

in question so that it can be related, first, to the known preferences of decision-makers and, second, to existing policies and programs. Agenda setting is in some ways the art of doing something new so that it appears old.

The techniques that can be applied to policy formulation are more sophisticated technically, but they also require sensitive political hands that can use them effectively. To a great extent, the use of old solutions for new problems applies in formulation as well as in agenda setting. For both agenda setting and policy formulation, incremental solutions are favored in the United States. This incrementalism produces a great deal of stability in the policy process, but it makes rapid response to major changes in the economy and society difficult.

The solutions that emerge from these first stages of the policy process, then, are designed to be readily accepted by legislators and administrators who must authorize and legitimate the policies selected. A more comprehensive approach to design might well produce better solutions to problems, but it would face the barrier of political feasibility. The task of the analyst and advocate, then, becomes stretching the boundaries of feasibility to produce better public policies.

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CHAPTER 5

Legitimizing Policy Choices

ONCE IT HAS BEEN DECIDED that a certain program is required or is feasible, as a response to a policy problem, that choice must be defended as a legitimate one for government to make. No matter what course of action is decided on, it is almost certain that some citizens will believe themselves disadvantaged by the choice. At a minimum, any public program or project will cost money, and citizens who pay taxes and receive (or perceive) no direct benefits from it will frequently consider themselves to be harmed by the policy choice. Because policy choices inevitably benefit some citizens and not others, a great deal of attention must be given in a democratic government to the process by which decisions are made. It is by means of the official process of government that substantive policy decisions are legitimated; the process attaches the legitimate authority of the state to the policy that is chosen.

Legitimacy is a fundamental concept in the discipline of political science, and it is important in understanding policymaking.¹ Legitimacy is conventionally defined as a belief on the part of citizens that the current government represents a proper form of government and a willingness on their part to accept the government's decrees as legal and authoritative.² The vast majority of Americans regard the government of the United States as the appropriate set of institutions to govern the country. And most Americans consequently accept the actions of the government as authoritative (as having the force of law), as long as they are carried out in accordance with the processes established in the Constitution or by procedures derived from them. It is understood that all policies adopted must be within the powers granted to the federal government by the Constitution. The boundaries of the policies considered constitutional have expanded during the history of the United States, but the limits current at the time establish the boundaries of legitimate action. So, for example, the federal government in 2015 can become involved in economic policy areas that it could not have in 1915. This increase in activity is in part a function of the economic crisis beginning in 2007, and the role of government in the economy may well decline after the end of the effects of that crisis.

Several things should be understood about legitimacy as it affects contemporary policymaking in the United States. First, legitimacy is largely a psychological property. Legitimacy depends on the majority's acceptance of the appropriateness of a government. A government may come to power by all the prescribed processes, but if the population does not willingly accept that government or the rules by which it gained power, then in practice it has no legitimacy. For example, many constitutions (including those of France and Britain) give government the right to suspend civil liberties and declare martial law, but citizens accustomed to greater freedom may find it difficult to accept decrees such as that,³ unless a crisis such as the attacks of September 11, 2001, intervenes to expand the range of acceptable action. Changes in a government may cause some citizens to question the legitimacy of a new government's actions.

Legitimacy has substantive as well as procedural elements.⁴ It matters not only how issues are decided but also what is decided. The government of the United States might decide to nationalize all oil companies operating in the country. (It will not do this, but just imagine so for a moment.) The decision could be reached with all appropriate deliberation as prescribed by the Constitution, but it would still not be acceptable to the majority of citizens. A more realistic example is provided by the wars in Vietnam and then in Iraq and Afghanistan, which were conducted according to the procedures of the Constitution but nevertheless rejected as illegitimate by a significant proportion of the population. As a consequence of the Vietnam War, Congress passed the War Powers Act, which changed the procedures by which the United States could become involved in any future foreign conflicts.⁵ The substantive question of legitimacy therefore produced a procedural response, although the debate in 2002 and 2003 over the ability of President George W. Bush to attack Iraq demonstrated that the procedures are themselves far from clear. In an attempt to provide greater legitimacy for U.S. intervention, President Obama introduced a request for an Authorization for Use of Military Force against ISIS.⁶

The limits of government activity became major political questions during the congressional elections of 2010, and those issues persisted into the 2012 presidential election. The rise of the Tea Party movement, opposed to most forms of federal government intervention into society, has placed the question of the limits of government more in the center of American politics.⁷ While seeming radical after the expansion of U.S. government since World War II, this movement is yet another manifestation of the populist tradition in U.S. politics that rejects large institutions in social and political life and promotes ideas of individualism.

Legitimacy is both a variable and a constant—it differs among individuals and across time. Some citizens of the United States may not accept the legitimacy of the current government. For example, some African American activists have rejected the legitimacy of the U.S. government and called for the formation of a separate African American nation within the country. On the other side, white

supremacists and some religious sects have organized settlements in parts of the West that reject the authority of all the constituted governments, and they even have engaged in armed conflict with federal agents. Citizens also appear more willing to accept the actions of state and local governments than those of the federal government.

A general decline in confidence in American institutions has been occurring, and it has been especially pronounced for government institutions other than the military (see Table 5.1).⁸ There was some upturn in confidence in the 1980s, but that has decayed, and Americans now have less confidence in government than they have had in the past. In particular, Congress now is one of the least-respected institutions in the United States. The various scandals during the second Clinton administration reduced citizens' confidence in the presidency. The first years of the George W. Bush administration seemed to restore legitimacy to the office, despite the extreme confusion of the 2000 election,⁹ but scandals of another sort in 2005 and 2006 and failures in economic management reduced the president's approval ratings to the lowest point ever.¹⁰ Likewise, the euphoria in many circles over the election of Barack Obama as president has been followed by approval ratings (Gallup Poll) of only 41 percent in July 2014.

The economic crisis beginning in 2008 has posed a major challenge to the legitimacy of U.S. government. Although public confidence in government is to some extent an emotional attachment to the symbols of the system, another major part of legitimacy derives from the effectiveness of government.¹¹ Something paradoxically, although most Americans say they do not want government heavily involved in the economy, when the economy has difficulties, government is blamed for its inaction. The latest economic crisis is no different and is perhaps

TABLE 5.1 Confidence in American Institutions, 1985–2014 (combined percentages saying "Great deal" or "Quite a lot")

	2014	2008	2006	2004	2002	1998	1996	1993	1990	1988	1985
Military	74	71	73	75	71	64	66	68	68	58	61
Organized religion	62	48	52	53	53	59	57	53	56	59	66
Supreme Court	30	32	40	46	41	42	45	44	47	56	56
Presidency	29	26	33	52	50	22	39	43	n.a.	n.a.	n.a.
Public schools	26	33	37	41	n.a.	37	38	39	45	49	48
Newspapers	22	24	30	30	16	31	32	31	39	36	35
Organized labor	22	20	24	24	11	26	25	26	27	26	28
Big business	22	20	18	24	16	22	24	22	25	25	31
Congress	8	12	19	30	22	28	20	22	24	35	39

Sources: Various Gallup Polls, CNN/Gallup Polls, and Harris Polls.

Note: n.a. = not available.

even more destructive of legitimacy because it has undermined the housing market, which many people counted on as their major investment.¹²

In societies that are deeply divided ethnically or politically, the rejection of the sitting government by one side or another is a constant fact of life. Even a government that is widely accepted may lose legitimacy or strain its legitimate status through unpopular activities and leaders. The Vietnam War and the Watergate scandal illustrate the low point to which the legitimacy of even a widely accepted political regime may fall. Nevertheless, the American government was able to survive those problems as well as such subsequent problems as the Iran-Contra controversy, several scandals during the Clinton administration, and failures in responding to Hurricane Katrina and continue to govern with legitimate authority.

Because of the variability of legitimacy, a fully legitimated government may gradually lose its legitimate status over time. A series of blatantly unpopular or illegal actions may reduce the authority of a government, making it open to challenge, whether of a revolutionary or more peaceable nature. Or a government may lose legitimacy through incompetence rather than unpopular activities, as has been demonstrated in the handling of both Iraq and the economic problems beginning in 2008. Citizens in most countries have a reservoir of respect for government, and governments can add to or subtract from that stock of authority. As a result, governments are engaged in a continuing process of legitimation for themselves and their successors.

Finally, government must somehow legitimate each individual policy choice. No matter how technically correct a policy choice may be, it is of little practical value if it cannot be justified to the public. For example, the decision to correct the formula for indexing Social Security pension benefits, once it was discovered that the increases it produced were unjustifiably large, was absolutely correct. But it created a huge political controversy and a sense of betrayal among some elderly citizens (see Chapter 12). Policy analysts, in their pursuit of elegant solutions and innovative policies, frequently forget this mundane point, and that forgetfulness can present a real barrier to their success.¹³ To design a policy that can be legitimated, a policy analyst must understand the political process. That process will define the set of feasible policy alternatives in a more restrictive fashion than does the economic and social world—more programs could work than could be adopted within the political values of the U.S. system. Thus, the task of the policy analyst is to be able to “sell” his or her decisions to the individuals who are crucial to their being legitimated. That does not mean that the analyst must advocate only policies that fit existing definitions of feasibility, but it does mean that the analyst must have a strategy for expanding that definition if a highly innovative program is to be proposed.¹⁴

In general, legitimation may be performed through the legislative process, through the administrative process designed for the issuing of regulations (secondary legislation), through the courts, or through mechanisms of direct

democracy. As shown in Figure 5.1, these modes of legitimation can be seen as combining characteristics of decisions—majoritarian and nonmajoritarian—and the range of actors involved.¹⁵ The nonmajoritarian mass cell is empty in the figure, but it might be filled by revolutionary or extremely powerful interest group activities. Indeed, the ongoing political controversy over abortion policy may fall into this cell, given that there is apparently no popular majority for the policies being pushed by an intense and active minority, although that minority has been successful in some states (see Chapter 16). We will discuss each type of legitimation and its implications for the policy choices that might be feasible as a result of each process.

Legislative Legitimation

In the United States, we traditionally have equated lawmaking with Congress, the principal legislative body at the federal level, or with similar bodies in the states. That notion is now excessively naive, for the workload and the technical content of many subjects on which decisions have to be made have overwhelmed Congress. The loss of capacity to legislate effectively has occurred despite the growth of legislative staffs and the increased availability of policy advice for legislators. Governments are simply too large and involved in too many issues to permit a large legislative institution, such as Congress, with all its intricate procedures, to make the full range of decisions required to keep the society functioning (from a public policy perspective). This problem was highlighted when it seemed that no members of Congress had read the 1,000-page economic stimulus bill that they voted on in 2009, nor the even longer Affordable Care Act. The legislative output of Congress has also declined as the internal political conflicts have reduced the ability to get legislation through both houses (see Table 5.1).

Of course, Congress remains the crucial source for primary legislation. Although administrative bodies are responsible for writing regulations in large numbers, Congress must supply the basic legislative frameworks within which

		Characteristics of decisions	
		Majoritarian	Nonmajoritarian
Range of actors	Elite	Referendums	—
	Mass	Congress	Courts; Administrative regulations

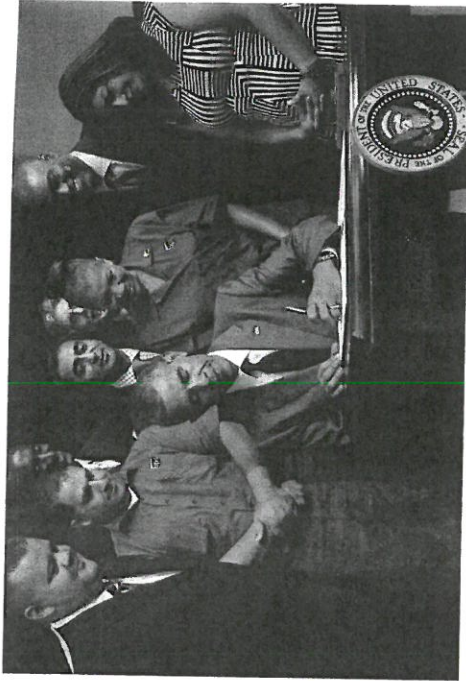
FIGURE 5.1 Modes of Legitimation

the other bodies operate. Congress tends to pass legislation written in relatively broad language, allowing administrators latitude for interpretation. Thus, despite various attempts to reassert the authority of Congress in opposing the "imperial presidency," it is best to think about the legitimating role of Congress as the authorizing of relatively diffuse statements of goals and structures. Those broad statements are then made operational by the executive branch, which fills in the details by writing regulations and by the implementation process.

Congress also retains its supervisory powers—oversight—so that if the executive branch strays too far when writing regulations, Congress can reassert its intentions in constructing the legislation.¹⁶ Until 1983, Congress had virtually unlimited power to pass "legislative vetoes," which required agencies issuing certain types of regulations to submit them to Congress for approval. Although the Supreme Court declared that the legislative veto is excessive meddling by one branch of government in the affairs of another and so is not constitutional,¹⁷ Congress has nevertheless continued to use similar instruments in other policy areas.¹⁸ If nothing else, Congress can always amend a law to clarify its intentions—or, if it must, even repeal the previous legislation.

In addition to the administrative regulations adopted by agencies, the president may act on his own, issuing executive orders. This power gives the president some capacity to legislate on his own, and presidents also use signing statements when they sign legislation coming from Congress as a means of expressing their interpretations of the law and the manner in which they intend to implement the policy.¹⁹ As noted in Table 5.1 presidents vary in the extent to which they use their powers. In his second term President Obama has expressed his frustration with Congress and has begun to issue many more executive orders.²⁰ For example, in late 2014 the president issued executive orders providing amnesty to certain immigrants who had entered the United States, even though it was clear that many members of Congress were opposed.

Congress places great emphasis on procedural legitimation and has established elaborate procedures for processing legislation.²¹ In fact, its institutions and procedures have become so well developed that it is difficult for legislation to be passed. Typically, a bill must be passed by a subcommittee, by a full committee, and by floor action in each house. And because one house is unlikely to pass a bill in exactly the same form as the other, conference committees are often necessary to reconcile the two versions. More arcane procedural mechanisms, such as filibusters, amendments, and recommitals, can slow down or kill legislation at a number of points if it fails to attract the necessary majority at the proper time. Or to put it the other way around, all that the opponents of a bill have to do is muster a majority at one crucial point to prevent its passage.²² Evidence from lobbying investigations in 2005 and 2006 also indicated the extent to which less formal rules permitted members of Congress to add money earmarked to benefit their constituents to legislation.²³



President Barack Obama signs the *Fair Pay and Safe Workplace executive order* on July 31, 2014, in the Eisenhower Executive Office Building, next to the White House in Washington, DC. While Congress makes most laws the president can issue executive orders that have the force of law.

Legislative procedures are important as mechanisms to prevent unnecessary or poorly formulated legislation from becoming law, but they can also frustrate good and needed legislation. The ability of the opposition to postpone or block civil rights legislation during the 1950s and 1960s demonstrated clearly the capacity of legislative procedures to thwart the apparent majority will of Congress. More recently, the continuing inability to produce a strong bill to control tobacco indicates the difficulties of passing legislation even when a significant portion of the population favors some change from the status quo.²⁴ Also, the threat of throwing the United States into default on its obligations in the debate on the debt ceiling was insufficient to prevent the use of an array of procedural devices.²⁵ A committed and well-supported minority is thus able to use legislative procedures to achieve its own ends.

Legitimation through the legislative process is majoritarian. It depends on building either simple or special majorities at each crucial point in the process. The task of the policy analyst or the legislative leader is to construct such majorities. In addition to appealing for support on the basis of the actual qualities of the proposed legislation, the analyst can form the needed majorities in several other ways. One method, which has been referred to as *parrisan*

analysis,²⁶ involves convincing members of Congress that the piece of legislation that the analyst wants is something that they want as well. The trick here is to design the legislation in such a way that it will appeal to a sufficient number of interests to create a winning coalition. For example, the National Defense Education Act of 1958, which still funds some international programs, was passed by a coalition of Congress members interested in education and in defense. The title of the bill indicates that it was intended to serve those two purposes and affect those two areas. It brought together liberals favoring a stronger federal role in education and conservatives favoring a stronger defense posture. More recently, some Democrats supported changes in Medicaid and Medicare that the George W. Bush administration favored as a strategy to prevent passage of more conservative legislation.

Another strategy for forming coalitions that is similar to partisan analysis is *logrolling*,²⁷ in which coalitions are formed not around a single piece of legislation but across a set of legislative initiatives. In the simplest example, Representative A favors bill A but is indifferent to bill B. Representative B, on the other hand, favors bill B but is indifferent to bill A. The logical thing for these two members to do is to trade their votes on the two pieces of legislation, with A voting for bill B and B voting for bill A. Several bills may be involved in vote trading over time. In some ways, logrolling is a rational activity because it allows the passage of legislation that some members of Congress—and presumably their constituencies—favor intensely but that might not otherwise be able to gain a majority. But logrolling also has the effect of bringing about the approval of a great deal more legislation than would otherwise be passed, thus boosting public expenditures and taxation. It enables relatively narrow interests in the nation to develop coalitions for their legislation that may not be justifiable in terms of the broader public interest.

As well as being a majoritarian body, Congress has universalistic norms that promote the spreading of government expenditures very broadly.²⁸ This is commonly referred to as *pork barrel legislation* or as the parochial imperative in American politics. Pork barrel legislation often concerns capital expenditures, of which the classic examples are river and harbor improvements. Obtaining such capital projects for their home districts has become a measure of Congress members' success; some argue that "bringing home the bacon," instead of policymaking on broad national issues, has become the dominant activity of Congress.²⁹ The tendency in designing legislation of this kind is to spread benefits as broadly as possible geographically and to create a majority by benefiting virtually anyone who wants a piece of the "pork." As with logrolling, this pattern of decision-making tends to increase the costs of government. Douglas Arnold pointed out that pork barrel legislation costs very little when compared with national defense or Social Security,³⁰ but it stands as an example of the way in which government misuses money by funding projects with relatively minor social benefit in order to ensure

the reelection of incumbent members of Congress. Spending on pork barrel projects has increased, in part through earmarked expenditures.³¹ The political importance of this style of decision-making may outstrip the actual amount of money spent, as it has become a symbol of waste and abuse in government and was a target of reform for Barack Obama as he took office.

This description of legitimation through the legislative process does not paint the most favorable picture of Congress. Actually, a good deal of congressional decision-making is based on the merits of legislation. To the extent that partisan analysis, logrolling, and pork barrel legislation characterize the actions of Congress, however, the legislative process has certain effects on the kinds of rules that can be legitimated. It can be argued that the process almost inevitably produces broad and rather diffuse legislation. The necessity of building a coalition requires that one take care not to offend potential members and that the proposed legislation produce benefits for individual legislators and their districts. As a consequence, a bill must be designed to be amenable to partisan analysis and must not be so clearly worded as to reduce the number of possible coalition members. This strategy of obfuscation allows administrators to make politically charged decisions on difficult issues by deflecting criticism from individual members of Congress.

Both logrolling and pork barrel legislation are related to the expansion of government beyond the bounds that could be set if there were no possibility of vote trading. The possibility of trading votes and building coalitions across pieces of legislation fuels a tendency to adopt public projects that are marginal in terms of social productivity. It is obvious that the world of policymaking is not perfectly rational, but these patterns of institutional decision-making seem to exacerbate the irrational character of much of politics, producing programs that benefit the few at the expense of the many.³² Logrolling and the pork barrel also make reducing the size of unneeded programs difficult. For example, the only effective way for Congress to accomplish the closing of redundant military bases in the early 1990s was to specify in advance that an independent commission would recommend closings, which would then be voted on as a group. Otherwise, logrolling might have prevented the closing of any bases at all. This self-denying restraint appeared to break down in 1998, when Congress demanded more influence in retaining bases than the Department of Defense itself wanted to close.³³ This process continued through summer 2003, when several apparently redundant bases escaped closure after coalitions to retain them were formed across partisan and geographical lines.³⁴ The proposed decline in defense spending after 2012 will again likely produce another round of debates over the geographical distribution of the losses.

These difficulties in congressional decision-making suggest more general points concerning social decision-making. In its simplest terms, the problem is, How can a set of conflicting social preferences best be expressed in a single

decision? Congress faces this problem when it attempts to combine the preferences of its members and their constituents in a single decision whether or not to adopt a piece of legislation; the same general problem arises in clubs, committees, and college faculty meetings.

One underlying problem facing decision-makers in legislatures and elsewhere is the varying intensity of preferences of the participants. We encountered this problem when discussing the logic of logrolling—in a majoritarian system, it may be possible to construct a majority composed of individuals who are not much interested in a proposal or do not feel intensely about it. This decision-making problem is in part a function of each legislator's having only one vote, whereas individuals in the market setting have more than one dollar and can apply their resources differentially depending on their preferences and the intensity of those preferences. Logrolling is one means of attempting to overcome the intensity problem, but it can be successful only in a limited set of circumstances with a certain distribution of preferences.

In majoritarian institutions with one vote per member, it is difficult to reflect accurately the preferences of the participants in a manner that creates their greatest net satisfaction. Generating such an optimal decision is made more difficult if in a number of successive decisions (e.g., voting on amendments), the order in which options are eliminated affects the final preferences.³⁵ In examining choices of this type, the economist Kenneth Arrow argued that it is impossible to devise a social-choice mechanism that satisfies the logical conditions for rationality.³⁶ The only way in which such decisions can be arrived at, in Arrow's framework, is to impose them, which he rejects on philosophical grounds. But the imposition of administrative regulations as another means of legitimating decisions has some characteristics of imposed solutions, although the procedures for adopting regulations have been sanctioned legally.

Once Congress has enacted legislation, it has played its major role in legitimating policy, but its involvement in the policy process is not over. We have already pointed out that the administrative agencies perform a major role in translating legislation into specific regulations. Congress then exercises some degree of oversight over the actions of the agencies.³⁷ The committees that initially approved the legislation monitor the way in which the agencies implement it and can act legislatively to correct anything the agencies may do incorrectly. Congress may not even have to do anything directly—often it can rely on its implicit authority over legislation and budgets to gain compliance from the agencies.

Oversight is in essence a second round of legitimation by Congress, which passes the initial legislation and then looks over the shoulders of the implementers to ensure that its intentions are followed. This oversight activity can be only so effective, however, because of the scarcity of time and the need of congressional actors to proceed with the next round of legislation. Furthermore, even the well-staffed U.S. Congress may lack the necessary expertise to judge the

numerous, complex, and technical regulations that the administrative agencies issue and their even more numerous administrative decisions. This means that oversight tends to be more "fire alarm" (reaction to crises) than "police patrol" (routine scanning of the relevant environment).³⁸

The divided government in the United States after the 2010 elections had led to a growth of oversight activities, especially over federal government responses to the economic crisis. Specific issues such as the huge financial losses of Fannie Mae (Federal National Mortgage Association) and Freddie Mac (Federal Home Loan Mortgage Corporation) provoked substantial congressional response, and policies such as the Troubled Asset Relief Program (TARP) also were targets for Congress, and especially congressional Republicans. More generally, Congress created the Congressional Oversight Panel in 2008, headed by Elizabeth Warren, to address some of these economic policy issues. These oversight opportunities, like many others, constitute both political and policymaking opportunities for Congress. Congress also has been using oversight to an increasing extent as a political device, as evidenced by the numerous hearings into the attack on the U.S. Embassy in Benghazi, Libya.³⁹

Regulations and the Administrative Process

Most rulemaking in the United States and other industrialized societies is now done through the regulatory process.⁴⁰ I use the term *regulatory process* in a broad context, to include the rulemaking activities of executive branch agencies as well as those of independent regulatory commissions.⁴¹ Administrative or independent regulatory bodies can issue binding regulations that are subsidiary to congressional legislation—these regulations are sometimes referred to as *secondary legislation*. Issuing such regulations is definitely a legislative or legitimating activity because it makes rules for the society, but the rules must be pursuant to primary legislation that Congress has already adopted.

The volume of regulation writing in the federal government is immense, as can be judged by the size of the *Federal Register*, a daily publication containing all regulations and proposed regulations (approximately 80,000 pages per year), and by the size of the *Code of Federal Regulations* (CFR), which contains all the regulations currently in force. An example of the volume of regulatory activity is provided by the Occupational Safety and Health Administration (OSHA) in the Department of Labor. OSHA, which has been a frequent target of the critics of government regulation, issued 4,600 regulations during the first two years of its existence and continues to issue hundreds of new regulations each year. As of 2010, these amounted to over 4,700 pages of rather fine print in the CFR. Taken together, three areas of public policy—agriculture, labor, and the environment—account for rules requiring approximately 25,000 pages in the *Code of Federal Regulations*.

Although conducted through a legal process, the decision-making required for adopting regulations is not majoritarian. If it were, many of the regulations adopted by OSHA and other regulatory bodies might never be approved. Decision-making in the regulatory process can be more technical and less tied to politics than is decision-making in Congress, although political considerations cannot be neglected entirely, especially by agencies within executive branch departments. Executive branch agencies are directly responsible to the president and consequently are under pressure to issue regulations that address the president's political priorities. Recent presidents have taken greater pains than their predecessors to know what regulations are being issued and to ensure that they match presidential priorities. President George W. Bush, for example, pushed forward a number of regulations during the last days of his administration that President Obama promptly attempted to rescind.⁴² Even the regulations issued by independent regulatory agencies cannot afford to stray too far from the basic political and ideological norms of the public; if they do, the agency threatens its own survival or at least its latitude to issue further regulations.

One way in which government has attempted to keep regulatory activity in check is through *regulatory analysis*, the attempt to apply cost-benefit analysis and other forms of economic analysis to regulations before they are adopted. President Reagan, for example, required executive agencies to submit all new regulations for review by the Office of Management and Budget (OMB) and later to report their plans for regulatory activity for the subsequent year. These regulatory reviews were as much political as economic, and they resulted in critics' referring to OMB as the "regulatory KGB."⁴³ The Republican Congress first elected in 1994 took regulatory analysis even further by mandating, through a formal regulatory review statute (Public Law [Pub. L.] 104-208), that OMB submit to Congress an economic impact assessment of each new regulation. Although the review of regulations by the president's Office of Management and Budget has in many cases been political and ideological, it also has served a legitimization function. In the first place, the elected presidency does have greater legitimacy than does the unelected bureaucracy, especially given the generally low opinion that Americans have of the bureaucracy. It can be further argued that because the techniques used in regulatory analysis are "rational," regulations that survive it may be more likely to make a positive contribution to the well-being of society.⁴⁴ That conception of positive contribution is primarily economic, however, rather than taking into account a broader range of concerns (see Chapter 17).

Even by the time of the George H. W. Bush administration, some analysts were arguing that deregulation had gone too far, spurring a number of important new regulations, including significant new air pollution standards. The Clinton administration adopted a more activist position in environmental and economic regulation, but it attempted to include more public involvement and public disclosure in the writing of regulations, even though some of the tools of regulatory analysis remained in place.⁴⁵

The George W. Bush administration placed a moratorium on regulation and in 2007 issued an executive order that greatly centralized regulatory power in the executive branch. Barack Obama promptly revoked that executive order and called on the OMB director to assist him in crafting a new plan for regulatory review. Although this came rather late in his administration, President Obama has undertaken some significant attempts at reforming regulation and making a number of administrative processes substantially easier for citizens and businesses.⁴⁶

Public Access to the Regulatory Process

The process of making regulations is open to the public's influence as well as that of the president and OMB. The Administrative Procedures Act and several other laws affecting the issuing of regulations require that agencies accept advice and ideas from interested citizens as the process goes forward and that time be given at each stage for affected interests in the society to respond to agency initiatives.⁴⁷ For some segments of the economy, in fact, the regulatory process may be more democratic than decision-making in Congress. The regulatory process permits affected interests to have direct access to decision-makers. In deliberations in Congress, affected interests may be excluded from effective involvement, especially if they represent an interest not widely considered "legitimate" by Congress members. Furthermore, regulatory outcomes may be "in the public interest" to a greater extent than those Congress devises, given that special interest influences are funneled through an administrative process and frequently made subject to judicial review.⁴⁸

Access to the regulation-writing process does not, of course, mean that the ideas of the affected interests or of public interest groups will dominate the decisions finally made. Simply granting access does not protect the interests of segments of the society that are not sufficiently well organized or sufficiently alert to make their presentations to the agency. Maintaining access to agency decision-making is by no means cost free, so many less well-funded groups may be excluded. This has led some agencies, such as the Federal Trade Commission, to provide funding for interests that might not otherwise have the lawyers and other resources to participate effectively.⁴⁹ There are no guarantees of success, but the procedures do indicate the openness of the regulatory process to a range of ideas and opinions.

The Processes of Writing Regulations

There are two principal ways in which regulation writers collect ideas and opinions. The first, *formal rulemaking*, appears somewhat like a court proceeding, with a formal hearing, the taking of oral testimony from witnesses, and the use of counsel.⁵⁰ Formal rulemaking is a time-consuming and cumbersome process,

but it is deemed necessary when the social and economic interests involved are sufficiently important. Examples of formal rulemaking are the approval of new medications by the Food and Drug Administration and the licensing of nuclear power plants by the Nuclear Regulatory Commission. The written records generated in such proceedings are important, given that these rulings are important to many elements in society and may be the subject of subsequent discussion and litigation. The procedure for licensing nuclear power plants and the degree of public participation have slowed approval of these facilities and may be a barrier to building new ones (see Chapter 14).

The second method of collecting inputs is *informal rulemaking*, which proceeds through several steps. First, the agency must publish in the *Federal Register* a notice of its intent to issue a certain regulation. A period of several months is specified, during which individuals and groups who believe themselves potentially affected by the rule can offer opinions and make suggestions about its content. After the designated time has passed, the agency may issue a draft of the regulation that it would ultimately like to be put into effect. The draft may be based on the suggestions received from affected interests, or it may be what the agency had been planning all along. Then, there is another waiting period for responses to the draft regulation, which may be made directly to the agency or submitted indirectly by having a friendly member of Congress contact the agency with proposed alterations. Then, based on these responses as well as its own beliefs, the agency issues the final regulation, which will have the force of law.

In addition to the two principal forms of rulemaking, administrative law has developed two other ways of adopting regulations. *Hybrid rulemaking* represents an attempt at compromise between the thoroughness of the formal process and the relative ease of the informal process.⁵¹ Hybrid rulemaking came about in part because of the courts,⁵² but it also was required by some acts of Congress, especially for environmental policy.⁵³ Although it does not entail full-scale judicial proceedings, it may require the opportunity to cross-examine witnesses, so as to create a full judicial record that can be the basis for an appeal if further judicial proceedings are demanded.

The other emerging form of rulemaking is *negotiated rulemaking*. Given the complexity of many of the policy areas into which government must now venture and the number of interests involved in each policy, it may be easier to negotiate rules than to attempt to make them administratively.⁵⁴ This process can save a great deal of future ill will among the affected interests, and it may actually create policies superior to those that might emerge from a more centrally directed process. Congress recognized the validity of this form of rulemaking by passing the Negotiated Rulemaking Act of 1990 to specify the conditions under which it can be used and the procedures required. Language about negotiated rulemaking has also been included in the authorizing

legislation for several executive agencies.⁵⁵ While negotiated rulemaking is an attempt to open the process to a variety of actors and thus make it somewhat more democratic, there are also pressures to make the process more technocratic. In particular, there has been increasing interest in regulatory analysis.

The legitimate force of a regulation comes from passage of a statute by Congress and from correct procedures (as specified in the Administrative Procedures Act) in issuing the regulation. In general, issuing a regulation takes about eighteen months from beginning to end and allows for substantial representation of affected groups and individuals. Although the law makes some provision for emergency rulemaking by some agencies, attempts to short-circuit the process will probably result in a regulation's being rejected, no matter how reasonable on its face, if it is appealed through the court system.

The role assigned to affected interests in the regulatory process brings up another point about social decision-making. In part as a means of justifying slavery, John C. Calhoun argued that a proper democracy would take into account not only the majority of individuals but also a majority of interests in society. His idea of "concurrent majorities" would have assigned greater importance to pressure groups than does most of U.S. political thought and would have made the opinions of such groups more central in the process of writing regulations. The fundamental point is that a decision should reflect not a simple majority but rather a more complex agreement among a range of segments of society.

The role of interest groups in decision-making about regulations is similar to the development of "neocorporatism" in western Europe.⁵⁶ The principal difference is that interest groups in the United States usually are not granted quasi-official status as representatives of an economic or social group, as they are in much of Europe. Affected U.S. interest groups are rarely brought together to negotiate a compromise decision, as they might be in many European systems.⁵⁷ The Clinton administration took such a step, however, in organizing a conference between logging interests and conservationists in the Pacific Northwest to discuss their differences over protection of the spotted owl.⁵⁸ The Bush administration involved industrial groups heavily in making decisions about energy policy, provoking challenges to the exclusivity of the process.⁵⁹ In the United States, decision-making is still carried out largely within the agency itself, however, with interest groups involved primarily as sources of information. In addition to protecting the interests of their members, interest groups frequently make substantive points about proposed regulations and can help prevent agencies from making errors in their rules.

Finally, regulatory decision-making is threatened by the classic problem of *agency capture*, in which agencies that regulate a single industry have tended to become advocates for their industries rather than impartial protectors of the public interest.⁶⁰ Capture results from the agencies' need to maintain political

support when, especially in the case of independent regulatory commissions, the only logical source of such support is the regulated industry itself. The public is usually too amorphous a body to offer the specific support an agency requires to defend its budget or even its very existence before Congress. Thus, reforms intended to remove political pressures from regulatory decision-making, by making the agencies independent, have succeeded only in making them independent of one source of political pressure but dependent on another. In Theodore J. Lowi's terminology, the public interest is appropriated for private gain.⁶¹

The capture argument is less applicable to newer regulatory agencies, which operate across a number of industries, than it is to single-industry regulatory bodies.⁶² For example, both the Consumer Product Safety Commission (CPSC) and the Occupational Safety and Health Administration (OSHA) regulate virtually every industry in the country; their advocacy and protection of any one industry might only injure other industries. It is generally too difficult for an industry to capture these crosscutting regulators, and they are therefore more likely to operate in the public interest—although an agency itself may be permitted to define the public interest. These organizations are not immune from political pressures, however. The George W. Bush administration quickly became embroiled in a conflict over its appointments to the CPSC when it attempted to make the organization friendlier to business in general than it had been during the Clinton years.

The economic crisis following 2008 has provoked a more aggressive form of economic regulation in the United States. In particular, the Obama administration created the Consumer Financial Protection Bureau as part of the Dodd-Frank Act addressing the crisis. This bureau was designed to address some of the issues that had become apparent as the causes of the economic crisis became more apparent. This organization is given substantial powers to protect consumers against credit card and mortgage companies that were overcharging or deceiving their customers.

Regulation is a central process in the legitimation of policies, although it is one that many citizens would challenge. Many critics, both popular writers and academics, comment negatively on the making of laws by bureaucrats without the direct congressional involvement that they consider essential for legitimation.⁶³ These regulatory procedures are "due," however, and they have been ordained by several acts of Congress. Each regulation adopted must have a legislative peg to hang on, but unlike acts of Congress, regulations tend to make specific judgments and decisions, and by so doing, they affect individual interests more directly. Many regulations issued through this process have been criticized as impractical and unnecessary—everyone has his or her favorite silly regulation. Presidents have also been concerned about the effects of regulation on the economy and society and, in general, have sought to create more deregulation than regulation, although the recent economic crisis may alter that trend.⁶⁴ Although

the regulatory process offers a possibility of greater objectivity and scientific rationality than the more politicized arena of Congress, the very attempt to apply such strict criteria for decisions is the source of many objections.

The Courts

The courts provide another nonmajoritarian means of legitimating policies. Just as the administrative process has assumed an increasing role in legitimation, the courts have become increasingly involved in issuing authoritative policy statements. Some critics have argued that public policy in the United States is dominated by the court system and not to the benefit of the types of policies generated.⁶⁵ Along with complaints against the administrative process, there have been complaints about judge-made law as a usurpation of congressional prerogatives. Of course, the courts have been involved in legitimating actions and issuing law-like statements in the United States for some time. However, perhaps because of increasing litigation involving social issues (such as gay marriage) and the willingness of the courts to make declarations about remedies to remove violations of the Constitution from federal laws, popular awareness of the role of the courts in making rules for society has grown.

The constitutional basis for the courts to make legitimating decisions is the "supremacy clause," which says that all laws and treaties made in pursuance of the Constitution are the supreme law of the land. In *Marbury v. Madison* (1803), Chief Justice John Marshall decided that it was incumbent on the courts to decide whether or not a law conformed to the Constitution and to declare, if it did not, that the law was void. Following from that fundamental declaration of judicial power, the courts have been able to make rules based on their interpretation of the Constitution. Particularly crucial to their role in legitimating actions is their ability to accept or reject the remedies proposed by the parties to particular disputes. If an action is declared unconstitutional, the courts frequently become involved in determining the actions needed to correct that unconstitutionality.

The most obvious examples of courts prescribing remedies to situations they find unconstitutional have been in cases involving school desegregation and prison overcrowding. In several cases—for example, *Swann v. Charlotte-Mecklenburg Board of Education* (1970)—the courts declared that boundaries between school districts constituted intent on the part of local governments to maintain or create racial segregation of the schools and that cross-district busing was the logical remedy for the problem. In other cases, the courts declared that seriously overcrowded prisons constituted cruel and unusual punishment, violating the Eighth Amendment to the Constitution. Judges then decided that they would take over the prison systems and run them directly to correct the situation, or they would make very specific policies that state administrators were obliged to follow.⁶⁶ These

decisions represent greater involvement of the courts in mandating state and local government actions than many citizens consider proper.

The role the courts have assumed in legitimating action is twofold. In its simplest sense, the courts may further legitimate the actions of other decision-makers by declaring that their actions are acceptable under the Constitution. As mentioned above, American society appears to be becoming increasingly litigious, so that more and more issues are not fully decided until they have been ruled on by the courts. Litigation presents an important means of protecting individual rights in the policymaking process, but it can also greatly slow the implementation of policy. Putting an issue into the court system is sometimes a means of winning a conflict simply by delay, as with the largely successful attempts to block construction of nuclear power plants.

In a second sense, the courts take part in policy legitimation by deciding that certain conditions that exist in society, especially if they are sanctioned by government, are in contradiction of the Constitution and then offering solutions to the problems. The role of the courts in school desegregation is an example of this kind of legitimation, and it occurred not only in busing cases but also in the entire process of desegregation, beginning with *Brown v. Board of Education* (1954). The courts have acted relatively independently of other political institutions and have been active in making decisions and offering remedies that they believed were derived from sound constitutional principles. Just as administrative agencies need a legal peg to hang their rulemaking on, so too do the courts need a constitutional peg on which to hang their interventions. Such terms as *due process* and *equal protection* are sufficiently broad to permit a wide scope for judicial involvement in legitimation activity. For example, the right to privacy was derived from other basic rights in the Constitution, and that right has been used to place limits on state laws outlawing abortion, a continuing policy debate in the United States (see Chapter 16).

Because the role of the courts is to judge the constitutionality of particular actions and to protect individual liberties against incursions by government or other individuals, decision-making in the courts can be expected to be different from decision-making through a legislative body. In many ways, the decisions that courts make are more authoritative than other legitimating decisions, both because of the courts' connection to constitutional authority and because of the absence of any ready recourse once appeals through the court system are exhausted. The courts leave less room for compromise and vote trading than does a legislative body, and they have a less clearly defined constituency, if they have any constituency at all. Finally, a court decision is narrower, speaking to the particular case in question rather than a general principle of policy to be implemented in other specific cases. Thus, court decisions legitimate certain actions but leave future decisions somewhat ambiguous, whereas decisions taken by both legislatures and administrative agencies are attempts to develop more general principles to guide subsequent actions and decisions.

Popular Legitimation

The three methods of legitimation discussed so far share one common feature: They are all performed by elites through political institutions. A number of U.S. states provide mechanisms for direct democracy that allow voters to legitimate policy decisions.⁶⁷ The referendum is in part a way for state legislatures to pass the buck to the people on issues that the legislators fear might be too hot for the good of their future political careers. Alternatively, in some instances, the public can use these mechanisms to bypass legislatures entirely or to prod them into action. Despite some agitation, direct democracy mechanisms have not been adopted at the federal level.

A *referendum* is a vote of the people on an issue put to them by the legislature or some other authoritative body. Approval by popular vote is required before the measure in question can become law. The majority of states in the United States employ referendums for some policy decisions—typically to pass bond issues and to change the state constitution—but some states use them to enact other legislation as well. An issue thought by the legislature to be sufficiently important or highly charged politically may be put to the voters for a decision. This practice certainly satisfies the tenets of democracy, but because voter turnout on referendums is low, it may lead to small numbers of relatively uninformed voters deciding issues of great importance that might be better left to more deliberative bodies. Furthermore, money for publicity campaigns is at least as important in referendums as it is in campaigns for office, so more powerful and affluent interests may be able to influence these elections significantly.

An even more extreme means of involving the public in policymaking is the *initiative*, which permits voters not only to pass on an issue put to them by government but also to place an issue on the ballot themselves. If the requisite number of signatures to a petition is obtained, an item can be placed on the ballot at the next election and will become law if approved by the voters. A number of significant policy measures—most notably the so-called Proposition 13, limiting property taxes and several important environmental laws in California—have been adopted through the initiative process. The initiative poses many of the same problems as the referendum. One difficulty is that important policy disputes, such as the use of nuclear power, become embroiled in political campaigns, so the complex issues involved become trivialized and converted into simple yes-no questions. The initiative provides an avenue for the expression of popular opinion, however, and it gives real power to the voters, who often think of themselves as absent from representative policymaking institutions.

Initiatives sometime are used to overcome legitimation activities by other actors, notably the courts. For example, in the 2008 elections, a number of popular referendums were used to overcome judicial decisions on social issues such as same-sex marriage.⁶⁸ Even then, however, the battles may not end because the courts may argue that even popular votes cannot override fundamental rights.

And the public has been much interested in legalizing drugs such as marijuana than have legislatures.

In addition to these established mechanisms for popular involvement, there are continuing calls for additional means of citizen involvement that would go beyond mere voting or public hearings. Such mechanisms are usually discussed under the term *deliberative democracy* or sometimes *strong democracy*.⁶⁹ The basic idea is that in a true democracy, the role of citizens would not be confined to selecting their leaders but would extend to the debate and selection of policies. This model has worked in the traditional New England town meeting, and the advocates of expanded participation would like to make it more general. The difficulty is in making it work in a country of 300 million people.

Even if it cannot work for such a large aggregation, deliberative democracy could perhaps be applied in smaller settings when making public policy. For example, there is a tradition of public hearings in the policy process at all levels of government in the United States. The typical pattern has been for citizens to make statements of their views to a decision-making body. In some areas, however, this pattern is being revised to allow citizens to discuss policy among themselves and perhaps even make the final decisions themselves. Ideas such as "citizens' juries" and "deliberative elections" are providing opportunities for increased participation by ordinary citizens.

Summary

Legitimation is at once the most difficult and the simplest component of the policymaking process. It generally involves the least complex and technical forms of policy analysis, and the number of actors is relatively limited, except in initiatives and referendums. On the other hand, the actors involved are relatively powerful and have well-defined agendas of their own. Consequently, the task of the policy analyst seeking to alter perceptions and create converts to new policies at the legitimation stage is difficult. The type of formal evidence used at other stages of the process may not carry much weight at this stage, and political factors become paramount.

The barriers that the policy analyst faces in attempting to push through his or her ideas are sometimes individual and political, as when members of Congress must be convinced through partisan analysis or vote trading to accept the analyst's concept of the desirable policy alternative. Conversely, the task may be one of altering substantial organizational constraints or mediating turf wars on a decision that would facilitate the appropriate policy response to a problem. The problem may also be a legal one, of persuading the courts to respond in the desired fashion to a set of facts and to develop the desired remedy for the perceived problem. Or, finally, the problem may be a political one in the broadest

sense—that is, to persuade the voters (through the political mastery of the analyst) to accept or reject a particular definition of an issue and its solution. This is a great range of problems for the analyst, and it demands an equally great range of skills.

No individual is likely to have all these skills, but someone must make strategic choices as to which skills are the most appropriate for a particular problem. If the problem is to get a dam built, then Congress is clearly the most appropriate arena. If the problem is a civil rights violation, the best place to begin is probably the court system. If the problem is a specialized environmental issue, then the regulatory process is the appropriate locus for intervention. Policies do not simply happen; they must be made to happen. This is especially true given the degree of inertia in American government and the number of points at which action can be blocked. It frequently occurs that the major task of the policy analyst is to define clearly the problem that must be solved. Once that is done, the solution may not be simple, but at least it is potentially analyzable, and a feasible course of action may become more apparent.

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83. Indeed, reducing values such as clean air, natural beauty, and social equality to dollars and cents (as is necessary to make cost-benefit analysis work) represents an extreme form of utilitarianism.
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86. The political risks for the mayor may be different than the actual risks to the city and its people. The mayor does not want to be seen as panicking in the face of a crisis, but the unnecessary loss of life may be the most damaging possibility of all for a political leader.
87. Stephen H. Linder and B. Guy Peters, "From Social Theory to Policy Design," *Journal of Public Policy* 4 (1984): 237–259; and M. Howlett, *Designing Public Policies: Principles and Instruments* (London: Routledge, 2010).
88. Anne L. Schneider and Helen M. Ingram, for example, argue that policy design runs directly opposite to the pluralistic politics that dominates policymaking in the United States. See their *Policy Design for Democracy* (Lawrence: University Press of Kansas, 1997).

CHAPTER 5

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4. Bruce Gilley, *The Right to Rule: How States Win and Lose Legitimacy* (New York: Columbia University Press, 2009).
5. Donald L. Westfield, *War Powers: The President, the Congress, and the Question of War* (Westport, CT: Praeger, 1996).
6. Peter Baker and Ashley Parker, "Congress Shows Lack of Enthusiasm for Giving Obama War Powers to Fight ISAs," *New York Times*, February 12, 2015.
7. Christopher F. Karpowitz, J. Quin Monson, Kelly D. Patterson, and Jeremy C. Pope, "Tea Time in America? The Impact of the Tea Party Movement in the 2010 Midterm Elections," *PS: Political Science and Politics* 44: 303–309.
8. See, for example, Alan Brinkley, "What's Wrong with American Political Leadership?" *Wilson Quarterly* 18, no. 2 (1994): 46–54; and Paul Krugman, "A Can't Do Government," *New York Times*, September 2, 2005.
9. The very high figure in 1991 appears to be at least in part a function of the Gulf War (see also the figure for the military in that year)—presidents often get a popularity boost from wars. George W. Bush enjoyed the same high levels after September 11, 2001.
10. His approval rating was 22 percent as he left office in the CBS/*Washington Post* poll.

11. Bruce Gilley, *Right to Rule: How Nations Win and Lose Legitimacy* (Cambridge: Cambridge University Press, 2009).
12. In addition to the rational economic dimension of housing, there is the emotional attachment to the "American Dream" of owning a home.
13. This is to some degree what Aaron Wildavsky meant when he argued that policy analysis must "speak truth to power" in his book *Speaking Truth to Power* (Boston: Little, Brown, 1979).
14. Arnold J. Meltsner, "Political Feasibility and Policy Analysis," *Public Administration Review* 32 (1972): 859–867; and Giandomenico Majone, "The Feasibility of Social Policies," *Policy Sciences* 6 (1975): 49–69.
15. For nonmajoritarian legitimation see G. Majone, "Nonmajoritarian Institutions and the Limits of Democratic Governance," *Journal of Institutional and Theoretical Economics* 157, 57–78.
16. Joel D. Aberbach, *Keeping a Watchful Eye: The Politics of Congressional Oversight* (Washington, DC: Brookings Institution Press, 1991).
17. *Immigration and Naturalization Service v. Chadha*, 462 U.S. 919 (1983); and John D. Huber and Charles R. Shipan, "The Costs of Control: Legislators, Agencies and Transaction Costs," *Legislative Studies Quarterly* 25 (2000): 25–52.
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23. Jeff Flake, "Earmarked Men," *New York Times*, February 9, 2006.
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28. See John A. Hamman, "Universalism, Program Development, and the Distribution of Federal Assistance," *Legislative Studies Quarterly* 18 (1993): 553–568.
29. Morris P. Fiorina, *Congress: Keystone of the Washington Establishment* (New Haven, CT: Yale University Press, 1981).

30. Douglas R. Arnold, *Congress and the Bureaucracy* (New Haven, CT: Yale University Press, 1979).
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CHAPTER 6

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