data, the information, and then control, supervise, and survey the operations of the Government.”⁵⁷

Congress responded by passing the Legislative Reorganization Act of 1946,⁵⁸ a law that had widespread bipartisan support and remade the congressional committee system.⁵⁹ Before the Act, there were eighty-one standing committees with unclear and overlapping jurisdictions.⁶⁰ After the Act, there were thirty-four committees with much more specific jurisdictions and delineation of responsibilities.⁶¹ Congressional staff increased with four expert staff members for each committee, as well as greater assistance for legislative reference and bill drafting.⁶²

The Legislative Reorganization Act of 1946 also took the Legislative Research Service, which was a small research agency that began in the Library of Congress in 1914, and turned it into its own legislative agency with an increased staff of experts and a larger mandate to assist congressional committees.⁶³ The Legislative Reorganization Act of 1970⁶⁴ provided this agency with even more resources and renamed it the Congressional Research Service (CRS) to reflect the more prominent role the Act envisioned for the agency in helping to provide congressional oversight⁶⁵ and to provide it with greater “capacity to evaluate the policy results of its work.”⁶⁶ The impetus for these changes was a concern that “Congress was again seen as falling behind the executive branch in its powers and performance and was again

57. Cross & Gluck, *supra* note 39, at 1557.

58. Pub. L. No. 79-601, 60 Stat. 812 (current version codified in scattered sections of the U.S.C.).

59. Opposition came largely from Democrats who chaired committees that were being eliminated by the legislation. Davidson, *supra* note 37, at 364.

60. *The Legislative Reorganization Act of 1946*, HIST., ART & ARCHIVES: U.S. HOUSE OF REPRESENTATIVES, <https://history.house.gov/Historical-Highlights/1901-1950/The-Legislative-Reorganization-Act-of-1946/> [<https://perma.cc/F4L2-FX3P>] (last visited Oct. 29, 2021).

61. *Id.*

62. Davidson, *supra* note 37, at 367. Not all increased staffing was of qualified experts. Some committees continued their practice of granting jobs as political favors. *Id.* at 368. Dissatisfaction with aspects of the 1946 Act prompted another Joint Committee on the Organization of Congress in 1965, which in turn led to the Legislative Reorganization Act of 1970. That legislation tweaked the committee system and provided more resources to the Congressional Research Service and GAO. Walter Kravitz, *The Advent of the Modern Congress: The Legislative Reorganization Act of 1970*, 15 LEGIS. STUD. Q. 375, 376–87 (1990) (describing issues targeted by the Legislative Reorganization Act of 1970).

63. Charles O. Jones, *Why Congress Can't Do Policy Analysis (or Words to That Effect)*, 2 POL'Y ANALYSIS 251, 256 (1976); Kevin R. Kosar, *The Atrophying of the Congressional Research Service's Role in Supporting Committee Oversight*, 64 WAYNE L. REV. 149, 152–54 (2018) (describing the Legislative Reorganization Act of 1946's effects on the CRS).

64. Pub. L. No. 91-510, 84 Stat. 1140 (current version codified in scattered sections of the U.S.C.).

65. Kosar, *supra* note 63, at 155 (describing the 1970 Act's vision for the CRS).

66. Cross & Gluck, *supra* note 39, at 1561.

held in low public esteem.”⁶⁷ In the decade following the 1970 legislation, the CRS staff more than doubled.⁶⁸ The CRS is nonpartisan and provides its policy and legal analysis exclusively to members of Congress.⁶⁹ It is staffed by policy analysts and attorneys, and it produces reports and briefs on topics spanning domestic social policy, American law, foreign affairs, science, industry, and finance.⁷⁰ CRS staff also respond to specific requests from members or their staff. In 2019, CRS fielded more than 71,000 research requests.⁷¹

The Legislative Reorganization Act of 1970 made other notable modifications. It “made changes to the committee system to empower the use of expert committee staffers.”⁷² Congress also realized in the 1970s that it needed greater expert assistance on budgetary matters in the wake of clashes with Presidents Lyndon B. Johnson and Richard Nixon over spending priorities. In 1967, President Johnson had assured critics that the Vietnam War and his Great Society programs could be financed simultaneously, only to turn around and ask for a tax increase to pay for them a year later.⁷³ President Nixon’s behavior was even more troubling to Congress. He ordered “impoundments”—essentially line-item vetoes through which he would refuse to spend money that Congress had appropriated—for social programs and demanded that Congress enact spending ceilings, which granted him discretion over which programs made the cut.⁷⁴

Congress came of the view that it needed its own expert advisers to rival presidential budgetary control and the OMB in the executive branch. Congress therefore passed the Congressional Budget and Impoundment Control Act of 1974.⁷⁵ This bipartisan effort passed with large margins, and it created the Congressional Budget Office (CBO) in an attempt to give Congress greater expertise to address budgetary matters and provide

67. Donald Wolfensberger, *A Brief History of Congressional Reform Efforts*, WILSON CTR. (Apr. 22, 2013), <https://www.wilsoncenter.org/article/brief-history-congressional-reform-efforts> [https://perma.cc/8ERS-Z7AS].

68. Cross & Gluck, *supra* note 39, at 1561–62.

69. *Congressional Research Service: Careers*, LIBR. OF CONG., <https://www.loc.gov/crsinfo/> [https://perma.cc/C59Y-WSCR] (last visited Oct. 29, 2021); *Congressional Research Service: History and Mission*, LIBR. OF CONG., <http://www.loc.gov/crsinfo/about/history.html> [https://perma.cc/3XBW-L2MJ] (last visited Oct. 29, 2021).

70. *Congressional Research Service: Areas of Research*, LIBR. OF CONG., <https://www.loc.gov/crsinfo/research/> [https://perma.cc/UXW5-GYBU] (last visited Oct. 29, 2021); see also Cross & Gluck, *supra* note 39, at 1562 (providing additional detail on CRS staffing).

71. Cross & Gluck, *supra* note 39, at 1563.

72. *Id.* at 1559.

73. PHILIP G. JOYCE, *THE CONGRESSIONAL BUDGET OFFICE: HONEST NUMBERS, POWER AND POLICYMAKING* 15 (2011).

74. *Id.* at 15–16.

75. Pub. L. No. 93-344, 88 Stat. 297 (current version codified in scattered sections of 2 and 31 U.S.C.); JOYCE, *supra* note 73, at 15–18.

information on the fiscal impacts of its policies.⁷⁶ According to the Senate report, “the [CBO] is the result of the Committees’ belief that Congress needs a highly competent staff to guide it in fiscal policy and budgetary considerations, similar in expertise to the President’s Office of Management and Budget.”⁷⁷

The CBO analyzes budget and economic issues for proposed legislation and is largely staffed by economists and analysts, who are hired on a nonpartisan basis.⁷⁸ The CBO not only reacts to issues that arise but proactively “anticipate[s] issues that would be the subject of congressional policymaking” and issues relevant reports.⁷⁹ CBO reports have allowed for extensive congressional engagement and resistance to the economic agendas of virtually every president since its creation.⁸⁰ The reports have sometimes halted legislation in its tracks and have often helped shape legislation to conform to a prescribed fiscal limit.⁸¹ The CBO has been credited with enabling Congress to take a multiyear perspective of policy decisions rather than overemphasizing single year impacts on the deficit.⁸² The CBO is also credited with keeping the OMB honest because it performs similar analyses that act as a check on how much the executive branch can play with budgetary figures.⁸³ Despite pressure from some members at various points to support their agenda items, the CBO refuses to issue policy recommendations and will provide only narrow “technical” recommendations when specifically requested.⁸⁴

The 1970s also witnessed the creation of the Office of Technology Assessment (OTA), which was tasked with providing Congress with nonpartisan analysis of issues related to technology and science.⁸⁵ Technology issues were at the forefront of public consciousness during the

76. See Cross & Gluck, *supra* note 39, at 1574–75 (describing the passage of the Congressional Budget and Impoundment Control Act of 1974 and its support in Congress).

77. JOYCE, *supra* note 73, at 17 (quoting S. REP. NO. 93-579, at 31 (1973)). The Act also continued in the 1946 Act’s path of tweaking the committee system, this time by curbing the power of the influential chairs of committees and formally moving subcommittees under the supervision of their committees, thus preventing them from growing too autonomous. Kravitz, *supra* note 62, at 376–77.

78. *Introduction to CBO*, CONG. BUDGET OFF., <https://www.cbo.gov/about/overview> [<https://perma.cc/AG8J-DAL8>] (last visited Oct. 29, 2021).

79. JOYCE, *supra* note 73, at 27–28.

80. See *id.* at 208–09 (describing the CBO’s influence on economic policy during the Reagan, Obama, and Clinton administrations); *id.* at 34 (same regarding the Carter administration).

81. See *id.* at 232 (“[T]here is no question that information provided by CBO on the costs of policies can have a substantial effect on the design of those policies. Sometimes the effect may be to stop legislation from moving, such as reportedly happened particularly during the BEA period. On at least as many occasions, the effect is to change the structure of the policies to make them fit within some prescribed fiscal limit.”).

82. *Id.* at 221.

83. *Id.* at 210 (describing the CBO-OMB dynamic).

84. See *id.* at 29 (describing the CBO’s nonpartisan identity).

85. *The OTA Legacy*, OFF. OF TECH. ASSESSMENT, <https://www.princeton.edu/~ota/> [<https://perma.cc/K9WV-VQNZ>] (last visited Oct. 29, 2021).

middle of the century, from the Cold War arms and space races to Ralph Nader's efforts on automobile safety and concerns about chemical pollution inspired by the book *Silent Spring*.⁸⁶ Congress was eager to legislate on these issues but had a difficult time sorting through complex and often one-sided input from academics, corporations, and activist groups.⁸⁷ Congress's lack of technology expertise also made it difficult to provide meaningful oversight to the technical work of executive agencies.⁸⁸ Congress was unsatisfied relying on the president's science advisers and wanted independent advice.⁸⁹ When a congressional subcommittee began considering a bill that would create the OTA, corporate executives mobilized to oppose it, fearing that it would lead to burdensome regulation.⁹⁰ The OTA ultimately had less bipartisan support than the GAO, CBO, or CRS, with roughly half of House Republicans opposed to it.⁹¹ Senator Ted Kennedy, who became the first chair of the OTA's board, explained the rationale for Democratic support: "without [the] OTA, the role of Congress in national science policy would become more and more perfunctory and more and more dependent on administration facts and figures, with little opportunity for independent congressional evaluation."⁹² Republicans, however, were split on whether to support the OTA because many of them were worried that the agency had too much power to set policies that would have negative economic effects.⁹³ Though the agency was itself bipartisan, with a board comprised of members of both parties from both the House and the Senate, it struggled in its initial years to shake the perception that it was an agency dominated by Democrats.⁹⁴

The OTA published more than 750 reports that took a range of forms.⁹⁵ Some focused on a particular technology, such as a 1983 report on the

86. See Jathan Sadowski, *Office of Technology Assessment: History, Implementation, and Participatory Critique*, 42 *TECH. SOCIETY* 9, 11–12 (2015) (describing early technology assessment reports).

87. See *id.* at 11. ("It soon became apparent to Congress that when confronting technological issues, such as the infamous debate about supersonic transport (SST), it was difficult to parse out all the varied and opposing viewpoints that stemmed from the private sector and the academy.")

88. *Id.*

89. See *id.* at 12–13 (describing congressional positions on technology assessment in the 1960s and 1970s).

90. *Id.*

91. See *id.* at 14 ("This amended bill with a revamped, bipartisan [board] was enough to appease legislators in Congress. 'The House then approved the amended bill on a roll call vote of 256–118, with Democrats clearly favoring the bill 180–39, while Republicans were split 76–79. The Senate passed the bill on a voice vote and President Nixon signed the bill into law on October 13, 1972.'" (citation omitted) (quoting Gregory C. Kunkle, *New Challenge or the Past Revisited?: The Office of Technology Assessment in Historical Context*, 17 *TECH. SOCIETY* 175 (1995))).

92. *Id.* at 13.

93. See *id.*

94. *Id.* at 14.

95. See *id.* at 15–16 (describing the publication and use of OTA reports).

validity and utility of polygraph tests.⁹⁶ The report concluded that the tests had significant margins of error, laying the groundwork for legislation, passed in 1988, which strictly limited the use of polygraphs by employers.⁹⁷ Other reports considered specific government programs, such as a 1994 report analyzing a plan to upgrade the Social Security Administration's computer system.⁹⁸ The GAO had already weighed in with concerns; the OTA report supported the overall idea but emphasized how the government had to develop its expectations and uses for the new system—insights that are credited with saving hundreds of millions of dollars in the ultimate implementation.⁹⁹ The OTA reports have been cited years after their initial publication,¹⁰⁰ and the OTA inspired the creation of several agencies in Europe in its image.¹⁰¹

That proved to be the peak of the path toward greater expertise and fact gathering in Congress.¹⁰²

B. *The Ebbing of Expertise in Congress*

Things took a sharp turn in 1994 when Newt Gingrich led a new wave of Republicans into office to take control of the House of Representatives from Democrats for the first time in forty years. This new wave of Republican candidates did not believe there were sufficient incentives for bipartisanship and believed there were greater rewards from voters for attacking Congress and government itself.¹⁰³ Many ran on a platform that criticized Congress for its wasteful spending,¹⁰⁴ and they immediately made drastic cuts when they took over.¹⁰⁵ Gingrich started his tenure as Speaker of the House with

96. Adam Keiper, *Science and Congress*, 7 NEW ATLANTIS 19, 33 (2005).

97. *Id.* (describing the OTA report's findings as a basis for enacting the Employee Polygraph Protection Act of 1988, Pub. L. No. 100-347, 102 Stat. 646 (codified as amended at 29 U.S.C. §§ 2001–2009)).

98. *Id.* at 34.

99. *See id.* (discussing the OTA Social Security report and its impact).

100. *See Keiper, supra* note 96, at 33 (describing how the polygraph report was considered definitive for many years after publication); Chris Mooney, *Requiem for an Office*, 61 BULL. ATOMIC SCIENTISTS 40, 42 (2005) (describing a senator in 2001 using the OTA's research on anthrax).

101. *See Mooney, supra* note 100, at 44–45 (describing the UK and Germany launching programs similar to the OTA).

102. In the 1980s, Congress created internal advisory bodies—MedPAC and MACPAC—to provide it with “objective expertise on Medicare payment policy.” Cross & Gluck, *supra* note 39, at 1595. As with so many of the other bodies created, these “likewise had their origins in congressional distrust of executive-branch administration” and a desire to “buffer members of Congress from pressures from interest groups.” *Id.* at 1594–96.

103. Kosar, *supra* note 63, at 157–59.

104. *See Robert Singh, The Rise and Fall of Legislative Service Organisations in the United States Congress*, 2 J. LEGIS. STUD. 79, 93–94 (1996) (describing Congress's unpopularity at the time and how Republicans campaigned around this issue).

105. Max Ehrenfreund, *Yes, Congress Is Getting Less Smart. No, It's Not Trump's Fault*, WASH. POST (June 12, 2017), <https://www.washingtonpost.com/news/wonk/wp/2017/06/12/yes-congress-is-getting-less-smart-no-its-not-trumps-fault/> [https://perma.cc/Y58P-UH6P] (arguing that, due to budget cuts, there are fewer congressional aides and technical experts in

a goal to “ma[k]e Congress dumb — on purpose.”¹⁰⁶ Gingrich believed nonpartisan experts were actually “a third column of liberals pretending to be experts.”¹⁰⁷

Guided by that world view, Republicans proceeded to cut congressional professional staff by one-third.¹⁰⁸ They slashed the budgets of the CRS, the CBO, and the GAO.¹⁰⁹ The staff of all three agencies dropped 40 percent from 1980 to 2015,¹¹⁰ with the biggest shift occurring when Republicans took over the House in 1995.¹¹¹ Under Gingrich’s leadership, Republicans cut the staff at the GAO and CRS by a third.¹¹² The GAO at one time had 15,000 employees, but that has plummeted to 3000.¹¹³ Agency staff levels in Congress have remained “more or less at the level [Gingrich] helped cut them to.”¹¹⁴ The CRS budget has remained flat and outpaced by inflation for much of the past two decades.¹¹⁵ The CRS has significantly decreased its engagement with congressional committees, in large part because of the reduction in the number of substantive, bipartisan hearings, but also because of a desire not to appear partisan and to be assisting a committee dominated by one party.¹¹⁶

The Republicans went even further with the OTA, completely defunding it and shutting it down.¹¹⁷ Republican anger at the OTA can be traced to its

Congress’s independent research bodies, forcing lawmakers to instead rely on lobbyists for technical policy advice); Curtlyn Kramer, *Vital Stats: Congress Has a Staffing Problem, Too*, BROOKINGS (May 24, 2017), <https://www.brookings.edu/blog/fixgov/2017/05/24/vital-stats-congress-has-a-staffing-problem-too/> [<https://perma.cc/K55X-VSBR>] (explaining that the size of congressional support staff has steadily declined over the past forty years and that the CRS, CBO, and GAO lost 45 percent of their staff over that period). “When the CRS and the CBO do not have adequate staff to provide Congress with the information it needs to make informed decisions, Congress members must either A) turn somewhere else for their information, or B) make less informed decisions.” Kramer, *supra*.

106. Ed O’Keefe, *When Congress Wiped an Agency Off the Map*, WASH. POST (Nov. 29, 2011), https://www.washingtonpost.com/blogs/federal-eye/post/when-congress-wiped-an-agency-off-the-map/2011/11/29/gIQAIt0J9N_blog.html?utm_term=.2f2e2e2716b9 [<https://perma.cc/29U2-JES2>].

107. Drutman & Teles, *supra* note 56.

108. Kosar, *supra* note 63, at 160; Norm Ornstein, *The Eight Causes of Trumpism*, ATLANTIC (Jan. 4, 2016), <https://www.theatlantic.com/politics/archive/2016/01/the-eight-causes-of-trumpism/422427/> [<https://perma.cc/BW8F-6A74>].

109. BIPARTISAN POL’Y CTR., EVIDENCE USE IN CONGRESS: CHALLENGES FOR EVIDENCE-BASED POLICYMAKING 15 (2018), <https://bipartisanpolicy.org/download/?file=/wp-content/uploads/2019/03/BPC-Evidence-Use-in-Congress.pdf> [<https://perma.cc/W83K-3JHE>].

110. *Id.*

111. Paul Glastri & Haley Sweetland Edwards, *The Big Lobotomy*, WASH. MONTHLY (June/July/Aug. 2014), <https://washingtonmonthly.com/magazine/junejulyaug-2014/the-big-lobotomy/> [<https://perma.cc/BDG9-WDVG>].

112. *Id.*

113. Cross & Gluck, *supra* note 39, at 1588.

114. Drutman & Teles, *supra* note 56.

115. Kosar, *supra* note 63, at 158–60.

116. *See id.* (describing the CRS’s decreased role in committee oversight).

117. Jathan Sadowski, *The Much-Needed and Sane Congressional Office That Gingrich Killed Off and We Need Back*, ATLANTIC (Oct. 26, 2012), <https://www.theatlantic.com/>

critiques of President Ronald Reagan's space-missile defense system, the feasibility of which the OTA concluded was "so remote that it should not serve as the basis of public expectation or national policy."¹¹⁸ The OTA's assessment upset the Reagan administration, officials at the Pentagon, and other conservatives.¹¹⁹ By the time Gingrich and his Republican colleagues came to power in 1994, they were still rankled by the report and had the OTA in their crosshairs.¹²⁰ One former OTA director called the push to end the agency "Reagan's revenge" for the fallout of the missile report.¹²¹ Gingrich and his followers alternately described the agency as overly political, too slow to be useful to Congress, and not worth the funding.¹²² The cost argument divided Republicans because many moderates felt the \$21 million per year budget was worth the benefits.¹²³ What seemed to appeal most to Republicans was the ability to find their own experts to support their positions instead of having them rejected by the OTA. As Gingrich put it, "[w]e constantly found scientists who thought what [the] [OTA reports] were saying was not correct."¹²⁴ Norm Ornstein has called the end of the OTA "the death knell for nonpartisan respect for science in the political arena, both changing the debate and discourse on issues like climate change, and also helping show in the contemporary era of 'truthiness,' in which repeated assertion trumps facts."¹²⁵

The CBO and JCT have suffered the least and still play an influential role in analyzing legislation.¹²⁶ But they, too, have seen their roles diminish over time. Congress still cares about the JCT's revenue estimates, but the JCT plays less of a role in developing tax legislation in the first instance, with partisan committee staff on the Ways and Means and Finance Committees playing a larger relative role.¹²⁷ This is consistent with the overall trend in

technology/archive/2012/10/the-much-needed-and-sane-congressional-office-that-gingrich-killed-off-and-we-need-back/264160/ [https://perma.cc/A5H8-QYJQ].

118. Sadowski, *supra* note 86, at 15.

119. *See* Mooney, *supra* note 100, at 44–45 (describing conservative responses to the OTA's assessments of the missile program).

120. *Id.*

121. *Id.* at 44.

122. *Id.* at 45.

123. *See id.* (describing different Republican perspectives on cutting the agency's budget).

124. Jim Dawson, *Legislation to Revive OTA Focuses on Science Advice to Congress*, PHYSICS TODAY (Oct. 1, 2001), <https://physicstoday.scitation.org/doi/10.1063/1.1420545> [https://perma.cc/JF5W-UXBN] (third alteration in original).

125. Ornstein, *supra* note 108.

126. *See* Cross & Gluck, *supra* note 39, at 1553, 1575, 1580; George K. Yin, *Crafting Structural Tax Legislation in a Highly Polarized Congress*, 81 L. & CONTEMP. PROBS. 241, 253–54 (2018) (showing little reduction in staff at the JCT).

127. Yin, *supra* note 126, at 264; *see also* Susan Webb Hammond, *Recent Research on Legislative Staffs*, 21 LEGIS. STUD. Q. 543, 549 (1996) (citing RANDALL STRAHAN, NEW WAYS AND MEANS: REFORM AND CHANGE IN A CONGRESSIONAL COMMITTEE 88–89 (1990)) (describing how the huge increase in staffing of the 1970s House Ways and Means Committee reduced the influence of the JCT, as "[i]nformation and staff support was more broadly diffused").

which the JCT “staff’s influence in developing tax legislation has been overshadowed” by more partisan actors.¹²⁸

Republicans have also become more vocal in their criticism of the JCT and CBO. After the CBO issued a negative estimate of a farm bill, for example, the Republican chair of the House Committee on the Budget stated that “[t]he CBO sucks, and you can quote me on that.”¹²⁹ Republicans particularly dislike the fact that the CBO uses static economic models because they do not think that methodology gives enough credit for what they believe are “the positive economic effects of Republican policies, such as tax cuts.”¹³⁰ To address this, when the CBO forecasts turn out to be inaccurate, Republicans present those mistakes as evidence of problems with the agency’s scoring.¹³¹ Republicans have also attempted to appoint a director of the CBO who would change the agency’s analysis to be more favorable to their positions. Though their eventual appointees did not do much to change the agency’s practices, the effort has created an appearance of greater partisanship at the CBO.¹³²

Republicans were particularly vocal in their opposition to the CBO and the JCT in 2017. After a CBO report found that Republican proposals to overhaul the Affordable Care Act¹³³ would result in twenty-three million more Americans becoming uninsured, many conservative Republicans called for budget cuts to the agency.¹³⁴ Newt Gingrich, then an adviser to President Donald Trump, labeled the CBO a “left-wing, corrupt, bureaucratic defender of big government and liberalism.”¹³⁵ In the wake of the JCT’s score of the 2017 tax legislation, which showed the Senate plan would not pay for itself but instead add \$1 trillion to the federal budget deficit, Republicans “opened an assault” on the JCT.¹³⁶ They made a “concerted push” to “discredit a nonpartisan agency they had long praised.”¹³⁷ Senator Bob Corker said that he believed Congress should “have a real debate and . . . have real economists

128. Yin, *supra* note 126, at 264.

129. JOYCE, *supra* note 73, at 42.

130. *Id.* at 38.

131. *Id.* at 77.

132. *Id.* at 38–42.

133. Pub. L. No. 111-148, 124 Stat. 119 (2010) (codified as amended in scattered sections of the U.S.C.).

134. Amanda Becker, *Republicans in House Push for Congressional Budget Office Cuts*, REUTERS (July 24, 2017, 5:15 PM), <https://www.reuters.com/article/us-usa-congress-cbo/republicans-in-house-push-for-congressional-budget-office-cuts-idUSKBN1A92KN> [<https://perma.cc/3QZA-3WZ6>]; see also Charles S. Clark, *House Lawmakers to CBO Analysts: You’re Fired*, GOV’T EXEC. (July 25, 2017), <https://www.govexec.com/oversight/2017/07/house-lawmakers-cbo-analysts-youre-fired/139721/> [<https://perma.cc/ZGK4-5HTF>].

135. Alan Rappeport, *White House Cast Pre-emptive Doubt on Congressional Budget Office*, N.Y. TIMES (Mar. 9, 2017), <https://www.nytimes.com/2017/03/09/us/politics/cbo-congressional-budget-office-american-health-care-act.html> [<https://perma.cc/3VD4-X498>].

136. Jim Tankersley, *Republicans Sought to Undercut an Unfavorable Analysis of the Tax Plan*, N.Y. TIMES (Dec. 4, 2017), <https://www.nytimes.com/2017/12/04/us/politics/republicans-joint-committee-on-taxation-estimate.html> [<https://perma.cc/7UAY-K26N>].

137. *Id.*

weighing in and we should take other things into account other than Joint Tax and C.B.O.”¹³⁸ In fact, “no credible, independent analyses” backed up the claim Republicans made that the tax cuts would pay for themselves with economic growth.¹³⁹ The criticism was, according to *The New York Times*, the “latest example of Republican lawmakers muddying the waters on empirical research in an effort to boost their policy agendas.”¹⁴⁰ Republicans similarly attacked the CRS for a critical report issued in 2019 assessing the effects of 2017 tax reform legislation.¹⁴¹ In this environment, it is no surprise that people working in Congress report that “nonpartisan staff are being impugned” and worry about the efforts to “minimize CBO and GAO and other organizations” doing expert work inside Congress.¹⁴²

Although Republicans have led the charge on most of the cuts, Democrats have sometimes been part of efforts to cut back on Congress’s expert advisers, particularly the GAO. A Senate appropriations subcommittee sought to cut the GAO’s 2012 budget by 9 percent, or \$50 million, which was eventually pared back to \$35 million.¹⁴³ The subcommittee’s Democratic chairman justified the move by saying that he “intend[s] to put the interests of Nebraska taxpayers ahead of Washington bureaucrats and make cuts where we can.”¹⁴⁴ This proposal drew a strong rebuke from Republican Senator Tom Coburn who observed:

The irony [of proposing cuts now] is Congress needs GAO’s assistance now more than ever. If the mission of GAO is compromised by excessive cuts, where else can Congress turn to find unbiased data to improve programs and save money? . . . [The cuts] could very well hobble the one agency that members of both parties have long trusted for thoughtful recommendations . . .¹⁴⁵

Coburn added, “[f]or nearly 90 years, GAO has served as a vital arm of Congress, helping it keep close tabs on federal spending. Without it, Congress would have difficulty performing its constitutional role of

138. Alan Rappoport, *In Battle over Tax Cuts, It’s Republicans vs. Economists*, N.Y. TIMES (Sept. 22, 2017), <https://www.nytimes.com/2017/09/22/us/politics/in-battle-over-tax-cuts-its-republicans-vs-economists.html> [<https://perma.cc/QE9M-EEDC>].

139. Jonathan Curry, *Year in Review: Tax Bill Takes a Topsy-Turvy Road to GOP Victory*, TAX NOTES (Dec. 26, 2017), <https://www.taxnotes.com/editors-pick/year-review-tax-bill-takes-topsy-turvy-road-gop-victory> [<https://perma.cc/E2SC-DJCP>].

140. Tankersley, *supra* note 136.

141. Cross & Gluck, *supra* note 39, at 1627.

142. *Id.* at 1628.

143. Jack Moore, *Shrinking GAO Budget Concerns Employees, Oversight Advocates*, FED. NEWS NETWORK (Apr. 9, 2012, 5:00 AM), <https://federalnewsnetwork.com/congress/2012/04/shrinking-gao-budget-concerns-employees-oversight-advocates/> [<https://perma.cc/Y6WE-TRFF>].

144. *Id.* (quoting Senator Ben Nelson).

145. TOM A. COBURN, SHOOTING THE MESSENGER: CONGRESS TARGETS THE TAXPAYERS’ WATCHDOG 3 (2011). Perhaps in an attempt to combat hostile characterizations of the GAO as “Washington bureaucrats” with more sympathetic associations of watchdogs, the cover of the report is graced by an image of a cute—yet alert—dog wearing a GAO dog tag.

overseeing the Executive Branch.”¹⁴⁶ In 1997, a Democrat from California, Representative Vic Fazio, tried to eliminate funding that would have increased the JCT staff by twelve because he “claimed the panel had swerved from its nonpartisan roots to become an advocacy arm for the Republican majority in charge of the House Ways and Means Committee.”¹⁴⁷

More typically, however, it has been the Republicans proposing the diminishment of expert bodies in Congress. According to Professors Lee Drutman and Steven Teles, “the decades-long diminishment of nonpartisan expertise in Congress has gone hand in hand with the rise of conservative power. Ideologically or lobbyist-driven legislation moves faster through the process when there are fewer knowledgeable, nonpartisan staffers asking inconvenient questions.”¹⁴⁸

The House of Representatives under Gingrich’s leadership stripped all funding from legislative service organizations (LSOs). LSOs were voluntary caucuses of representatives interested in learning more and communicating with other legislators about particular issues. Some of the LSOs centered on regional issues, whereas others focused on topics that cut across geography, like poverty or the arts.¹⁴⁹ Before Gingrich ended support for LSOs, they had received limited resources, including an office and access to communications and research resources.¹⁵⁰ They were restricted from receiving outside funds to maintain their independence from interest groups.¹⁵¹ LSOs were perceived as being more of a Democratic institution because many of them were founded and approved under Democratic control of the House, and the Black and Hispanic LSOs featured more Democrats.¹⁵² One of the Gingrich House’s first actions was to defund the LSOs and order them to return any unused funds to the Treasury to “reduce the national debt.”¹⁵³

The frequency and use of hearings have followed a similar pattern of decline. After a peak in the 1970s, hearings declined through the 1990s, plateauing at around one thousand per year in the House, and continuing to decline in the Senate since then.¹⁵⁴ Perhaps even more significant than the declining number is the content. Hearings have become far more partisan. Previously, hearings were considered methods for lawmakers to gather information, engage in debate, and help staff get up to speed on a policy issue, but now hearings are used to “structure a binary choice and highlight the

146. *Id.* at 27.

147. CQ PRESS, GUIDE TO CONGRESS 703 (7th ed. 2013).

148. See Drutman & Teles, *supra* note 56.

149. See Singh, *supra* note 104, at 85 (listing LSOs active in the 103d Congress).

150. *Id.* at 84.

151. See *id.* at 84–90 (describing conflicts over LSO funding).

152. *Id.* at 92.

153. *Id.* at 96.

154. Linda Fowler, *The Long Decline of Congressional Oversight*, FOREIGN AFFS. (Nov. 15, 2018), <https://www.foreignaffairs.com/articles/2018-11-15/long-decline-congressional-oversight> [<https://perma.cc/8E6N-HFHR>].

dimension most amenable to partisan advantage.”¹⁵⁵ Now that hearings are televised, “lawmakers posture for the cameras and avoid positions that might anger interest groups.”¹⁵⁶ As lawmaking becomes more partisan, lawmakers are more likely to make up their minds before the hearings start, making them less inclined to spend time engaging with the substantive issues.¹⁵⁷ A 2014 analysis found that dozens of Representatives attended less than one-third of their committee meetings.¹⁵⁸ One anonymous member of Congress described the situation as they saw it in 2015:

[M]embers routinely don’t show up at committee hearings, or if they do show up, it’s only to ask a few questions and leave. A lot of members fight for committees that will help them raise money or get a sweet lobbying job later The result is that the engine for informed lawmaking is broken.¹⁵⁹

Unsurprisingly, the shift toward partisan hearings has meant a shift in the witnesses who testify.¹⁶⁰ Instead of focusing on academics and other

155. Jonathan Lewallen et al., *Congressional Dysfunction: An Information Processing Perspective*, 10 REG. & GOVERNANCE 179, 183 (2016); see also Philip H. Devoe, Opinion, *Congressional Hearings Need Aggressive Reform*, NAT’L REV. (May 5, 2018, 6:30 AM), <https://www.nationalreview.com/2018/05/congressional-hearings-need-drastic-reform-partisan-posturing/> [https://perma.cc/5ELG-DPWS] (“[M]ost such hearings have long been hollow partisan charades meant to advance the illusion that the legislative body is actually legislating or give the party in control fodder for campaign ads.”); Tevi Troy, Opinion, *Congressional Hearings Aren’t What They Used To Be. Here’s How To Make Them Better*, WASH. POST (Oct. 21, 2015), https://www.washingtonpost.com/posteverything/wp/2015/10/21/congressional-hearings-arent-what-they-used-to-be-heres-how-to-make-them-better/?utm_term=.2e39f601e5e2 [https://perma.cc/NNK7-EQ2U] (“For a long time, many hearings were bipartisan affairs, with members on both side [sic] of the aisle trying to get to the heart of the matter, rather than simply advancing partisan interests.”).

156. WILLIAM F. CONNELLY JR. & JOHN J. PITNEY JR., *A Return to Madisonian Republicanism, in IS CONGRESS BROKEN?: THE VIRTUES AND DEFECTS OF PARTISANSHIP AND GRIDLOCK* 213, 222 (William F. Connelly Jr. et al. eds., 2017).

157. See Neal Devins, *The Academic Expert Before Congress: Observations and Lessons from Bill Van Alstyne’s Testimony*, 54 DUKE L.J. 1525, 1539 (2005) (“Today’s lawmakers . . . spend less time sorting out their policy preferences through committee work. Because they are more partisan, they are more likely to know their mind before the start of committee deliberations.”).

158. Luke Rosiak, *Many House Members Miss More Than Two-Thirds of Their Committee Meetings*, WASH. EXAMINER (Sept. 29, 2014, 5:00 AM), <https://www.washingtonexaminer.com/many-house-members-miss-more-than-two-thirds-of-their-committee-meetings> [https://perma.cc/T3SX-FMUJ].

159. MIKE MIESEN ET AL., BELFER CTR., BUILDING A 21ST CENTURY CONGRESS: IMPROVING CONGRESS’S SCIENCE AND TECHNOLOGY EXPERTISE (2019), <https://www.belfercenter.org/sites/default/files/2019-09/ST/Building21stCenturyCongress.pdf> [https://perma.cc/X9AA-NQQ7].

160. For example, one study by a scientific advocacy group found that the percentage of witnesses representing industry who were called to testify in front of the House Committee on Science, Space, and Technology has increased steadily over the past twelve years and that the percentage of industry witnesses exceeded academia witnesses for the first time during the 112th Congress. YOGIN KOTHARI & LINDSEY FONG, CTR. FOR SCI. & DEMOCRACY AT THE UNION OF CONCERNED SCIENTISTS, ARE PARTISANSHIP AND INDUSTRY INFLUENCE COMPROMISING THE MISSION OF THE HOUSE COMMITTEE ON SCIENCE? 1–2 (2014).

subject-matter specialists, Congress is now more likely to pick witnesses based on their partisan leanings.¹⁶¹ A CRS report found that committees sometimes selectively invite witnesses to represent “only particular points of view.”¹⁶² Even the experts themselves view their invitations to testify in a partisan light.¹⁶³ This phenomenon is consistent with the increasing frequency of “positional” hearings, in which legislators hear from only one side of the debate and the discussion is aimed at advocacy rather than fact gathering.¹⁶⁴ According to one study, positional hearings have risen in frequency from 19 percent in the 1970s to 34 percent in the early 2000s.¹⁶⁵ At the same time, hearings on the whole are on a decline,¹⁶⁶ and the hearings that are held focus less often on solutions.¹⁶⁷

The decline in the use of and deference to experts can be seen in a host of ways beyond their diminishing role at hearings and the shrinking role of the expert agencies within Congress. First, committees play less of an informational role than they used to in the legislative process. Committees have traditionally taken the lead in gathering research and facts about a particular issue,¹⁶⁸ but committees and subcommittees have been meeting

161. Devins, *supra* note 157, at 1526 (“[A]ttitudes in Congress toward academic experts have undergone a sea change. Over the past twenty-five years, committee staffers have increasingly turned away from nonpartisan, unpredictable academic witnesses The ever-growing divide that separates Democrats and Republicans explain this phenomenon.”).

162. CHRISTOPHER M. DAVIS, CONG. RSCH. SERV., HOUSE COMMITTEE HEARINGS: ARRANGING WITNESSES 1 (2015) (explaining that while committees strive to ensure “all reasonable points of view are represented,” there are cases when “witnesses expressing only particular points of view will be invited”). Research also shows fewer witnesses are being called to testify than before. *See, e.g.*, Jonathan Lewallen et al., *The Senate’s Disastrous Process for Crafting the AHCA Fits a Historic Pattern*, VOX (June 21, 2017, 9:50 AM), <https://www.vox.com/the-big-idea/2017/6/21/15843352/senate-hearings-secrecy-ahca-debate-stealth> [<https://perma.cc/7NXX-DMWF>] (“Committees are bringing fewer information sources into the process by which Congress learns about how to make policy.”).

163. *See* Devins, *supra* note 157, at 1527 (“Many of the experts now called before Congress consider themselves witnesses for Republicans or Democrats; that is, they see Congress as a highly partisan institution and the academic witness as someone who helps advance the agenda of one or the other party. Although partisanship certainly played a role in earlier hearings, today’s Congress is much less interested in hearing from nonpartisan experts.”).

164. Lewallen et al., *supra* note 155, at 184.

165. *Id.* at 185 (arguing also that this trend “indicates that the information that committees are acquiring, synthesizing, and, in turn, using, is more one sided today than it was in the 1970s, which, in turn, feeds back into the partisan war”).

166. *Id.* at 183 (“Committees are holding fewer hearings each year, and minority party members increasingly opt for dilatory strategies rather than seriously engage debate on the issues.”).

167. *Id.* at 185 (finding that 71 percent of hearings in 1971 and 1972 focused on a solution or set of solutions, compared with 31 percent of hearings in 2007 and 2008). “This finding is consistent with increasing partisan warfare over defining the functions of government; as less information is acquired and synthesized concerning policy solutions, the debate over those solutions should be less informed.” *Id.*

168. *See generally* KATHY GOLDSCHMIDT, CONGRESSIONAL MGMT. FOUND., STATE OF THE CONGRESS: STAFF PERSPECTIVES ON INSTITUTIONAL CAPACITY IN THE HOUSE AND SENATE (2017); Lewallen et al., *supra* note 155, at 183.

less often in both houses of Congress.¹⁶⁹ In 1958, congressional committees met almost three times more often than they did in 2010.¹⁷⁰ In addition, more bills are bypassing committee consideration altogether. Prior to the 1970s, nearly all legislation considered on the floors of both chambers was reported out of committee.¹⁷¹ In 2013 and 2014, over half of the legislation heard on the floor of the Senate, and about 40 percent in the House, bypassed committee.¹⁷²

Now committees perform more of a partisan role.¹⁷³ Professor George Yin explains the changes in the context of the Ways and Means Committee, which “has traditionally been the venue to develop virtually all serious tax legislation.”¹⁷⁴ While previously the committee consisted of senior members with safe seats “to enable them to follow a norm of restrained partisanship in their committee work,” now “newer members from competitive districts are assigned to the committee to give them an electoral and fund-raising boost” while the power of the committee “has largely been transferred to party leaders.”¹⁷⁵ Thus, when Congress considered the repeal and replacement of the Affordable Care Act in 2017, “important legislation affecting millions of Americans, committee involvement in both the House and Senate was essentially nonexistent.”¹⁷⁶ When Congress passed the massive 2017 tax bill, “potentially affecting every person and business in the country,” it followed the same path.¹⁷⁷ Neither the House nor the Senate convened a single committee meeting after the legislation was introduced, and the Senate approved the almost 500-page bill from the House within hours of receiving it.¹⁷⁸ Yin contrasts that with the last major rewrite of the tax laws in 1986, when the House Ways and Means Committee held thirty days of full committee hearings and ten days of subcommittee hearings and when the Senate Finance Committee held thirty-six days of full committee hearings and six days of subcommittee hearings.¹⁷⁹ As Yin notes,

[t]he demise of the committees has meant a loss of deliberation and legislative expertise. The “hard work” of legislating that has mostly been performed by the committees—identifying and investigating problems, devising and analyzing possible solutions, obtaining and evaluating input from the public and outside experts, debating solutions and reaching compromises during markups, floor debate, and conferences, and drafting

169. GOLDSCHMIDT, *supra* note 168, at 14–15.

170. Glastris & Edwards, *supra* note 111.

171. GOLDSCHMIDT, *supra* note 168, at 15.

172. *Id.*

173. Yin, *supra* note 126, at 256.

174. *Id.*

175. *Id.* at 257.

176. *Id.*

177. *Id.*

178. *Id.* at 258.

179. *Id.*

careful legislative language to reflect the intended solution—has simply become more and more rare in today’s Congress.¹⁸⁰

There has also been a reduction in committee staff,¹⁸¹ so even in the relatively rare instance when issues do go through committee, they receive less vetting than they previously did. House committees have 50 percent fewer employees and Senate committees have 20 percent fewer employees than they did in 1985.¹⁸² A big shift came in 1995 when the Republican House cut professional staff (such as lawyers, economists, and investigators working within committee) by a third.¹⁸³ Republican House members also drastically altered the House’s committee structure—concentrating power within the House speaker’s office and limiting members’ and their staff’s independent research capacity.¹⁸⁴ By 2009, every House standing committee had fewer staffers than it did in 1994.¹⁸⁵

A larger percentage of the overall staff in Congress now works for individual members of Congress or the leadership team, as opposed to the committees.¹⁸⁶ Between 1979 and 2009, House leadership staff grew by 253 percent, and Senate leadership staff grew by 340 percent.¹⁸⁷ Personal staff members tend to be generalists who share the ideological views of the member of Congress for whom they work, whereas committee staff often have specialized knowledge in a field.¹⁸⁸ Even when congressional leaders hire staff based on expertise in a particular area, these experienced staffers work primarily to advance the partisan goals of the leadership. Again, this makes it that much harder for biases or predispositions to be challenged by relevant data or facts.

Congressional staff recognize there is a problem. While 81 percent of congressional staffers polled consider high-quality, nonpartisan policy expertise to be “very important” to the effective functioning of their chamber, only 24 percent stated that they were “very satisfied” with the quality and quantity of nonpartisan expertise that they have access to.¹⁸⁹ A study by the Congressional Management Foundation of survey responses from senior staff found that senior staff believe that Congress lacks the proper “staff knowledge, skills and abilities,” as there is continuous staff turnover and

180. *Id.*

181. VITAL STATISTICS ON CONGRESS, BROOKINGS (May 21, 2018), <https://www.brookings.edu/multi-chapter-report/vital-statistics-on-congress/> [<https://perma.cc/2JAS-7ZFY>].

182. GOLDSCHMIDT, *supra* note 168, at 17.

183. Glastris & Edwards, *supra* note 111.

184. *Id.*

185. *Id.*

186. Tim LaPira & Herschel Thomas, *So What If Congressional Staff Levels Are Declining?*, LEGBRANCH (June 27, 2016), <http://www.legbranch.com/theblog/2016/6/27/so-what-if-congressional-staff-levels-are-declining> [<https://perma.cc/ZV6N-G9DJ>].

187. Lewallen et al., *supra* note 155, at 185.

188. Ronald C. Moe & Steven C. Teel, *Congress as Policy-Maker: A Necessary Reappraisal*, 85 POL. SCI. Q. 443, 456 (1970).

189. GOLDSCHMIDT, *supra* note 168, at 16.

there is a “lack [of] necessary time and resources to understand, consider and deliberate public policy and legislation.”¹⁹⁰ The survey also showed that staff wanted to “improve Member and staff access to high quality, nonpartisan policy expertise within the Legislative Branch.”¹⁹¹

The sharpest drop may have been in 1995, but the cuts have not stopped since then. Between 1993 and 2010, Congress’s full-time researchers dropped from 6166 to 4000, with the GAO cutting more than 2000 staffers and the CRS losing 20 percent of its capacity.¹⁹² In 2017, a shrinking GAO budget¹⁹³ caused the agency’s full-time staff to drop below 3000 for the first time since 1935.¹⁹⁴ Staffing at the CBO has remained relatively stable over the years,¹⁹⁵ but members of Congress have grown increasingly critical of its projections and analysis when the CBO’s budget scores conflict with their legislative goals, as was the case in 2017 when Republican leadership disputed the CBO analysis of what would happen if the Affordable Care Act were repealed.¹⁹⁶

Instead of relying on these agencies and their objective analysis of data, legislators get their information from think tanks, interest groups, and lobbyists who tend to share the general ideological outlook of the members.¹⁹⁷ That is not a surprise because these congressional agencies developed in the first instance to provide unbiased views and act as a safeguard against interest group pressures.¹⁹⁸ Thus, as the congressional sources of expert judgment diminish, the power of the interest groups increases. Commentators have observed that “it is not a coincidence the demand for ‘revolving door lobbyists’ has grown In effect, Congress has outsourced its analytic capacity to K street lobbyists working for special interests, rather than internally delegating it to staff working for members’ constituents.”¹⁹⁹ Indeed, in 2013, Congress spent around \$2 billion funding the entire House and Senate, while lobbying expenditures exceeded \$3.2

190. *Id.* at 6, 10.

191. *Id.* at 16.

192. Glastris & Edwards, *supra* note 111.

193. Sasha Moss, *What’s in the FY2018 House Legislative Branch Appropriation?*, CONG. DATA COAL. (July 13, 2017), <http://congressionaldata.org/whats-in-the-fy2018-house-legislative-branch-appropriation/> [<https://perma.cc/2L5E-JGKB>].

194. Curtlynn Kramer, *Vital Stats: Congress Has a Staffing Problem, Too*, BROOKINGS (May 24, 2017), <https://www.brookings.edu/blog/fixgov/2017/05/24/vital-stats-congress-has-a-staffing-problem-too/> [<https://perma.cc/3VG9-KBDA>].

195. GOLDSCHMIDT, *supra* note 168, at 17.

196. Dylan Matthews, *The Republican War on the CBO, Explained*, VOX (July 19, 2017, 9:00 AM), <https://www.vox.com/policy-and-politics/2017/7/19/15967224/congressional-budget-office-cbo-war-explained> [<https://perma.cc/U9U8-PKWU>].

197. Drutman & Teles, *supra* note 56 (arguing that over the past four decades, lawmakers have increasingly turned to lobbyists due in part to their own lack of expertise).

198. Cross & Gluck, *supra* note 39, at 1563.

199. LaPira & Thomas, *supra* note 186.

billion (a six-fold increase from the mid-1980s).²⁰⁰ Privately funded think tanks have acquired an enormous presence over the years. As of 2013, 1828 think tanks existed in the United States, many of which were funded by industry, labor, or partisan donors.²⁰¹ Within Washington, D.C., think tanks more than tripled from 1970 to 1996 (rising from one hundred to 306).²⁰² Moreover, many of these think tanks employ former congressional staffers, whose familiarity with the legislative branch enables special interest groups to gain an outsized advantage in the lawmaking process.²⁰³ Without adequate capacity to conduct its own nonpartisan research, Congress cannot challenge the claims made by the powerful interests and think tanks.²⁰⁴

The current lack of expert-driven decision-making in Congress is thus the product of larger patterns. With the rise of partisan politics and unified party orthodoxy, it becomes less important for Congress to have its own base of experts to counter the executive. Either Congress is of the same party as the president, in which case it goes along with the president's platform, or it is controlled by the opposition, in which case it opposes the president's platform, regardless of the underlying facts or expert views. It is partisanship all the way down.²⁰⁵ In the 1940s, when the first Reorganization Act was passed, Congress felt a greater need to keep control over the executive because there was not the same sense of a unified party platform.²⁰⁶ Likewise, legislation in the 1970s grew out of a dissatisfaction with President Nixon's "imperial presidency" that garnered support from both the Democratic majority and some Republicans.²⁰⁷ But we no longer live in an era with that kind of intraparty diversity, so we do not have much bipartisan pursuit of policies backed by the best evidence. Moreover, as Professors Levinson and Pildes note, "there is reason to expect that the parties will remain internally cohesive and ideologically distant for the foreseeable future."²⁰⁸

200. Lee Drutman & Steven Teles, *A New Agenda for Political Reform*, WASH. MONTHLY (Mar./Apr./May 2015), <https://washingtonmonthly.com/magazine/maraprmay-2015/a-new-agenda-for-political-reform/> [https://perma.cc/Y7VJ-TN2N].

201. *Id.*

202. *Id.*

203. Austin Wright & Leigh Munsil, *In House Bill, Arms Makers Wrote Their Own Rules*, POLITICO (May 21, 2015, 6:53 PM), <https://www.politico.com/story/2015/05/in-house-bill-arms-dealers-wrote-their-own-rules-117842> [https://perma.cc/9L4R-LMCT].

204. Harry Stein & Ethan Gurwitz, *Congress Makes Itself Dysfunctional with Legislative Branch Cuts*, CTR. FOR AM. PROGRESS (June 15, 2015, 9:07 AM), <https://www.americanprogress.org/issues/economy/news/2015/06/15/114975/congress-makes-itself-dysfunctional-with-legislative-branch-cuts/> [https://perma.cc/Y8GX-TG46].

205. Notably, party politics was not always this way. "In some historical periods, and on certain issues in every historical period, intraparty cleavages have rivaled interparty ones. But American political parties today are both more internally ideologically coherent and more sharply polarized than at any time since the turn of the twentieth century." Daryl J. Levinson & Richard H. Pildes, *Separation of Parties, Not Powers*, 119 HARV. L. REV. 2311, 2333 (2006).

206. *Id.* at 2334.

207. Sadowski, *supra* note 86, at 11–12.

208. Levinson & Pildes, *supra* note 205, at 2338.

Congress has grown more polarized and divided, with a steady increase in polarization since the 1970s and 1980s.²⁰⁹ Representatives and senators increasingly vote in unison along party lines.²¹⁰ There is far less compromise and instead politicians on both sides of the aisle make much greater use of tools to block the other party's goals, regardless of merit.²¹¹ This includes a greater incidence of the use of tactics such as "repeal of just-enacted statutes, coordinated challenges to their constitutionality, and denial of funds for implementation."²¹² Senate and House counsel have participated less frequently in litigation because they cannot meet the statutorily required threshold of "broad bipartisan support," and instead, there has been an increase in partisan amicus filings by parties.²¹³ To some extent, the increasing polarization in Congress reflects increased polarization among the public at large,²¹⁴ but studies indicate that politicians are even more polarized than the general public.²¹⁵

Another key shift is the dominant role played by special interest groups and financial contributions.²¹⁶ Money buys access because politicians who want to be reelected want to keep the groups who fund them happy.²¹⁷ Interest groups, for the most part, do not target all legislators equally.

209. See Jeff Lewis, *Polarization in Congress*, VOTEVIEW (June 4, 2020), https://voteview.com/articles/party_polarization [<https://perma.cc/KVZ4-T3FV>]; see also *The Polarization of the Congressional Parties*, POLARIZED AM. (June 12, 2018), https://web.archive.org/web/20180901073820/http://polarizedamerica.com/political_polarization_2018.htm; Keith Poole, *Graphic Picture of a Polarized Congress*, UGARESEARCH, Spring 2012, at 32, 32–33, <https://research.uga.edu/news/magazine-archive-spring-2012/> [<https://perma.cc/9327-9CQM>].

210. VITAL STATISTICS ON CONGRESS, BROOKINGS (Feb. 8, 2021), <https://www.brookings.edu/multi-chapter-report/vital-statistics-on-congress/> [<https://perma.cc/V8CZ-664G>].

211. THOMAS E. MANN & NORMAN J. ORNSTEIN, IT'S EVEN WORSE THAN IT LOOKS: HOW THE AMERICAN CONSTITUTIONAL SYSTEM COLLIDED WITH THE NEW POLITICS OF EXTREMISM 101 (2012).

212. *Id.* at 98.

213. Neal Devins, *Measuring Party Polarization in Congress: Lessons from Congressional Participation as Amicus Curiae*, 65 CASE W. RESV. L. REV. 933, 951 (2015).

214. *Political Polarization in the American Public*, PEW RSCH. CTR. (June 12, 2014), <https://www.pewresearch.org/politics/2014/06/12/political-polarization-in-the-american-public/> [<https://perma.cc/8LMA-8N46>].

215. Compare Michael Barber & Nolan McCarty, *Causes and Consequences of Polarization*, in NEGOTIATING AGREEMENT IN POLITICS 19, 25, 36 (Jane Mansbridge & Cathie Jo Martin eds., 2013) (arguing politicians are "more polarized than the public at large" and "representatives were found to take positions that are considerably more extreme than those of their constituents"), and Joseph Bafumi & Michael C. Herron, *Leapfrog Representation and Extremism: A Study of American Voters and Their Members in Congress*, 104 AM. POL. SCI. REV. 519, 530 (2010) (finding most senators and representatives hold more extreme positions than the voters of their party), with ALAN I. ABRAMOWITZ, THE DISAPPEARING CENTER: ENGAGED CITIZENS, POLARIZATION, AND AMERICAN DEMOCRACY 15–16 (2010) (arguing that the polarization of the elite is driven by the "engaged public"—the most politically active citizens—and reflects the preferences of them), and Alan I. Abramowitz & Kyle L. Saunders, *Is Polarization a Myth?*, 70 J. POLITICS 542, 553–54 (2008).

216. See Barber & McCarty, *supra* note 215, at 31.

217. See *id.*

Instead, they want to talk to those predisposed to agree with them and do not spend their time trying to convince others who generally disagree with them.²¹⁸ The result is an echo chamber where politicians meet with people who share their views and get little pushback on their positions.

In this kind of climate, there is little need for objective expert views. There is just one side versus the other, and the current institutional design and staffing in Congress reflect that. The flaws in congressional decision-making and Congress's declining use of experts do not just affect the legislative process and the content of our laws. Because members of Congress speak about issues and policies based on this skewed set of information, they in turn influence how voters view those same issues. This can create a vicious circle where voters demand policies based on misleading factual assumptions, and legislators respond to those same outlier examples by reinforcing the view that they are typical.²¹⁹

II. CONGRESSIONAL DECISION-MAKING WITHOUT EXPERTISE

There is a larger trend in society of discounting or ignoring expert assessments or empirical evidence,²²⁰ but this part focuses on the particularly damaging effects the lack of expert agencies and staff has on the legislative process given the partisan pressures in that context. It then looks to criminal law policymaking as a case study of what the process looks like with and without expert involvement to show how the role of experts can improve policy even in a hyperpartisan environment.

A. Cognitive Bias in the Legislative Process

First, let's consider the decision-making process for the average member of Congress. Cognitive psychologists have taught us a great deal over the past several decades about how human beings make decisions.²²¹ There are two main cognitive strategies that humans use to process information efficiently given the competing stimuli and demands on our thought processes. First, people use heuristics, which are types of mental shortcuts, to allow information to be processed quickly.²²² Heuristics have been characterized as "simple rules of thumb that facilitate rapid, almost reflexive,

218. See John M. de Figueiredo & Brian Kelleher Richter, *Advancing the Empirical Research on Lobbying*, 17 ANN. REV. POL. SCI. 163, 168–69 (2014); Richard L. Hall & Alan V. Deardorff, *Lobbying as Legislative Subsidy*, 100 AM. POL. SCI. REV. 69, 69 (2006) (describing a "subsidy" model of legislation as one where lobbyists align with legislative allies to help them both work toward their goal rather than try to "change legislators' minds").

219. See John O. McGinnis & Charles W. Mulaney, *Judging Facts Like Law*, 25 CONST. COMMENT. 69, 71 (2008) ("As an elected body, Congress is designed to respond to its constituents' subjective desires, not to the objective facts of the world.").

220. See TOM NICHOLS, *THE DEATH OF EXPERTISE: THE CAMPAIGN AGAINST ESTABLISHED KNOWLEDGE AND WHY IT MATTERS* 7 (2017).

221. See Daniel Kahneman & Amos Tversky, *On the Reality of Cognitive Illusions*, 103 PSYCH. REV. 582, 582–83 (1996).

222. See Tversky & Kahneman, *supra* note 14, at 1124.

information processing.”²²³ Second, humans organize incoming information into preexisting organizing principles known as schemas. A schema is “a scripted set of default information and organizational themes that help people focus on the information most likely to be relevant, thereby allowing them to ignore information likely to be irrelevant.”²²⁴ “[S]chemas influence every feature of human cognition, affecting not only what information receives attention, but also how that information is categorized, what inferences are drawn from it, and what is or is not remembered.”²²⁵ While these tools help us to process vast amounts of information, they also lead to “systematic errors in judgment.”²²⁶ These can include, for example, overstating an event’s likelihood or making racially prejudicial assumptions.

Legislators, like the rest of us, have to rely on heuristics to make decisions. The pressing demands of a legislator’s job make the use of heuristics inevitable.²²⁷ But we know from cognitive psychology that heuristics often lead to inferior decisions because of the way they influence the thought process; in the legislative context, that can mean inferior policymaking that affects all of us.

Several heuristics are especially likely to apply to legislators. First, “the availability heuristic, which is the tendency to estimate the importance and frequency of an event based upon how easy it is to recall examples of it,”²²⁸ is likely to play a powerful role in legislative thinking. Because legislators have so many competing demands on their time, they typically lack the time to carefully study the underlying facts and research on a given issue. Nor do they get feedback on how their policies are being applied from day to day. Instead, events that get widespread press coverage or are raised by constituents are likely to play an oversized role in their thinking, and they may assume those events are more typical or common than underlying factual research would indicate.²²⁹ While this heuristic (like others) is likely to be prevalent across a range of subjects, it will be particularly potent when a

223. Rachlinski & Farina, *supra* note 10, at 555.

224. *Id.* at 555–56.

225. Ronald Chen & Jon Hanson, *Categorically Biased: The Influence of Knowledge Structures on Law and Legal Theory*, 77 S. CAL. L. REV. 1103, 1131 (2004).

226. Rachlinski & Farina, *supra* note 10, at 556.

227. See Jeffrey J. Rachlinski, *Heuristics, Biases, and Governance*, in BLACKWELL HANDBOOK OF JUDGMENT AND DECISION MAKING 567, 577 (Derek J. Koehler & Nigel Harvey, eds., 2004) (“Legislators . . . face a cognitively difficult job that almost certainly forces them to rely on mental shortcuts.”).

228. Gary M. Lucas, Jr. & Slavisa Tasic, *Behavioral Public Choice and the Law*, 118 W. VA. L. REV. 199, 223 (2015); see also Tversky & Kahneman, *supra* note 14, at 1124, 1127 (describing the availability heuristic as the tendency for people to “assess the frequency of a class or the probability of an event by the ease with which instances or occurrences can be brought to mind”).

229. See Lucas & Tasic, *supra* note 228, at 211 (noting that the availability heuristic focuses people’s “attention on problems that receive significant media coverage, which causes the government to neglect more important but less newsworthy issues”).

subject is emotional, such that overestimation of a perceived risk is “heavily influenced by mental images of possible outcomes.”²³⁰

One key method for counteracting bias is to make sure that people making decisions encounter relevant information that is inconsistent with their preconceived notions.²³¹ Commentators have pointed out that exposure to stereotype-incongruent exemplars can counter implicit associations people may otherwise have, including about racial and ethnic groups. Bias occurs in part because common narratives put forth by the media tend to strengthen the link between certain groups and negative behaviors. For example, stories about Black people or immigrants committing crime or about certain racial minorities committing welfare fraud can forge a link in people’s minds that those behaviors are associated with those groups.²³²

It is thus helpful to present narratives that break those linkages to “recode” how people think about certain groups and associated behaviors.²³³ The implication of this research might suggest that exposing legislative decision-makers to different types of people can have a debiasing effect when they are debating policy.²³⁴ That means effort should be made to have diverse witnesses at legislative hearings and for diverse constituents to meet with their representatives. But there are limits to a strategy based in giving legislators greater exposure to different narratives and perspectives. Some researchers report smaller debiasing effects than predicted, in part because any temporary exposure to stereotype-incongruent exemplars is often overpowered by the daily, schema-consistent narratives found in mass media.²³⁵ The effect of direct contact with stereotype-incongruent exemplars has been modest because of the daily, real-life exposure that rebiasing people shortly after the initial debiasing.²³⁶ Rebiasing is likely to be strong in Congress because of the partisanship that exists there and the fact that Congress does not get a steady stream of debiasing examples to consider.

Legislators might also start with a preconceived idea about how something is working, which in turn serves as an anchor for their subsequent thought

230. *Id.* at 224–25. For an argument that emotional reactions, such as fear and compassion, have an important place in the development of public policy, see Rachel F. Moran, *Fear Unbound: A Reply to Professor Sunstein*, 42 WASHBURN L.J. 1 (2002).

231. See Chen & Hanson, *supra* note 225, at 1229–30; Negowetti, *supra* note 16, at 311 (“Psychological research also shows that avoiding the influences of stereotypes in decision-making requires a decisionmaker to put forth more effort and time to gathering individuating information . . . rather than relying on her triggered stereotypes.”).

232. See Jerry Kang, *Trojan Horses of Race*, 118 HARV. L. REV. 1489, 1563 (2005).

233. See *id.* at 1580.

234. See Kang et al., *supra* note 16, at 1169–70 (“[I]f we have a negative attitude toward some group, we need exposure to members of that group to whom we would have a positive attitude. If we have a particular stereotype about some group, we need exposure to members of that group that do not feature those particular attributes. These exposures can come through direct contact with countertypical people.”).

235. See, e.g., Jennifer A. Joy-Gaba & Brian A. Nosek, *The Surprisingly Limited Malleability of Implicit Racial Evaluations*, 41 SOC. PSYCH. 137, 141 (2010) (finding an effect that was substantially smaller than that originally reported).

236. See Kang et al., *supra* note 16, at 1169–70.

processes. Or legislators may have a fixed idea about a particular sentence someone should receive for crime X, which in turn anchors their views about crime Y. This dynamic is known as anchoring.²³⁷

Because legislators operate in a world of partisan politics, they are also particularly susceptible to “availability cascades,” in which increasing numbers of people accept imperfect information as true because other people believe it.²³⁸ A Republican, for example, is likely to accept what a group of Republicans is thinking, just as a Democrat is likely to accept what other Democrats are thinking. And the more members of a political party speak only to those who share their views, they are likely to gravitate toward more extreme positions because of a phenomenon known as group polarization, which is when like-minded people in a group tend toward extremes.²³⁹

Legislators may also be prone to confirmation bias, which occurs when they seek out information that confirms their preexisting beliefs but ignore information that undercuts those views.²⁴⁰ Relatedly, legislators may engage in biased fact assimilation or motivated reasoning, whereby they view confirming evidence at face value but subject disconfirming evidence to far more critical evaluation or ignore it.²⁴¹ All people engage in motivated reasoning and suffer from confirmation bias, but legislators may be especially likely to succumb to these psychological pressures because they outwardly take positions and do not want to have to walk them back or be viewed as someone who waffles or made previous errors that they must account for.

The use of schemas can also lead legislators to make systemic errors in judgment. One aspect of the use of schemas involves framing effects, or “the tendency to treat potential gains differently from potential losses.”²⁴² In particular, people tend to be risk averse about losses, so they will focus more on avoiding potential harms than on the benefits they forgo if they do not take action. Legislators thus may be prone to avoiding taking actions that could produce immediate harms, even if those same actions would produce greater benefits in the long term. For example, legislators may resist passing a criminal justice reform measure that would reduce the sentences of people currently serving time in prison, for fear that a person might commit a crime upon release. That potential harm will weigh heavily on their minds even

237. *Why We Tend to Rely Heavily Upon the First Piece of Information We Receive*, DECISION LAB, <https://thedeclarationlab.com/biases/anchoring-bias/> [https://perma.cc/BEH2-57WV] (last visited Oct. 29, 2021).

238. Lucas & Tasic, *supra* note 228, at 223. See generally Timur Kuran & Cass R. Sunstein, *Availability Cascades and Risk Regulation*, 51 STAN. L. REV. 683 (1999).

239. See Cass R. Sunstein, *Deliberative Trouble?: Why Groups Go to Extremes*, 110 YALE L.J. 71, 74–77 (2000).

240. See Lucas & Tasic, *supra* note 228, at 225–26; Raymond S. Nickerson, *Confirmation Bias: A Ubiquitous Phenomenon in Many Guises*, 2 REV. GEN. PSYCH. 175, 175 (1998).

241. See Charles G. Lord et al., *Considering the Opposite: A Corrective Strategy for Social Judgment*, 47 J. PERSONALITY & SOC. PSYCH. 1231, 1232 (1984); Lucas & Tasic, *supra* note 228, at 226.

242. Rachlinski & Farina, *supra* note 10, at 557.

when, overall, a sentencing reduction would produce greater public safety benefits because most people released will not commit additional crimes, their earlier release could ease their reentry into society, and the resources saved could be used for more productive public safety efforts.

Legislators, like everyone, may also suffer from “focusing illusion,” whereby they passively accept the frame or characterization of the problem that is provided to them and “restrict their thoughts to salient situational elements.”²⁴³ So if legislators are presented with stories of immigrants or Black people committing crimes, they may have associations between certain ethnic and racial groups with those activities that then guide their thinking about those issues going forward. This is especially so if the legislator is not a member of the minority group, because people suffer from in-group bias, “a readiness to reduce society to us and them.”²⁴⁴

The “determined *other* effect,” where “any determined target evokes a stronger emotional reaction than an undetermined target,”²⁴⁵ also plays a role in legislators’ thought process, and again, the power of that effect will be strongest when victims are part of the legislator’s in-group. This helps explain why narratives of particular crime victims often motivate legislative responses tailored to those specific victims instead of considering a problem at a greater level of generality.²⁴⁶

Finally, it should be noted that the people elected to serve as legislators may win their elections precisely because they reflect the same biases as the people who vote for them.²⁴⁷ “Not only will their message resonate, but these politicians will appear more genuine than will rational, well-informed politicians who recognize bad policies but pretend otherwise in order to get elected.”²⁴⁸

All of these biases thus combine with partisan incentives to create an environment where policymaking is likely to be driven by interest groups and instincts. But some scholars have argued that Congress has the capacity to overcome this. In a pathbreaking article on the relationship between cognitive psychology and optimal government design, Professor Jeffrey Rachlinski and Cynthia Farina argue that, despite the various cognitive biases that legislators might use in their decision-making, Congress nevertheless has a relative advantage over the courts and the president because it has “greater potential than any of the other key constitutional actors for creating expertise

243. Lucas & Tasic, *supra* note 228, at 217.

244. *Id.* at 234 (quoting Donald R. Kinder & Cindy D. Kam, US AGAINST THEM: ETHNOCENTRIC FOUNDATIONS OF AMERICAN OPINION 8 (2010)).

245. Deborah A. Small & George Loewenstein, *Helping a Victim or Helping the Victim: Altruism and Identifiability*, 26 J. RISK & UNCERTAINTY 5, 14 (2003).

246. *See* Zoldan, *supra* note 7, at 549.

247. *Cf.* BRYAN CAPLAN, THE MYTH OF THE RATIONAL VOTER: WHY DEMOCRACIES CHOOSE BAD POLICIES 168 (2007) (“Unusually talented politicians do more than cater to current misconceptions. They steer the grateful public toward the ‘new and improved’ misconceptions of tomorrow.”).

248. Lucas & Tasic, *supra* note 228, at 214–15.

within itself and structuring its processes to correct for errors.”²⁴⁹ They based their view on the fact that Congress can make use of expert assistance through specialized committees that give its members relevant experience over time²⁵⁰ and the institutional memory of those who work there on substantive issues.²⁵¹ They believed expert congressional agencies like the GAO could further act as valuable checks against cognitive bias because they “will likely adopt a different decisionmaking perspective on the problems they are asked to address, providing at least the opportunity for Congress to expose itself to novel perspectives ‘outside’ the immediate decisions it must make.”²⁵²

The key lesson of Part I is that these mechanisms are falling into disuse, which means Congress’s relative institutional advantage at overcoming biased decision-making no longer holds. In a world in which Congress dismisses the value of expertise, it may no longer be the case that it retains its advantages over the courts and the executive branch in the battle against cognitive bias. To be sure, there may be other reasons to prefer Congress as a policymaking body—perhaps because of its greater accountability to constituents—but its supposed advantages as a superior substantive policy maker have dissipated.²⁵³

Indeed, Congress may operate at a policymaking disadvantage because unlike the executive and judicial branches—which see how policies apply to real-world cases and facts on a regular basis—Congress only gets a wholesale view of any problem. To the extent Congress sees retail examples, they are all the handpicked outliers of partisans seeking to make a predetermined point. There is thus no feedback mechanism in place that challenges the assumptions or biases of members of Congress. Instead, they get examples that just confirm the biases they already have. Partisanship and bias therefore align to create an environment that is particularly ill-suited for arriving at the best policy based on objective evidence.

B. Criminal Law and Policy as a Case Study

One can see the danger of a legislative process that fails to consider empirical information by looking at Congress’s approach to criminal laws. This is a space where Congress has never really made use of expert assessment or shown regard for empirical facts or studies. Indeed, there is perhaps no area where partisan incentives and cognitive bias triumph over objective analysis more than in legislation surrounding criminal law. There are countless examples of legislators’ and voters’ conceptions of what a

249. Rachlinski & Farina, *supra* note 10, at 586.

250. *Id.* at 572–73.

251. *Id.* at 574.

252. *Id.* at 575.

253. Some scholars have argued that, even with these expert agencies in place, Congress is an inferior fact-finder because of its partisan incentives. *See, e.g.*, Devins, *supra* note 20, at 1178, 1182–86; McGinnis & Mulaney, *supra* note 219, at 71.

typical crime or criminal in a given category looks like then dictating their choices thereafter, even when the facts are otherwise.²⁵⁴ This is not surprising given that scholars have found that newly presented risks and increases in the level of known risks “tend to generate extreme responses” and “create pressure for alarmist government regulations.”²⁵⁵ Crime is an area where new risks constantly present themselves—either with new drugs or certain criminal behaviors—and where existing risks always seem to be increasing because of the way the media covers crime. The lead story on the local news is typically a crime story and studies have found roughly one third of all local television news stories are about crime.²⁵⁶ The number of stories in the media about crime either increases or stays constant, even when crime itself is declining.²⁵⁷ The risk of crime thus appears ever-present, and with it, the pressure for government action.

Congress’s reaction to the emergence of crack cocaine in the 1980s is a perfect example. In the wake of media reports characterizing crack as more dangerous than other drugs and after the well-publicized death of basketball star Len Bias of what was believed to be a crack cocaine overdose, Congress rushed to pass crack penalties.²⁵⁸ Representative Tip O’Neill, the Speaker of the House from Massachusetts, essentially started a bidding war on crack penalties, in large part because the Boston Celtics drafted Bias to join the team before his death.²⁵⁹ Congress viewed crack through a schema that presented it as a drug associated with unprecedented danger and violence.²⁶⁰ This led to what would become known as the 100-to-1 ratio between powder and crack cocaine. Under Congress’s framework, the mere possession of five grams of crack yielded a mandatory minimum sentence of five years and possession of fifty grams of crack (an amount associated with trafficking) yielded a ten-year mandatory minimum.²⁶¹ It would take one hundred times those quantities for someone to receive the same sentence for powder cocaine.²⁶² Congress relied on media accounts and did not bother to seek expert guidance. Congress did not even ask its newly created U.S.

254. See RACHEL ELISE BARKOW, *PRISONERS OF POLITICS: BREAKING THE CYCLE OF MASS INCARCERATION* 21–32 (2019) (describing instances of disconnect between public statements and understanding about what statutes cover and the actual acts or individuals covered by those statutes).

255. W. Kip Viscusi & Ted Gayer, *Behavioral Public Choice: The Behavioral Paradox of Government Policy*, 38 HARV. J.L. & PUB. POL’Y 973, 994 (2015).

256. JAMES KILGORE, *UNDERSTANDING MASS INCARCERATION: A PEOPLE’S GUIDE TO THE KEY CIVIL RIGHTS STRUGGLE OF OUR TIME* 113 (2015) (reporting on studies as of 2009).

257. See BARKOW, *supra* note 254, at 106–07.

258. *Id.* at 74.

259. *Id.*

260. Rachel E. Barkow, *Categorical Mistakes: The Flawed Framework of the Armed Career Criminal Act and Mandatory Minimum Sentencing*, 133 HARV. L. REV. 200, 215 (2019).

261. Anti-Drug Abuse Act of 1986, Pub. L. No. 99-570, § 1002, 100 Stat. 3207, 3207-2 to 3207-4 (codified as amended at 21 U.S.C. § 841).

262. BARKOW, *supra* note 254, at 74.

Sentencing Commission to study the issue.²⁶³ In the words of one representative: “We initially came out of committee with a 20-to-1 ratio. By the time we finished on the floor, it was 100-to-1. We didn’t really have an evidentiary basis for it.”²⁶⁴

If Congress had bothered to seek expert guidance, they would have discovered that crack and powder are indistinguishable on all the relevant measures they focused on. The two drugs have indistinguishable pharmacological effects, “crack is no more addictive than powder cocaine,” and individuals using “crack are no more likely to have violent reactions than those who use powder cocaine.”²⁶⁵ If they had engaged in an inquiry instead of going off their assumptions, they would have further learned that Bias had overdosed on powder, not crack, cocaine. And if they took the time to study how their proposed law would apply, they would have discovered grotesque racial disparities in treating crack and powder so differently. In 2013, 83 percent of those charged with crack trafficking offenses were Black, but only 5.8 percent were white.²⁶⁶ In contrast, Black people comprised only 31.5 percent of powder cocaine trafficking offenders, Hispanic people made up 58 percent, and white people made up 9.4 percent.²⁶⁷ It took more than twenty-four years for Congress to reduce the disparity between crack and powder, and even then it was not to a 1-to-1 ratio, but to an 18-to-1 ratio.²⁶⁸

Crack was initially penalized so harshly and continually treated as such for decades because legislators had an image in mind of crack as an especially dangerous drug associated with violence given news stories associating the drug with violent acts. The availability heuristic meant Bias’s death and news stories of violence dominated their thinking, and they overestimated the dangers of crack. And in the absence of hearings or consultation with experts, no other information could break through to change their course. Legislators continued to keep crack sentences high, likely in part because of the endowment effect and the fact that they did not want to roll back the long sentences they already put on the books, which would make it look like people were getting out too early. To be sure, even an expert consultation might not have prompted a 1-to-1 ratio. But discovering that the two drugs are indistinguishable on the relevant measures and getting accurate predictions of the racial bias might have tempered the leanings of many members and at least reduced that disparity.

263. Barkow, *supra* note 260, at 213.

264. NAOMI MURAKAWA, *THE FIRST CIVIL RIGHT: HOW LIBERALS BUILT PRISON AMERICA* 124–25 (2014).

265. Barkow, *supra* note 260, at 215–16.

266. U.S. SENT’G COMM’N, *QUICK FACTS: CRACK COCAINE TRAFFICKING OFFENSES* (2014), https://www.ussc.gov/sites/default/files/pdf/research-and-publications/quick-facts/Quick_Facts_Crack_Cocaine.pdf [<https://perma.cc/76JW-3FCU>].

267. U.S. SENT’G COMM’N, *QUICK FACTS: POWDER COCAINE TRAFFICKING OFFENSES* (2014), https://www.ussc.gov/sites/default/files/pdf/research-and-publications/quick-facts/Quick_Facts_Powder_Cocaine.pdf [<https://perma.cc/26UE-U26P>].

268. *See* Fair Sentencing Act of 2010, Pub. L. No. 111-220, 124 Stat. 2372 (codified as amended in scattered sections of 21 U.S.C.).

Nor has crack been unique in terms of how Congress approaches drug policy. The entire field is largely based on anecdotes and assumptions. Congress established severe mandatory minimum penalties for drugs assuming they would apply to high-level traffickers and kingpins and failed to consult with experts or the Sentencing Commission to learn how they would actually operate.²⁶⁹ The result is that most people sentenced to mandatory minimums are actually low-level members of drug conspiracies. Of the people in federal prison serving sentences for drug crimes, only 14 percent of these individuals were identified as being the manager, leader, or organizer that the law's drafters had in mind, and yet they are serving sentences of eleven years on average.²⁷⁰ One reason that legislators failed to appreciate how their new law would apply is that they were not thinking about how conspiracy law would affect their decisions and they did not ask an expert agency or anyone else with the relevant knowledge.

In just about every area where Congress considers legislation dealing with crime, it relies heavily on narratives of egregious cases but fails to consider data or facts, even when the stated goal is public safety and a broader consideration of facts would suggest a different approach to maximize public safety. Consider, for example, Congress's decision to expand sex offender registration requirements to juvenile offenders.²⁷¹ The act imposing this requirement was named after Amy Zyla, and her story of being sexually assaulted by a juvenile offender who went on to reoffend after being released was front and center in the discussion of the law.²⁷² The determined other effect operated in full force, as legislators were motivated to remedy what happened to Amy and subsequent victims of her attacker. But is a notification approach the right one to stop these crimes from being committed? Would putting children on sex offender registries stop more crime or would it make it more likely that those children go on to reoffend because of what being on the registry would do to their own prospects of reentry? One would expect a legislative body to want expert assessment of these questions, but that was not part of their inquiry. In fact, there were just a couple brief statements expressing concerns about the proposed legislation and the wisdom of putting "13 and 14 year olds" on registries.²⁷³

If members of Congress had considered or cared about the effectiveness of sex offender registries, they would have discovered a wealth of empirical data casting doubt on their utility.²⁷⁴ Similarly, they would have found that

269. Barkow, *supra* note 260, at 216–17.

270. See CHARLES COLSON TASK FORCE ON FED. CORR., *TRANSFORMING PRISONS, RESTORING LIVES* 11–12 (2016).

271. Adam Walsh Child Protection and Safety Act of 2006, Pub. L. No. 109-248, 120 Stat. 587 (codified as amended in scattered sections of the U.S.C.).

272. 152 CONG. REC. 2974–75 (2006) (statement of Rep. Mark Green).

273. *Id.*

274. See Amanda Y. Agan, *Sex Offender Registries: Fear Without Function?*, 54 U. CHI. J.L. & ECON. 207, 235 (2011); Amy Baron-Evans, *Still Time to Rethink the Misguided*

the federal classifications that place offenders into different tiers based on legislators' views of risk²⁷⁵ actually do a poor job of predicting recidivism when compared to state approaches and actuarial predictors.²⁷⁶ If legislators would have explored the science of juvenile brain development, they likewise would have discovered that treating that population the same as adult sex offenders makes no sense given biological differences in how juveniles reason about risk and crime and that a focus on rehabilitation is far more likely to reduce recidivism among that population.²⁷⁷

We see similar shortcomings in decision-making when Congress considered changes to bail practices in the 1980s. The Bail Reform Act of 1984²⁷⁸ created significant changes in the federal bail and pretrial detention statutory scheme originally enacted in the Bail Reform Act of 1966.²⁷⁹ Among other things, the Act allowed judges far greater leeway to detain defendants before their trials if they posed a risk to public safety.²⁸⁰ Legislators had certain stories in mind and told them during the debate. Thus, Senator Orrin Hatch spoke of violent crimes committed by people awaiting trial, including “a 17-year-old [who] was apprehended for the fatal shooting of a 68-year-old in the course of a robbery” and who “had two armed robbery cases pending at the time of the killing.”²⁸¹ Senator Hatch’s final story was particularly intended to invoke anger and concern, as it involved a defendant who was out on bail for a stabbing with intent to kill yet had committed a nearly identical crime shortly after release:

[A] defendant stabbed a man at a bar who refused to buy him a drink. This victim is still only barely clinging to life in a hospital intensive care unit. At the time of the crime, the defendant was on pretrial release for another incident *in the same bar under identical circumstances*. In addition, he was under grand jury investigation for at least one other unprovoked stabbing.²⁸²

Approach of the Sex Offender Registration and Notification Act, 20 FED. SENT’G REP. 357, 359 (2008).

275. See Adam Walsh Child Protection and Safety Act of 2006.

276. KRISTEN M. ZGOBA ET AL., A MULTI-STATE EVALUATION OF SEX OFFENDER RISK AND RECIDIVISM USING THE ADAM WALSH ACT TIERS (2013), <https://www.thefreelibrary.com/A+multi-state+evaluation+of+sex+offender+risk+and+recidivism+using+the+...-a0332811047> [<https://perma.cc/GBS8-JGQP>].

277. See Catherine L. Carpenter, *Against Juvenile Sex Offender Registration*, 82 U. CIN. L. REV. 747, 758–64, 788 (2014); Robin Walker Sterling, *Juvenile-Sex-Offender Registration: An Impermissible Life Sentence*, 82 U. CHI. L. REV. 295, 312 (2015).

278. Pub. L. No. 98-473, tit. II, § 203(e)(1)–(2), 98 Stat. 1985 (codified as amended in scattered sections of the U.S.C.) (enacted as tit. II, ch. I of a joint resolution making continuing appropriations for the fiscal year 1985, and for other purposes, H.J. Res. 648, 98th Cong. (1984)).

279. Pub. L. No. 89-465, 80 Stat. 214 (codified as amended in scattered sections of 18 U.S.C.).

280. Kenneth F. Berg, *The Bail Reform Act of 1984*, 34 EMORY L.J. 685, 703 (1985) (citing the Bail Reform Act of 1984 § 3142(e)–(f)).

281. 130 CONG. REC. 1822 (1984) (statement of Sen. Orrin Hatch).

282. *Id.* (emphasis added).

The goal of reducing pretrial crime and violence is laudable, but any assessment of pretrial detention should consider whether detention itself poses public safety risks—and we have ample evidence that it does. Pretrial detention often means the person being held loses a job, housing, or even custody of a child because so many people who are detained are already living on the margins.²⁸³ These pressures mean that those detained pretrial are more likely to plead guilty (regardless of their crime or actual guilt).²⁸⁴ Those detained pretrial also serve longer sentences than otherwise similarly situated people who are released pretrial, perhaps because it is more difficult for them to work with lawyers in defending themselves.²⁸⁵ Whatever the reason, the increased likelihood of incarceration costs money that could be better spent elsewhere. But far more relevant to any consideration of pretrial detention is that pretrial detention itself—regardless of the underlying crime and holding other factors constant—leads to more crime later. Studies have found that incarcerating individuals before trial was associated with a 30 percent increase in felonies and a 20 percent increase in misdemeanors eighteen months after their hearing.²⁸⁶

A process that sets pretrial detention policy without even considering these tradeoffs is thus fundamentally flawed if the goal is public safety. Interestingly, Senator Hatch noted that he told stories of people committing crimes while released before trial precisely because he wanted them to motivate the debate “so that [Congress does] not make the mistake of concentrating on statistics that fail to account for the human suffering involved in crime.”²⁸⁷ Presumably Hatch was referring to statistics that show that most people released before trial do not commit crimes. But if the goal is minimizing human suffering and reducing crime, legislators cannot ignore the costs of pretrial detention, including the costs to public safety. An expert assessing all the data with a goal toward maximizing public safety would likely have limited pretrial detention more than the ultimate legislation did.

Because most politicians have no expertise or training in criminal justice policy, they may be unaware of the downsides and tradeoffs of more punitive policies such as longer sentences, registries, and pretrial detention.²⁸⁸ They are setting criminal justice policies as a general matter and are often responding to particularly heinous cases or press accounts, which they often discuss at length in their floor debates and discussions of proposed laws. What they are not doing is consulting any expert body or individual who studies the area to see what the most effective policy would be.

283. Nick Pinto, *The Bail Trap*, N.Y. TIMES MAG. (Aug. 13, 2015), <https://www.nytimes.com/2015/08/16/magazine/the-bail-trap.html> [<https://perma.cc/2ALP-P74V>].

284. See Paul Heaton et al., *The Downstream Consequences of Misdemeanor Pretrial Detention*, 69 STAN. L. REV. 711, 724–29 (2017).

285. CHRISTOPHER T. LOWENKAMP ET AL., LAURA AND JOHN ARNOLD FOUND., INVESTIGATING THE IMPACT OF PRETRIAL DETENTION ON SENTENCING OUTCOMES 4 (2013).

286. See Heaton et al., *supra* note 284, at 718; LOWENKAMP ET AL., *supra* note 285, at 19.

287. 130 CONG. REC. 1822 (1984) (statement of Sen. Orrin Hatch).

288. For a discussion of Congress’s flawed assumptions, see Barkow, *supra* note 260, at 219–27.

Federal criminal law is a cautionary tale of what happens when Congress cares little about what experts have to say. But it also shows how expertise can help improve policymaking and that partisanship does not have to operate without any checks by expert assessments. Even in this space—which has been as politicized as any—experts have made a difference where they have been allowed to operate and were consulted. In recent years, Congress has paid more attention to the Sentencing Commission and its recidivism studies and data. After the Commission lowered crack sentences under the Sentencing Guidelines and applied its changes retroactively in 2007, Congress followed suit and lowered the legislative 100-to-1 ratio between powder and crack cocaine in the Fair Sentencing Act of 2010.²⁸⁹ Seeing that crack penalties could be lowered without negative consequences influenced Congress's decision, as did the voluminous record the Commission assembled over the years showing that crack penalties overstated the relative harm of the drug and created huge racial disparities in sentencing.

Congress has also been influenced by Commission recidivism studies in the wake of Guideline sentencing reductions. The Commission studied people who received lower crack sentences after its 2007 changes over a five-year period and compared them to a similarly situated group that served their sentences in full because they were no longer incarcerated when the Commission made its change.²⁹⁰ The Commission found no statistically significant difference in recidivism rates between the two groups.²⁹¹ These results paved the way for the Commission to lower all federal drug sentences and make those changes retroactive in 2014, ultimately allowing 30,000 people to receive average sentencing reductions of more than two years.²⁹² Following the blueprint of its crack sentencing changes, the Commission analyzed recidivism rates of those who received the retroactive reductions and compared them to a similarly situated group of individuals who served their sentences in full, and again the Commission found no statistically significant difference between the two groups.²⁹³

289. Pub. L. No. 111-220, 124 Stat. 2372 (codified as amended in scattered sections of 21 U.S.C.); see Rachel E. Barkow, *The Evolving Role of the United States Sentencing Commission*, 33 FED. SENT'G REP. 3, 7 (2020).

290. U.S. SENT'G COMM'N, RECIDIVISM AMONG OFFENDERS RECEIVING RETROACTIVE SENTENCE REDUCTIONS: THE 2007 CRACK COCAINE AMENDMENT (2014).

291. The group that received the retroactive reduction was rearrested at a rate of 43.3 percent, compared to a rate of 47.8 percent for the group of individuals who served their full sentences. *Id.* The Commission made similar findings when it studied retroactive reductions in the Guidelines in 2011 that were made in response to passage of the Fair Sentencing Act. U.S. SENT'G COMM'N, RECIDIVISM AMONG FEDERAL OFFENDERS RECEIVING RETROACTIVE SENTENCE REDUCTIONS: THE 2011 FAIR SENTENCING ACT GUIDELINE AMENDMENT (2018).

292. See Barkow, *supra* note 289, at 8.

293. See U.S. SENT'G COMM'N, 2014 DRUG GUIDELINES AMENDMENT RETROACTIVITY DATA REPORT (2018).

These empirical studies proved critical to the passage of the First Step Act of 2018²⁹⁴ and its provisions that made the 2010 changes to the crack/powder disparity retroactive.²⁹⁵ The Commission's recidivism studies showed that longer sentences were not necessary for greater deterrence, thus pushing back on a common congressional assumption.²⁹⁶ Congress also sought out data from the Commission on who would be covered by various changes to mandatory minimum sentences and the safety valve that makes the mandatory sentences inapplicable to certain cases.²⁹⁷ This information was critical to getting enough votes for the legislation to pass. So, too, were hearings and reports on problems with compassionate release as it was then operating.²⁹⁸ Congress may have assumed that the Federal Bureau of Prisons (BOP) was the right gatekeeper to make sure people were not being released from prison in the absence of real need, but the reports and hearings on the topic showed that the BOP was turning away just about everyone, leaving sick and vulnerable people to die in prison when they were in fact the very candidates Congress initially had in mind when it created the compassionate release law.²⁹⁹ The Commission's analysis of this issue, along with reports from the U.S. Department of Justice Office of the Inspector General, greatly influenced the congressional debate and subsequent legislation.³⁰⁰

The moral of the story is that having experts involved in policymaking can and does change content, even with political pressures doing most of the work. The absence of expert consultation can yield policies that fail to achieve their objective or that are centered around outlier cases and ill-suited for most contexts. To be sure, expertise will not always or even typically be enough to overcome partisanship and interest group pressures. But it often makes a difference. Experts can help shape laws for the better and overcome misimpressions and biases that members of Congress bring to the process. That is why Professors Jesse Cross and Abbe Gluck tout the congressional bureaucracy as a "counterweight to hyper-partisanship."³⁰¹ The experts in Congress can have just that effect.

294. Pub. L. No. 115-391, 132 Stat. 5194 (codified as amended in scattered sections of 18, 24, and 31 U.S.C.).

295. *Id.*

296. Barkow, *supra* note 260, at 219–20.

297. See Barkow, *supra* note 289, at 8; U.S. SENT'G COMM'N, AN OVERVIEW OF MANDATORY MINIMUM PENALTIES IN THE FEDERAL CRIMINAL JUSTICE SYSTEM (2017).

298. Barkow, *supra* note 289, at 8; see, e.g., U.S. DEP'T OF JUST., OFF. OF THE INSPECTOR GEN., EVALUATIONS & INSPECTIONS DIV., THE FEDERAL BUREAU OF PRISONS' COMPASSIONATE RELEASE PROGRAM (2013), <https://oig.justice.gov/reports/2013/e1306.pdf> [<https://perma.cc/4LLF-CY7P>]; U.S. SENT'G COMM'N, PUBLIC HEARING ON COMPASSIONATE RELEASE AND CONDITIONS OF SUPERVISION (2016), https://www.usc.gov/sites/default/files/Transcript_6.pdf [<https://perma.cc/M7ZD-GD6D>].

299. See William W. Berry III, *Extraordinary and Compelling: A Re-Examination of the Justifications for Compassionate Release*, 68 MD. L. REV. 850, 866–68 (2009); U.S. DEP'T OF JUST., *supra* note 298, at i.

300. See Barkow, *supra* note 289, at 8.

301. Cross & Gluck, *supra* note 39, at 1610.

And that is precisely why the decline in Congress's substantive expertise infrastructure is so disconcerting.³⁰² In the absence of data, evidence-gathering, and a process that seeks to gather objective assessments, sensationalized stories and narratives drive policies, and the result is that those policies can be ill-fitting to the real world in which they need to apply.

III. IMPLICATIONS

What, if anything, should be done about the lack of respect for substantive expertise and neutral fact-finding by Congress? This part considers this question in two contexts. Part III.A asks what Congress could or should do because it remains up to Congress what process it will follow. Part III.B asks whether there are or should be any doctrinal implications if Congress stays on the present course and continues to devalue internal expertise in its decision-making. In particular, Part III.B turns to the implications for the debate over the status of the nondelegation doctrine and for statutory interpretation.

A. Reforming Congress

The history of the use of experts in Congress shows that at various points, Congress has recognized their value. It is therefore worth asking whether it is possible to return to a model of greater substantive committee involvement, more staffing and support for the expert bodies that legislators in Congress previously consulted, and better use of objective witnesses and consultants who have expertise in an area and are not associated with extreme partisan views.

One factor pointing in favor of that possibility is that key actors in Congress realize there is a problem. A 2017 survey of current and former members of Congress and congressional staffers found that most respondents considered access to nonpartisan policy expertise in the legislative branch "very important," but only a quarter were "very satisfied" with the current situation.³⁰³ In early 2019, the House of Representatives created a bipartisan

302. Cross and Gluck are more optimistic about the role of the congressional bureaucracy than I am because they are focused on those legislative bodies that assist with the lawmaking process and do not focus on the decline in the use of those agencies with substantive policymaking expertise. *See, e.g., id.* at 1640–41 (noting that "[w]hen it comes to a broad swath of legislative activities (including drafting, estimating, auditing, analyzing, and following the procedures for amending legislation), Congress continues to seek out rational deliberation and expertise" while conceding that "the bureaucracy's institutions are not Congress's main source of substantive subject-matter expertise"). When one focuses on the internal bodies in Congress that focus on substance and not process, the story is far more bleak.

303. *See* GOLDSCHMIDT, *supra* note 168, at 16 ("Member and staff access to high-quality, nonpartisan policy expertise within the legislative branch was only slightly less important to the senior staffers we surveyed than their staffers' skills and abilities. Most (81%) considered it 'very important,' and only 24% were 'very satisfied' (Figure 6). There were also 44% of the staffers who were 'somewhat satisfied.'").

Select Committee on the Modernization of Congress,³⁰⁴ and Democratic Representative Bill Pascrell observed at one of their hearings that Congress had become “feeble . . . from deliberate institutional vandalism.”³⁰⁵ He called for skilled congressional staff so that they would not be “overwhelmed by the army of corporate lobbyists roaming our halls and a world growing more socially, economically, and technologically complex at a stunning rate.”³⁰⁶ But thus far, the Committee’s recommendations have focused more on technology and transparency reforms rather than reinvigorating the use of experts.³⁰⁷

Analysts and commentators outside of Congress have also pushed for greater legislative expertise. Some ex-congresspeople working as lobbyists have also made recommendations for Congress to increase funding for agencies like GAO and CRS, increase the funding available for congressional staffers, and shift power back toward committees.³⁰⁸ Many congressional observers have called for recreating the OTA.³⁰⁹ Others have called for

304. Tajha Chappellet-Lanier, *There’s a New Select Committee for Modernizing Congress. What Does It Mean for Legislative IT?*, FEDSCOOP (Jan. 7, 2019), <https://www.fedscoop.com/select-committee-modernizing-congress/> [<https://perma.cc/F4B8-QGZJ>].

305. LEE DRUTMAN ET AL., MODERNIZING CONGRESSIONAL CAPACITY 2 (2019), <https://www.legbranch.org/app/uploads/2019/09/APSA-memo-capacity-subcommittee-report-09-2019.pdf> [<https://perma.cc/5ECF-HKB8>].

306. *Id.*

307. *116th Congress Recommendations*, SELECT COMM. ON THE MODERNIZATION OF CONG., <https://modernizecongress.house.gov/116th-recommendations> [<https://perma.cc/TLV9-T87D>] (last visited Oct. 29, 2021). The Committee’s chairman, Representative Derek Kilmer (D-WA) has featured on his website the perspectives of former lawmakers who have called for increasing legislative expertise. Kate Ackley, *Lobbyists to Congress: Pay Staffers Better*, DEREK KILMER (May 2, 2019), <https://kilmer.house.gov/news/in-the-news/lobbyists-to-congress-pay-staffers-better> [<https://perma.cc/VH24-RD35>] (describing proposals from former lawmakers, including calls to increase staff for expert agencies); David Thorton, *To Modernize Congress, Start with Staffer Pay and Technology*, *Retired Lawmakers Say*, DEREK KILMER (May 3, 2019), <https://kilmer.house.gov/news/in-the-news/to-modernize-congress-start-with-staffer-pay-and-technology-retired-lawmakers-say> [<https://perma.cc/4H7X-9SWU>] (same).

308. See Ackley, *supra* note 307 (quoting six former legislators—five Democrats, one Republican—on their proposals for legislative reform).

309. See, e.g., LORELEI KELLY, NEW AM. FOUND., CONGRESS’ WICKED PROBLEM: SEEKING KNOWLEDGE INSIDE THE INFORMATION TSUNAMI 24 (2012) (supporting creation of “an OTA for the 21st century” as a means of addressing knowledge deficit in the current Congress); MIESEN ET AL., *supra* note 159 (supporting revival of the OTA as part of a broader set of changes to increase Congress’s ability to grapple with science and technology issues); Laura H. Kahn, *Bring Back the Office of Technology Assessment*, BULL. ATOMIC SCIENTISTS (May 20, 2007), <https://thebulletin.org/2007/05/bring-back-the-office-of-technology-assessment/> [<https://perma.cc/R2LL-8M6W>] (“OTA would provide Congress the broad perspective needed to write the best possible legislation.”); see also Will Rinehart, *Should Congress Revive the Office of Technology Assessment*, AM. ACTION F. (Oct. 29, 2018), <https://www.americanactionforum.org/insight/should-congress-revive-the-office-of-technology-assessment/> [<https://perma.cc/GH4F-TMK9>]; Sadowski, *supra* note 117; Grant Tudor & Justin Warner, *Bring Back the OTA?: Not Without a Few Changes*, LEGBRANCH (July 18, 2019), <https://www.legbranch.org/bring-back-the-ota-not-without-a-few-changes/> [<https://perma.cc/V75P-LFWR>] (arguing that any revival of the OTA would need to seriously overhaul agency structure to be effective today).

improving legislative outcomes by letting experts do more of the talking at committee hearings³¹⁰ or by bringing back LSOs.³¹¹

Although the need for expertise is recognized, there is little sign that the political will exists to fix the problem. Thus far, efforts to reinvigorate expertise in Congress have failed. There have been regular calls for the recreation of a technology agency like the OTA that have gone nowhere. During the George W. Bush administration, former Representative Rush Holt, a Democrat, introduced several bills that proposed reviving the OTA in some form, but to no avail.³¹² Similar efforts continued into the 2010s, slowly picking up more support, but still falling short.³¹³

The prospect of a resurgence in expertise holding weight in Congress seems unlikely particularly when one considers what prompted Congress to place greater weight on expertise throughout its history. When Congress initially created expert agencies, the common driving force that emerged was a concern with checking executive overreach. Calls for increasing staff today are often based on the same concern with having greater legislative capacity for oversight over the executive branch.³¹⁴ But in an age of party control, separation of powers and interbranch conflict has taken a backseat. As Professors Daryl Levinson and Rick Pildes put it, “political competition in government often tracks party lines more than branch ones.”³¹⁵ A Democratically-controlled Congress is thus unlikely to be concerned with checking a Democratic president. Instead, it seems far more likely that all the partisan pressures will continue to lead members of Congress to turn to partisan think tanks, lobbyists, and activists for policy assessments instead of consulting neutral experts or trying to find bipartisan consensus based on the best available evidence.

That said, the fact that the JCT and CBO continue to play an important role in the congressional process suggests that there are still sufficient incentives

310. Casey Burgat & Anthony Marcum, *At Congressional Hearings, Let the Experts Do the Talking*, REALCLEAR POL’Y (Mar 1, 2019), https://www.realclearpolicy.com/articles/2019/03/01/at_congressional_hearings_let_the_experts_do_the_talking_111087.html [<https://perma.cc/5GVD-TZW5>].

311. See KELLY, *supra* note 309, at 13–22 (advocating for the return of LSOs and explaining their virtues). For a discussion of LSOs and their abandonment, see *supra* notes 149–53 and accompanying text.

312. Mooney, *supra* note 100, at 47.

313. See Chase Gunter, *Will Democrats Revive the Office of Technology Assessment in 2019?*, FCW (Dec. 7, 2018), <https://fcw.com/articles/2018/12/07/2019outlook-ota-revival-gunter.aspx> [<https://perma.cc/5WTV-L8LS>] (“Earlier [in 2018], a bid led by Reps. Mark Takano (D-Calif.) and Bill Foster (D-Ill.) was thwarted by a 195–217 vote, with just 15 Republicans supporting the measure. But the OTA gained more support than the 2014 effort, which failed by a 164–248 margin.”).

314. See Molly E. Reynolds, *Improving Congressional Capacity to Address Problems and Oversee the Executive Branch*, BROOKINGS (Dec. 4, 2019), <https://www.brookings.edu/policy2020/bigideas/improving-congressional-capacity-to-address-problems-and-oversee-the-executive-branch/> [<https://perma.cc/PK4P-A22P>] (arguing that Congress’s ability to process information should be improved to facilitate oversight of the executive branch).

315. Levinson & Pildes, *supra* note 205, at 2315.

for Congress to have an independent source of information about budget and tax issues beyond what OMB and Treasury, respectively, produce. Perhaps each party recognizes the value in having these resources when they do not hold the presidency and want to be able to check executive overreach. Perhaps fiscal concerns are sufficiently bipartisan that these independent nonpartisan sources of expertise retain their value and can survive (so far, at least) attacks on them. Whatever the reason, these agencies, while diminished, continue at least for now to retain their importance to members of Congress.

And their continued existence offers some hope that other expert bodies can be rejuvenated. If this happens, it will likely need to be championed by Democrats, just as Republicans championed the diminishment of these agencies. When we have seen calls for the rejuvenation of expert agencies in Congress, the ideas have largely been spearheaded by Democrats, though they have attracted a limited degree of Republican support.³¹⁶ Perhaps now that the Democrats have control of the Senate as well as the House there is a greater chance of success, but it is unclear whether the Democrats want to use their political capital for the effort. The key is whether Democrats currently in power believe that reenergizing some of these institutions could be beneficial for the time when Republicans resume control of the presidency and they want to have mechanisms for greater checking in place. Because many of the major Democratic policies align more readily with expert evidence, particularly in areas involving science such as climate change, having rejuvenated expert bodies in Congress might offer some help in the future. Given the slim margins of Democratic control in the Senate and House, it is unclear whether there are enough Democrats who will support a broad effort to resuscitate expertise, particularly when that will involve a fiscal investment at a time when deficits are soaring and there is a greater focus on getting relief to voters struggling from the pandemic.

In this climate, Democrats might want to consider a more targeted effort at reinvigorating nonpartisan expert assessments in the legislative process. To that end, they should consider what kind of expert assessment and forecasting is likely to appeal most to their voters and therefore be worth whatever expenditure is required. Racial impact is high on the list given pervasive inequality and President Joe Biden's explicit commitment to addressing structural racism and staying true to the diverse voting coalition that supported him. In that vein, Democrats might want to use some of their political capital to get more expert assessments of how legislation they are considering will affect different communities. CBO and JCT reports remain

316. *See id.* (describing fifteen House Republicans supporting the 2018 bid to revive OTA); Mary Pflum, *OTA Making a Comeback?: House Dems Eye Shuttered Office to Combat Silicon Valley*, NBC NEWS (July 22, 2019, 11:06 AM), <https://www.nbcnews.com/tech/tech-news/washington-s-answer-big-tech-could-be-office-mothballed-almost-n1030566> [<https://perma.cc/J2JK-REYU>] (describing Republican support for OTA revival in the House).

the most influential substantive contributions by experts in Congress because Congress cares about costs and the budget and knows that voters care about the economy, as well. Because many Democratic voters care about racial disparities, this might be the kind of assessment that Democrats are willing to use political capital to get passed. Several states require racial impact statements before they pass new criminal law legislation so that legislators can consider carefully whether they want to pass laws that will have a disproportionate impact.³¹⁷ Iowa is one such state, and after it required racial and ethnic impact statements, proposed legislation with a disproportionate impact on minorities was twice as likely to fail relative to proposed legislation that was rated as neutral or found to have no such effect.³¹⁸ So, while these kinds of statements do not dictate outcomes, they can have an influence. The key is to get that information into the process, and a modest proposal like this might help improve substantive outcomes.

The other top contender would be the recreation of OTA or something like it. We have reached a juncture where science is politicized, and the Democratic Party is the party that believes in it. In this environment, they stand the best chance to push for a new OTA, and they might be able to get enough Republicans to support it given the threat of future viruses, the shared concern between the two parties of Big Tech dominance, and the increasing difficulty in ignoring climate change now that we are having so many extreme weather events across the country.

But if one were to bet, the odds are against rejuvenating OTA or getting more expert assessments of racial impact. These proposals face an uphill battle in a partisan body that might be content to just rely on the interest groups who support them to tell them what matters. Any prospect for internal congressional action that makes experts a bigger part of any process seems unlikely given the political climate right now, though it should be welcomed.

B. Doctrinal Implications

If Congress stays on its present course and continues to devalue expertise in its internal processes, there remains the question of whether this could or should affect legal doctrine in any way. This section considers two possible areas of law. The first subsection considers what these shifts in Congress's internal processes mean for administrative law and particularly the nondelegation doctrine. The second subsection asks whether there are or should be any shifts in statutory interpretation as a result of these changes.

1. Delegation to Agencies

Congress has already confronted the fact that it sometimes is not the best actor to address a policy question. The creation of the administrative state is

317. BARKOW, *supra* note 254, at 183.

318. Ryan J. Foley, *Racial-Impact Law Has Modest Effect in Iowa*, MILWAUKEE J. SENTINEL (Jan. 21, 2015, 7:47 PM), <http://www.jsonline.com/story/news/politics/2015/01/21/racial-impact-law-effect-iowa-legislature/22138465/> [<https://perma.cc/H62T-JV8L>].

a testament to Congress's acknowledgement of its own limitations. Congress often delegates key policymaking responsibility to expert agencies because it believes that will produce better outcomes. To be sure, there are political reasons for this delegation. Congress is more likely to delegate when the risk of a bad policy decision is high, and the payoff for good policy decisions is low.³¹⁹ Congress strategically delegates in "areas least favorable to their reelection chances."³²⁰ In keeping with its partisan motivations, Congress also delegates more often when the executive branch is controlled by the same party.³²¹ And its choice to delegate varies based on which party is in power, choosing independent agencies when the opposing party from Congress's majority controls the White House and choosing executive agencies when they are from the same party.³²²

But Congress is not just pursuing partisan ends when it delegates. It also delegates because of a view that agencies will produce better outcomes given their expertise and their processes for gathering the relevant information and responding to changes on the ground.³²³ Delegation to agencies can thus inject expertise into decision-making that is otherwise lacking in the congressional process.³²⁴ One reason why the decline of expertise in Congress may be less concerning than it otherwise would be is that we have administrative agencies to pick up some of the slack. Unfortunately, not all substantive areas have seen this kind of delegation. Criminal law, for example, has traditionally been a policy space where Congress does not bother to delegate because legislators have reaped political rewards for passing legislation and do not face much pushback when those policies do not do much to advance public safety or result in excess costs. But in many other areas, Congress has seen value in delegating to expert bodies.

In the typical delegation scenario, Congress focuses on setting the general policy goals in a particular area and then leaves the details of the rules and policies to best achieve those goals to the relevant institutional actor best positioned to set those policies. Typically, that means delegating authority to an agency, staffed with people who have the relevant expertise to sift through and process information, the authority to promulgate rules after public comment and input, and the obligation to face judicial review for

319. DAVID EPSTEIN & SHARYN O'HALLORAN, *DELEGATING POWERS: A TRANSACTION COST POLITICS APPROACH TO POLICY MAKING UNDER SEPARATE POWERS* 206 (1999).

320. *Id.*

321. *See id.* at 129–38.

322. *Id.* at 156–57.

323. *See* Kathleen Bawn, *Political Control Versus Expertise: Congressional Choices About Administrative Procedures*, 89 AM. POL. SCI. REV. 62, 62 (1995); Terry M. Moe, *Delegation, Control, and the Study of Public Bureaucracy*, 10 FORUM 1, 28 (2012); Richard Stewart, *The Reformation of American Administrative Law*, 88 HARV. L. REV. 1667, 1702 (1975).

324. *See* STEPHEN BREYER, *BREAKING THE VICIOUS CIRCLE: TOWARD EFFECTIVE RISK REGULATION* 61–72 (1993).

rationality of any of its policies.³²⁵ Agencies have to explain their decisions and why they rely on certain pieces of evidence and not others to avoid being found arbitrary and capricious, and that can have a disciplining effect that helps to counter cognitive biases.³²⁶ Responding to comments requires the agency to consider alternative possibilities and inconsistent information, which can help limit bias in their decisions because considering counterarguments and alternative positions is one of the most effective debiasing strategies, particularly for overcoming biased fact assimilation and confirmation bias.³²⁷

This is not to say that agencies do not have biases. The same expertise that gives agencies a broader base of knowledge may also make the people in those agencies susceptible to other cognitive errors. In particular, experts can be overconfident in their judgments.³²⁸ They can also suffer from tunnel vision and “myopically focus on issues within their area of expertise and thereby fail to recognize that a decision would benefit from accessing other bodies of knowledge or ways of thinking.”³²⁹ So while experts are more likely to get accurate results than laypeople because of their expertise, they will sometimes make mistakes, and when they do, they may be less likely to question whether they made a good decision.³³⁰

Aspects of the agency process help to correct for this, however. Having to consider alternative policy approaches and respond to comments helps to correct against overconfidence, and explaining why they chose one path over another to the Office of Information and Regulatory Affairs may also help curb tunnel vision.³³¹ More fundamentally, the question here is not whether

325. For a sampling of arguments in favor of delegating to regulatory experts to improve decision-making, see *id.* and CASS R. SUNSTEIN, *RISK AND REASON: SAFETY, LAW, AND THE ENVIRONMENT* (2002).

326. See Mark Seidenfeld, *Cognitive Loafing, Social Conformity, and Judicial Review of Agency Rulemaking*, 87 CORNELL L. REV. 486, 509–12 (2002). *But see* William N. Eskridge, Jr. & John Ferejohn, *Structuring Lawmaking to Reduce Cognitive Bias: A Critical View*, 87 CORNELL L. REV. 616, 629 (2002) (noting the possibility that judicial review could be burdensome and lead to mistakes as a result).

327. See Linda Babcock et al., *Creating Convergence: Debiasing Biased Litigants*, 22 L. & SOC. INQUIRY 913, 916 (1997); Andrea A. Curcio, *Addressing Barriers to Cultural Sensibility Learning: Lessons from Social Cognition Theory*, 15 NEV. L.J. 537, 565 (2015); Adam D. Galinsky & Gordon B. Moskowitz, *Counterfactuals as Behavioral Primes: Priming the Simulation Heuristic and Consideration of Alternatives*, 36 J. EXPERIMENTAL SOC. PSYCH. 384, 385 (2000); Charles G. Lord et al., *Considering the Opposite: A Corrective Strategy for Social Judgment*, 47 J. PERSONALITY & SOC. PSYCH. 1231, 1231–32 (1984).

328. Derek J. Koehler et al., *The Calibration of Expert Judgment: Heuristics and Biases Beyond the Laboratory*, in *HEURISTICS AND BIASES: THE PSYCHOLOGY OF INTUITIVE JUDGMENT* 686, 693 (Thomas Gilovich et al. eds., 2002).

329. Rachlinski & Farina, *supra* note 10, at 560; see also BREYER, *supra* note 324, at 11–19.

330. Rachlinski & Farina, *supra* note 10, at 560.

331. See *id.* at 588–89 (noting that public comment and judicial review helps to debias agency decision-makers); *id.* at 596–97 (noting the value of Office of Information and Regulatory Affairs review to bring a different perspective to problems and counteract tunnel vision); see also Hal R. Arkes, *Costs and Benefits of Judgment Errors: Implications for Debiasing*, 110 PSYCH. BULL. 486, 492–95 (1991); Derek J. Koehler, *Explanation*,

agencies will be perfect decision-makers. Clearly they will not. The issue is whether they are better suited to make detailed policy prescriptions, guided by broad policy goals from Congress, than Congress is on its own. And what we know about the legislative process these days provides ample reason to believe agencies will do a better, even if imperfect, job.

Agencies do not operate on their own, however. The same judicial review that can provide a disciplining effect on agencies might also create opportunities for judges to inject biases of their own. Courts may be less than ideally deferential to agency expertise when they are conducting judicial review of an agency policy.³³² But even when judges strike down agency policies as arbitrary and capricious, the agency can still implement them with better explanation and record support. In general, a process that relies on comments from all interested parties and the agency explaining its decision is likely to be preferable at reducing bias than leaving all the key decisions and details with Congress even if the congressional decisions would face less scrutiny by judges. That is why Congress typically uses agencies to fill in policy details when there are powerful interest groups on both sides of an issue. Indeed, agencies exist in the first place precisely because Congress wanted entities that could engage in “specialized information-gathering.”³³³

Those interested in better policymaking should therefore be concerned about recent calls for a more robust nondelegation doctrine. Although the Supreme Court has rarely struck down an agency delegation on this basis, the doctrine retains life as a canon of interpretation to avoid overly broad delegations,³³⁴ and at least five Justices on the current Supreme Court have sent signals that they might be more willing to resuscitate a more robust version of the doctrine.³³⁵ While some applaud a stronger nondelegation doctrine because they think it will lead Congress to play a greater role in policymaking,³³⁶ the congressional process is so partisan and ungrounded in

Imagination, and Confidence in Judgment, 110 PSYCH. BULL. 499, 500 (1991); Asher Koriat et al., *Reasons for Confidence*, 6 J. EXPERIMENTAL PSYCH. 107, 116 (1980).

332. Eskridge & Ferejohn, *supra* note 326, at 629–31.

333. *Paul v. United States*, 140 S. Ct. 342, 342 (2019) (statement of Kavanaugh, J., respecting the denial of certiorari) (noting that the Court uses a statutory interpretation doctrine that mirrors the nondelegation doctrine in cases involving “major questions”); Cass R. Sunstein & Richard B. Stewart, *Public Programs and Private Rights*, 95 HARV. L. REV. 1193, 1322 (1982).

334. Cass R. Sunstein, *Nondelegation Canons*, 67 U. CHI. L. REV. 315, 321–22 (2000).

335. *See, e.g., Gundy v. United States*, 139 S. Ct. 2116, 2131–48 (2019) (Gorsuch, J., dissenting, joined by Chief Justice Roberts and Justice Thomas) (calling into question the intelligible principle test for delegation and advocating for greater policing of improper legislative delegations); *id.* at 2131 (Alito, J., concurring in the judgment) (noting his willingness to go along with the majority “[i]f a majority of this Court were willing to reconsider the approach” the Court has taken to the nondelegation doctrine); *Paul*, 140 S. Ct. at 342 (statement of Kavanaugh, J., respecting the denial of certiorari) (noting that “Justice Gorsuch’s scholarly analysis of the Constitution’s nondelegation doctrine in his *Gundy* dissent may warrant further consideration in future cases”).

336. *See generally* DAVID SCHOENBROD, *POWER WITHOUT RESPONSIBILITY: HOW CONGRESS ABUSES THE PEOPLE THROUGH DELEGATION* (1993).

empirical facts that it is hard to see this as an unadulterated good. To be sure, one might see congressional decisions as more accountable than agency ones—though that is debatable given executive accountability. But on the basis of pure policy analysis, this move would come at a significant substantive cost. Maybe these advocates think Congress would improve its policy if it had to take real control over its decisions. But that is a big gamble in the partisan climate in which we currently operate. Keeping more of the policy details with agencies guarantees that the process must be grounded in the empirical record, and that may well be why Congress continues to delegate. When Congress believes delegation produces better policies, courts should respect that decision.³³⁷ Under the doctrine, there must be an intelligible principle from Congress. But when there is, courts should permit that congressional call as an example of Congress deciding what produces the best policy outcome.

The same animating principle that sees the policymaking value of giving more authority to agencies also applies in some contexts to giving more authority to courts. Criminal law, for example, is an area where Congress often faces a question of whether to decide a punishment for itself by making it mandatory or giving more discretion to judges. Mandatory punishments set by Congress are ill-advised precisely because they prevent the necessary tailoring to specific factual scenarios. It is far better to adopt a framework that allows district judges, who see all the factual nuances of cases and the retail application of laws, to adjust as cases come in that are different from the schemas that the legislature had in mind.

The basic idea in both contexts is for Congress to recognize that, as a wholesaler, it is limited in its abilities. Better substantive decision-making depends on using all the best available evidence we have about problems. Congress should therefore create mechanisms in its laws that allow the other branches to adapt to better information in retail applications while still acting as faithful agents who help Congress achieve its goals. If Congress makes clear its factual assumptions, these agents can then adapt when the facts on the ground prove otherwise.³³⁸ This might mean more effort in either legislation itself or legislative history to spell out the underlying factual predicates or assumptions behind laws and enough discretion vested in judges and the executive to make corrections when the assumptions or presumed facts prove to be false or incomplete. While Congress has no

337. This is consistent with an originalist interpretation of the Constitution, as persuasively documented in recent articles. See Julian Davis Mortenson & Nicholas Bagley, *Delegation at the Founding*, 121 COLUM. L. REV. 277, 366–67 (2021); Nicholas R. Parrillo, *A Critical Assessment of the Originalist Case Against Administrative Regulatory Power: New Evidence from the Federal Tax on Private Real Estate in the 1790s*, 130 YALE L.J. 1288, 1288 (2021).

338. Rachlinski & Farina, *supra* note 10, at 587 (“So long as the statute is relatively clear in its substantive objectives and methodological choices, judges can reason their way incrementally toward completing the details within the master legislative plan.”); *id.* (“[A] system of administrative agencies is the best institutional recipient of the responsibility to particularize regulatory goals and means, within general policy outlines supplied by the legislature.”).

obligation to do this to pass constitutional rational basis review, it is a good idea as a matter of improving policy outcomes.

A benefit of giving agencies and the judiciary more flexibility to adjust laws based on Congress's general policy goals is that agencies and the judiciary should be getting feedback on how policies are playing out in real-world settings. That kind of feedback loop is typically missing in the legislative sphere unless it is an area where a powerful enough group can raise a fire alarm that something is going wrong. But in many areas, the targets of legislation, such as criminal defendants, immigrants, and people who receive need-based benefits, have little power or sway, and in those contexts, fire alarms may be lacking. Setting up a process that allows an agency or the judiciary (whichever body processes that type of case) flexibility to adjust policy based on the feedback it is getting from the trenches where the law is being applied can help get a better feedback loop in place. And legislators should want such flexibility to make sure their statutes are being applied in the ways they expected and not to situations that they did not have in mind.³³⁹ We have seen federal judges take a far more nuanced view of what kinds of people fall within legislative definitions of criminal offenders precisely because they see counterexamples in their courtrooms.

To be sure, judicial and political appointees are often put in these posts precisely because they have a preexisting schema that corresponds with those of the party and politicians who appoint them.³⁴⁰ So this model hardly avoids partisanship. Moreover, while their interaction with more on-the-ground cases can help break certain narratives and examples from being the only ones in their minds, it is important to note that these courts and agencies can have their own biases.³⁴¹ But in general, these bodies get more feedback on how things are working on the ground, and agencies in particular have a process well suited for gathering the necessary empirical information to guide decision-making even if partisan interests also influence the ultimate decision.

2. Statutory Interpretation

In a recent article, Professors Jesse Cross and Abbe Gluck persuasively argue that the existence and role of the congressional bureaucracy should

339. Cf. Eskridge & Ferejohn, *supra* note 326, at 642–43 (“Statutory interpreters should construe laws to reduce the risk of unanticipated error costs of a large magnitude.”).

340. See Lucas & Tasic, *supra* note 228, at 252 (noting that experts face political constraints); Rachlinski & Farina, *supra* note 10, at 602–03 (noting that having political appointees at agencies and under more direct presidential control undercuts the value of agency expertise in checking against cognitive bias).

341. See, e.g., Christine Jolls et al., *A Behavioral Approach to Law and Economics*, 50 STAN. L. REV. 1471, 1543 (1998); Kang, *supra* note 232, at 1512–13; Nicole Negowetti, *Judicial Decisionmaking, Empathy, and the Limits of Perception*, 47 AKRON L. REV. 693, 696–99 (2014).

have implications for statutory interpretation.³⁴² Though they largely focus on the implications of having nonpartisan congressional agencies and staff involved in drafting, they also suggest substantive canons, such as incorporating assumptions built into CBO budget scores and JCT's understanding of tax laws as part of a statute's interpretation.³⁴³ I agree with this suggestion given the central role these congressional agencies continue to play—particularly when so many other internal processes have been decimated.

Cross and Gluck's suggested interpretive canons stem from the positive use of these experts within Congress, but one can also argue that the *disuse* of the congressional bureaucracy and failure to consult experts might also aid in interpretation. If the statute is clear, the legislative process will not matter one way or another. But when a statute is not clear, courts traditionally look to legislative intent or purpose to help assess a statute's meaning. And the role—or lack of a role—of experts can help determine what that intent or purpose is.

Consider criminal law. Courts often assume that Congress would want an interpretation of a criminal law that favors the government, perhaps because of an assumption that Congress is concerned with public safety more than it is concerned with defendants' rights.³⁴⁴ Given the politics of criminal law, it is a safe assumption that Congress is not all that worried about defendants' interests.³⁴⁵ But the assumption that Congress wants the government to be able to reach all possible cases does not follow from the fact that Congress pays little attention to defendants' interests. In fact, Congress is often driven by particular outlier cases and has no idea how a law it is passing will apply in the vast run of cases because it fails to get any kind of expert forecast or analysis of its proposals, as Part II.B explored. In this environment, Congress's purpose is actually rather narrow and tied to a particular set of facts that are driving its decision. In the absence of clarity that Congress means to go further, it makes no sense to interpret statutes with an assumption that there is a purpose for the law to be as broad as possible.

Considering the use (or disuse) of expert assessment thus offers additional support for the rule of lenity that gives the benefits of ambiguity to a defendant.³⁴⁶ There are many reasons to support this canon,³⁴⁷ but congressional process provides yet another. The cognitive biases that legislators exhibit in criminal policymaking and the lack of any expert consultation mean that Congress is not doing much evaluating in this context.

342. See Cross & Gluck, *supra* note 39, at 1634–40.

343. *Id.* at 1676.

344. See, e.g., *Moskal v. United States*, 498 U.S. 103, 132 (1990) (Scalia, J., dissenting) (observing the temptation to affirm convictions and “stretch the law to fit the evil”).

345. See BARKOW, *supra* note 254, at 103.

346. See *Bell v. United States*, 349 U.S. 81, 83 (1955).

347. For an excellent survey of the arguments for strict construction of penal statutes, see Shon Hopwood, *Restoring the Historical Rule of Lenity as a Canon*, 95 N.Y.U. L. REV. 918 (2020).

Using the rule of lenity means that if Congress wants expansive enforcement beyond the facts of the cases it is considering and highlighting, it will need to make the text of the statute clear to do that work. Otherwise, it makes no sense to treat Congress as following some broader purpose of public safety when nothing in the process indicates Congress actively explored how to achieve that. The assumption that reaching as many cases as possible will promote public safety is incorrect;³⁴⁸ so without some kind of inquiry into how best to balance the criminogenic effects of criminal punishments with the goals of the law, there are no grounds for making an assumption about how broadly an ambiguous law should reach.

This kind of interpretive move might extend beyond criminal law to other contexts where the legislative history makes clear paradigmatic cases are driving policy and where no analysis was done by any key expert body to shed light on how far a statute would or should actually reach in practice. In these contexts, when the text is not clear, it makes no sense to give statutes expansive readings.

A benefit of this kind of interpretive rule is that it will force Congress either to be clear or to make use of certain processes to get the benefit of the doubt and signal that it does intend for a broader interpretation should the language not be as clear as it thinks it is. This interpretive rule thus provides a disciplining effect on legislators by making them use a clear statement when they want laws to apply more broadly than the specific factual assumptions they have in mind or to do some due diligence to understand how its law will work in practice before passage to send that same signal.

CONCLUSION

We get better decisions when we seek out all the relevant information and consult people with expertise in a field. This is no less true when the decisions are made by our elected representatives. One might think this is not controversial, but sadly we are living in strange times. The very notions of knowledge and facts and expertise are viewed by some as negatives,³⁴⁹ and that is pushing our politics to reject the pursuit of information in Congress.

It may well be that the kind of biased and flawed decision-making we see from Congress is precisely the kind that voters prefer because they cannot see past their own biases. To the extent that is true, there is little hope for remedying the problems in Congress.

But as substantive decisions reveal themselves to be problematic, as they have, for example, in criminal law, where we now have mass incarceration and have criminalized huge segments of the population precisely because of a flawed decision-making architecture, it may well be that voters start to realize that they could be getting better results. And one key place to start is

348. *See generally* BARKOW, *supra* note 254.

349. *See* NICHOLS, *supra* note 220, at 20.

to make use of the expertise that is already out there to combat biases that lead to failed policies.

If Congress will not fix itself, it might be time for other institutional actors to view its work product differently and reassess how it views delegations or to read statutes in light of this change in process. At a minimum, we should recognize the end of the idealized version of Congress as a great deliberative body that “refine[s] and enlarge[s] the public views, by passing them through the medium of a chosen body of citizens, whose wisdom may best discern the true interest of their country, and whose patriotism and love of justice will be least likely to sacrifice it to temporary or partial considerations.”³⁵⁰ Madison’s vision of Congress is sadly not the one we live with today, and it is time we shift some of our presumptions to recognize that reality.

350. THE FEDERALIST NO. 10, at 51 (James Madison) (Ian Shapiro ed., 2009).