

Separating Law-Making from Sausage-Making:
The Case for Judicial Review of the Legislative Process

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ABSTRACT

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Inspired, perhaps, by the old adage that “people who like sausages and respect the law should never watch either being made,” there is significant resistance among judges and scholars alike to the idea that courts should review the lawmaking process. This doctoral dissertation challenges this prevalent position, and establishes the case for judicial review of the legislative process.

The dissertation develops the arguments for the authority of courts to review the legislative process; the legitimacy and theoretical justifications of such judicial review; and the practical and normative importance of such judicial involvement. It also challenges the resistance to judicial review of the legislative process by scrutinizing, and seeking to rebut, the major arguments underlying this resistance, and revealing this position’s doctrinal and theoretical incoherence, and its negative consequences.

In an effort to provide a multifaceted exploration of the issue, the dissertation combines multiple approaches of legal scholarship, including a

legal-doctrinal approach, a comparative law approach, a jurisprudential and constitutional theory approach, and an interdisciplinary approach that draws upon political science research and several other disciplines.

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To my parents, Ronit and Yaacov

PREFACE

Faithful, perhaps, to the old adage that “people who like sausages and respect the law should never watch either being made,”¹ federal courts have been persistently reluctant to exercise judicial review of the legislative process.² The idea that courts will determine the validity of legislation based on the adequacy of lawmaking procedures is highly controversial in the academic literature as well.³ This doctoral dissertation challenges this approach, and establishes the case for judicial review of the legislative process.

The dissertation is divided into three articles. Each of the articles challenges a different aspect of the resistance to judicial review of the legislative process (JRLP). Each article also approaches the issue from a different theoretical and methodological perspective: The first article combines doctrinal and comparative approaches; the second article takes an interdisciplinary approach, focusing on political science research about legislative behavior; and the third article turns to constitutional theory and

¹ This oft-quoted saw is usually attributed to Otto von Bismarck, however there is some controversy as to its origin. See Peter L. Strauss, *The Common Law and Statutes*, 70 U. COL. L. REV. 225, 240 n. 38 (1999); Jeremy Waldron, *Legislating with integrity*, 72 FORDHAM L. REV. 373, 374 n. 9 (2003).

² *Marshall Field & Co. v. Clark* 143 U.S. 649 (1892); Marci A. Hamilton, *Discussion and Decisions: A Proposal to Replace the Myth of Self-rule with an Attorneyship Model of Representation*, 69 N.Y.U. L. REV. 477, 493, 545 (1994) (noting “the Court’s persistent refusal to embrace judicial review of the legislature’s deliberative process”).

³ Glen Staszewski, *Rejecting the Myth of Popular Sovereignty and Applying an Agency Model to Direct Democracy*, 56 VAND. L. REV. 395, 465-66 (2003).

jurisprudence. This preface provides a brief overview of the dissertation and explains how the three articles are tied together.

The first article, *Legislative Supremacy in the United States?: Rethinking the Enrolled Bill Doctrine*, challenges the Supreme Court’s resistance to JRLP, embodied in the “enrolled bill” doctrine. This long-established doctrine requires courts to accept the signatures of the Speaker of the House and President of the Senate on the “enrolled bill” as unimpeachable evidence that a bill has been constitutionally enacted,⁴ and effectively insulates the legislative process from judicial review.⁵

The article reexamines the soundness of the enrolled bill doctrine’s main rationales in light of factual and doctrinal developments. In addition, the article introduces two major novel arguments against this doctrine. First, it argues that the doctrine amounts to an impermissible delegation of both judicial and lawmaking powers to the legislative officers of Congress. Second, by examining the doctrine’s historical origins and its interpretation, development and rejection in other countries, it establishes that this doctrine is inextricably related to the traditional English concept of parliamentary supremacy. Although the doctrine was never explicitly linked to legislative

⁴ *Marshall Field*, 143 U.S. at 672.

⁵ John C. Roberts, *Are Congressional Committees Constitutional?: Radical Textualism, Separation of Powers, and the Enactment Process*, 52 CASE W. RES. L. REV. 489, 527, 531 (2001); John C. Roberts & Erwin Chemerinsky, *Entrenchment of Ordinary Legislation: A Reply to Professors Posner and Vermeule*, 91 CAL. L. REV. 1773, 1789–90 (2003).

supremacy in the United States, this article argues that it amounts, in effect, to a view of the legislative process as a sphere of unfettered legislative supremacy, immune from judicial review. The article argues, therefore, that the doctrine is incompatible with the U.S. Constitution and the fundamental and well-settled principles of American constitutionalism.

Arguing that the enrolled bill doctrine leaves the legislative process entirely to the control of the political branches, the article notes the need for further research on whether these branches can be relied upon to enforce the lawmaking provisions without judicial review. In particular, it notes that such research requires, *inter alia*, an examination of Congress's institutional competence, incentives, and mechanisms. This issue is examined in the second article, *Lawmakers as Lawbreakers*.

Lawmakers as Lawbreakers challenges one of the prominent objections to JRLP: the claim that judicial review is not required or justified because Congress has “adequate incentives” and “numerous, effective techniques” to enforce the rules that govern the legislative process.⁶ It also responds to broader arguments that “political safeguards” can reduce or eliminate the need for judicial review;⁷ and to recent claims that legal scholarship tends to rely on

⁶ Jesse H. Choper, *The Political Question Doctrine: Suggested Criteria*, 54 DUKE L.J. 1457, 1505-07 (2005).

⁷ This phrase was famously coined in Herbert Wechsler, *The Political Safeguards of Federalism: The Role of the States in the Composition and Selection of the National Government*, 54 COLUM. L. REV. 543, 543 (1954). For an overview of the “political

public choice theory's over-simplified and overly cynical assumptions about lawmakers, when in fact "legislators have greater incentives [to act as responsible constitutional decision makers] than scholars typically assert."⁸

The article examines Congress's capacity and incentives to enforce upon itself "the law of congressional lawmaking"—the constitutional, statutory, and internal rules that constrain Congress's legislative process. It explores the political safeguards that may motivate lawmakers to engage in self-policing and rule-following behavior. It identifies the major political safeguards that can be garnered from the relevant legal, political science, political economy, and social psychology scholarship, and evaluates each safeguard by drawing on a combination of theoretical, empirical, and descriptive studies about Congress. Avoiding public choice theory's assumption that legislators are self-interested, single-minded reelection seekers, the article undertakes this inquiry under the assumption that lawmakers are motivated by a combination of self-interest and public-

safeguards" debate see, e.g., Robert A. Mikos, *The Populist Safeguards of Federalism*, 68 OHIO ST. L.J. 1669, 1670-71 & n. 2-6 (2007).

⁸ Mark Tushnet, *Interpretation in Legislatures and Courts: Incentives and Institutional Design*, in THE LEAST EXAMINED BRANCH: THE ROLE OF LEGISLATURES IN THE CONSTITUTIONAL STATE 355, 356 (Richard W. Bauman & Tsvi Kahana eds., 2006); see also, e.g., MARK TUSHNET, TAKING THE CONSTITUTION AWAY FROM THE COURTS 65-66 (1999); Philip P. Frickey & Steven S. Smith, *Judicial Review, the Congressional Process, and the Federalism Cases: An Interdisciplinary Critique*, 111 YALE L.J. 1707, 1708-09 (2002); Elizabeth Garrett & Adrian Vermeule, *Institutional Design of a Thayerian Congress*, 50 DUKE L.J. 1277, 1286-90 (2001); Barbara Sinclair, *Can Congress Be Trusted with the Constitution? The Effects of Incentives and Procedures*, in CONGRESS AND THE CONSTITUTION 293, 294-97 (Neal Devins & Keith E. Whittington eds., 2005).

regarding motivations, and that they simultaneously pursue multiple goals, which also include ideology and desire to make good public policy.

The article's main argument is that the political safeguards that scholars and judges commonly rely upon to constrain legislative behavior actually motivate lawmakers to be lawbreakers. It concludes that Congress's mechanisms and incentives to enforce the law of congressional lawmaking are lacking, and that Congress therefore cannot be relied upon to police itself.

The third article, *The Puzzling Resistance to Judicial Review of the Legislative Process*, turns to constitutional theory and legal theory to establish the theoretical case for JRLP. The article develops theoretical arguments to establish the authority of courts to review the legislative process, the crucial practical and normative importance of reviewing the enactment process, and the legitimacy of such review.

This article focuses on a particularly striking aspect of the resistance to JRLP: the observation that most judges and scholars “find it improper to question legislative adherence to lawful procedures,” while “tak[ing] substantive judicial review for granted.”⁹ The article is therefore largely devoted to challenging this dominant position in constitutional law and theory,

⁹ Hans A. Linde, *Due Process of Lawmaking*, 55 NEB. L. REV. 197, 242–43 (1976).

which views JRLP as less justified, and much more objectionable, than substantive judicial review.

The article argues, *inter alia*, that, ironically, some of the major arguments for substantive judicial review in constitutional theory, and even the arguments in *Marbury v. Madison*¹⁰ itself, are actually more persuasive when applied to JRLP. It further claims that even some of the arguments raised by leading critics of judicial review can actually be employed as arguments for justifying JRLP.

The article therefore concludes that JRLP is no less important, and in fact, more justifiable than substantive judicial review, and that the prevalent view that takes substantive judicial review for granted, while adamantly rejecting JRLP, is hard to sustain.

The three articles complement each other, and come together into a comprehensive (albeit, by no means exhaustive) exploration, and defense of, judicial review of the legislative process. They can be read as three parts of one coherent dissertation. At the same time, each of the articles can also stand on its own feet, and can be understood independently of the other two. Moreover, while the three articles focus on judicial review of the legislative process, each

¹⁰ 5 U.S. (1 Cranch) 137 (1803).

of them also appeals to, and seeks to contribute to, broader issues of constitutional law, constitutional theory, and legislation scholarship.

FIRST ARTICLE:
LEGISLATIVE SUPREMACY IN THE UNITED STATES?: RETHINKING
THE ENROLLED BILL DOCTRINE

INTRODUCTION

Justice Cardozo once argued that “[f]ew rules in our time are so well established that they may not be called upon any day to justify their existence as means adapted to an end.”¹ This Article argues that the day has come for the “enrolled bill” doctrine (EBD) to be reconsidered. Laid down in *Marshall Field & Co. v. Clark*, this doctrine requires courts to accept the signatures of the Speaker of the House and President of the Senate on the “enrolled bill” as “complete and unimpeachable” evidence that a bill has been properly and constitutionally enacted.² Although the federal courts have consistently and uniformly invoked this doctrine for more than a century,³ it has received relatively little attention.⁴

¹ BENJAMIN N. CARDOZO, *THE NATURE OF THE JUDICIAL PROCESS* 98 (1921).

² *Marshall Field & Co. v. Clark*, 143 U.S. 649, 672 (1892).

³ *Public Citizen v. U.S. Dist. Court for D.C. (Public Citizen II)*, 486 F.3d 1342, 1351 (D.C. Cir. 2007) (noting that “the Courts of Appeals have consistently invoked *Marshall Field*”), *cert. denied*, 128 S. Ct. 823 (2007); *OneSimpleLoan v. U.S. Sec’y of Educ.*, 496 F.3d 197, 203 (2d Cir. 2007) (describing EBD as “a longstanding rule, invoked by many courts, including the Supreme Court and our own Court” (quoting *United States v. Pabon-Cruz*, 391 F.3d 86, 99 (2d Cir. 2004))), *cert. denied sub nom.*, *OneSimpleLoan v. Spellings*, 128 S. Ct. 1220 (2008); *Public Citizen v. Clerk, U.S. Dist. Court for D.C. (Public Citizen I)*, 451 F. Supp. 2d 109, 125 (D.D.C. 2006) (noting that EBD “has, in fact, been uniformly applied over the years”), *aff’d sub nom.*, *Public Citizen II*, 486 F.3d 1342, *cert. denied*, 128 S. Ct. 823.

⁴ Mitchell N. Berman, *Constitutional Decision Rules*, 90 VA. L. REV. 1, 72 (2004) (describing EBD as “little known”). There are, of course, a few exemplary exceptions. These works are cited throughout this Article.

Recently, however, this doctrine garnered renewed interest as news reports widely reported allegations that the Deficit Reduction Act of 2005 (DRA) was enacted in violation of the Constitution’s lawmaking requirements, namely, the bicameral requirement of Article I, Sections 1 and 7.⁵ Some even alleged “‘a conspiracy’ to violate the Constitution”⁶ or a “legally improper arrangement among certain representatives of the House, Senate and Executive Branch to have the President sign legislation that had not been enacted pursuant to the Constitution.”⁷ Several different lawsuits challenged DRA’s constitutionality, but the district and appellate federal courts were compelled by *Field*’s EBD to dismiss all these cases without examining whether the Act was indeed passed in violation of the Constitution.⁸ Some courts opined that “the meaning of *Marshall Field* and its continuing vitality more than 100 years after its issuance require a more complete examination,” but concluded that “in the

⁵ See *Public Citizen I*, 451 F. Supp. 2d at 109 n.1.

⁶ See Posting of Marty Lederman to Balkinization, <http://balkin.blogspot.com/2006/02/q-when-is-bill-signed-by-president-not.html> (Feb. 10, 2006, 10:33 EST) (arguing that the DRA case was, “in fact, a ‘conspiracy’ to violate the Constitution. That is to say, [House Speaker] Dennis Hastert has violated his constitutional oath by attesting to the accuracy of the bill, knowing that the House version was different (and having intentionally avoided fixing the discrepancy when it came to his attention before the House vote). And [President pro tempore of the Senate] Stevens and the President are coconspirators, assuming they, too, knew about the problem before they attested to and signed the bill, respectively”).

⁷ *OneSimpleLoan*, 496 F.3d at 200–01 (internal quotation marks omitted).

⁸ E.g., *Public Citizen I*, 451 F. Supp. 2d at 128; *Public Citizen II*, 486 F.3d at 1355; *Conyers v. Bush*, No. 06-11972, 2006 WL 3834224, at *5 (E.D. Mich. Nov. 6, 2006); *Cal., Dep’t of Soc. Servs. v. Leavitt*, 444 F. Supp. 2d 1088, 1096 (E.D. Cal. 2006); *Cookeville Reg’l Med. Ctr. v. Leavitt*, No. 04-1053 (JR), 2006 WL 2787831, at *4 (D.D.C. Sept. 26, 2006); *OneSimpleLoan v. U.S. Sec’y of Educ.*, No. 06 Civ. 2979 (RMB), 2006 WL 1596768, at *9 (S.D.N.Y. June 9, 2006), *aff’d*, 496 F.3d 197 (2d Cir. 2007); *Zeigler v. Gonzales*, No. 06-0080-CG-M, 2007 WL 1875945, at *1 (S.D. Ala. June 28, 2007).

absence of an express overruling of the case by the Supreme Court, this Court is constrained to conclude that [EBD] remains in full effect today.”⁹ Against this backdrop, this Article argues that reconsideration of this doctrine is particularly timely.

Reconsideration of this time-honored doctrine is also appropriate because, as this Article will establish, factual and doctrinal developments since *Field* was decided in 1892 significantly erode its soundness. Its reexamination is also interesting, for as this Article demonstrates, this doctrine touches upon some of the most fascinating and vigorously debated issues in legal scholarship. These include, for example, separation of powers and the proper relationship between courts and legislatures; the appropriate allocation of authority to interpret the Constitution among the three branches of government; justiciability and the political question doctrine; and even the merits of textualism. Most importantly, however, this Article argues that EBD requires reevaluation because it has far-reaching ramifications that were largely overlooked by the *Field* Court and in much of the later discussions of the doctrine. This doctrine has the powerful effect of preventing judicial review of the legislative process—that is, judicial examination of the enactment process in order to determine compliance with the Constitution’s lawmaking requirements.¹⁰ Any

⁹ *Public Citizen I*, 451 F. Supp. 2d at 115–16; see also *OneSimpleLoan*, 496 F.3d at 203, 208.

¹⁰ While there are many models of judicial review of the legislative process—and all will apparently be blocked by EBD—this Article focuses on the model that grants courts the power to invalidate a statute that was enacted in violation of the lawmaking requirements of the

doctrine that considers a whole sphere of governmental activity as immune from judicial review, and treats certain constitutional provisions as judicially non-enforceable, requires special attention. As Professor Louis Henkin has written in another context, “[j]udicial review is now firmly established as a keystone of our constitutional jurisprudence. A doctrine that finds some issues exempt from judicial review cries for strict and skeptical scrutiny.”¹¹

This Article introduces two major novel arguments against EBD. First, it argues that the doctrine amounts to an impermissible delegation of both judicial and lawmaking powers to the legislative officers of Congress. It argues that the doctrine cedes the judicial power to interpret and enforce the constitutional lawmaking provisions, and the authority to determine the validity of legislation, to the exclusive and final authority of the legislative officers. It also argues that the doctrine permits the exercise of lawmaking authority by just two individuals—the Speaker of the House and the President of the Senate—rather than by Congress as a whole, as mandated by the Constitution. Second, by examining the doctrine’s historical origins and its interpretation and development in other countries, the Article establishes the claim that this doctrine is intimately (if not inextricably) related to the traditional English concept of legislative supremacy, which views lawmaking

Constitution. See Philip P. Frickey & Steven S. Smith, *Judicial Review, the Congressional Process, and the Federalism Cases: An Interdisciplinary Critique*, 111 YALE L.J. 1707, 1711–13 (2002) (describing “the model of procedural regularity”).

¹¹ Louis Henkin, *Is There a “Political Question” Doctrine?*, 85 YALE L.J. 597, 600 (1976).

as an absolute sovereign prerogative and the legislative process as a sphere of unfettered legislative omnipotence. Although the doctrine was never explicitly linked to legislative supremacy in the United States, this Article argues that it amounts, in effect, to a view of the legislative process as a sphere of unfettered legislative supremacy, immune from judicial review. It argues, therefore, that the doctrine represents a view of the legislative process that is incompatible with the U.S. Constitution. This Article also advances the existing discussions on EBD by reexamining its major rationales and their soundness today.

Part I discusses the grounds for the doctrine in *Marshall Field & Co. v. Clark* and its contemporary justifications. Part II describes the DRA case in more detail, as this case will provide the background for the reevaluation of EBD. Part III reexamines the doctrine's soundness in light of factual developments. Part IV reconsiders its soundness vis-à-vis later Supreme Court rulings and doctrinal developments. Part V argues that the doctrine amounts to an impermissible delegation. Part VI establishes the doctrine's link to legislative supremacy and its incompatibility with the Constitution. Part VII revisits the major and most common justification for the doctrine—that it is required by separation of powers and the respect due to a coequal branch. While conceding that some of the doctrine's rationales still offer a valid case for judicial restraint in reviewing the legislative process, this Article argues that EBD is on balance unjustifiable. Part VIII concludes, therefore, that there is a need for more sophisticated alternatives to the doctrine that will more

properly balance the competing considerations underpinning the debate about the doctrine.

I. THE ENROLLED BILL DOCTRINE: ITS FOUNDATIONS AND JUSTIFICATIONS

This Part begins with a brief explanation of the basic terms of EBD. It then turns to examine the doctrine’s grounds in *Marshall Field & Co. v. Clark* and its modern justifications.

A. The Enrolled Bill Doctrine: Basic Terms

Article I, Section 7 of the Constitution requires that before proposed legislation may become a law, the same bill must be passed by both houses of Congress and signed by the President.¹² When one chamber of Congress passes a bill, the enrolling clerk of that chamber prepares the “engrossed bill”—a copy of a bill that has passed one chamber—which is printed and sent to the other chamber. After the bill has been agreed to in identical form by both chambers, the enrolling clerk prepares the “enrolled bill”—the final copy of a bill which has passed both chambers of Congress. The “enrolled bill” is printed and signed by the Speaker of the House and the President of the Senate, in attestation that the bill has been approved by their respective houses, and then presented to the President. It is this document that, if signed by the President,

¹² U.S. CONST. art. I, § 7, cl. 2; *Clinton v. City of New York*, 524 U.S. 417, 448 (1998).

is forwarded to archives from which the *Statutes at Large* are copied and the United States Code is subsequently compiled.¹³

EBD requires courts to accept the signatures of the Speaker of the House and President of the Senate on the “enrolled bill” as “complete and unimpeachable” evidence that a bill has been properly enacted.¹⁴

B. The Doctrine and Its Grounds in Marshall Field & Co. V. Clark

EBD was adopted in the federal system in the 1892 decision of *Marshall Field & Co. v. Clark*. Marshall Field and other importers challenged the validity of the Tariff Act of October 1, 1890. They argued that the enrolled version of the Act differed from the bill actually passed by Congress. Based on the *Congressional Record*, committee reports, and other documents printed by the authority of Congress, they argued that a section of the bill, as it finally passed, was omitted from the “enrolled bill.”¹⁵ The Court held, however, that courts may not question the validity of the “enrolled bill” and may not look beyond it to the *Congressional Record* or other evidence.¹⁶ It stated:

¹³ 1 U.S.C. § 106 (2002); Matthew D. Adler & Michael C. Dorf, *Constitutional Existence Conditions and Judicial Review*, 89 VA. L. REV. 1105, 1172 (2003); Charles W. Johnson, *How Our Laws Are Made*, H.R. REP. NO. 108-93, at 37–38, 50–51 (2003), available at <http://www.senate.gov/reference/resources/pdf/howourlawsaremade.pdf>. On the enrollment process, see *infra* section III.B.

¹⁴ *Marshall Field & Co. v. Clark*, 143 U.S. 649, 672 (1892).

¹⁵ *Id.* at 668–69.

¹⁶ *Id.* at 672–80.

The signing by the speaker of the house of representatives, and by the president of the senate . . . of an enrolled bill, is an official attestation by the two houses of such bill as one that has passed congress. . . . And when a bill, thus attested, receives [the President's] approval, and is deposited in the public archives, its authentication as a bill that has passed congress should be deemed complete and unimpeachable. . . . The respect due to coequal and independent departments requires the judicial department to . . . accept, as having passed congress, all bills authenticated in the manner stated¹⁷

Cognizant of the larger significance of this case, the Court noted that it “has received, as its importance required that it should receive, the most deliberate consideration,”¹⁸ and enunciated a number of reasons for adopting EBD. A cardinal consideration was the Court’s view that EBD is required by the “respect due to coequal and independent departments.”¹⁹ Another consideration was a consequentialist, or public policy, concern: the fear that allowing courts to look behind the “enrolled bill” would produce uncertainty and undermine the public’s reliance interests on statutes.²⁰ An additional, related reason was the Court’s reluctance to make the validity of a congressional enactment depend upon legislative journals, as the Court seemed to indicate mistrust in “the manner in which the journals of the respective

¹⁷ *Id.* at 672.

¹⁸ *Id.* at 670.

¹⁹ *Id.* at 672.

²⁰ *Id.* at 670 (“[W]e cannot be unmindful of the consequences that must result if this court should feel obliged . . . to declare that an enrolled bill, on which depend public and private interests of vast magnitude . . . did not become a law.”); *see also id.* at 675–77.

houses are kept by the subordinate officers charged with the duty of keeping them.”²¹ The final argument for the Court’s adoption of EBD was that “[t]he views we have expressed are supported by numerous adjudications in this country.”²²

The Court also recognized one major consideration against EBD: “the duty of this court, from the performance of which it may not shrink, to give full effect to the provisions of the constitution relating to the enactment of laws.”²³ It also noted the argument that EBD makes it “possible for the speaker of the house of representatives and the president of the senate to impose upon the people as a law a bill that was never passed by congress,” but dismissed “this possibility [as] too remote to be seriously considered.”²⁴ The Court concluded, therefore, that the “evils that may result from the recognition of the principle that an enrolled act . . . is conclusive evidence that it was passed by congress, according to the forms of the constitution, would be far less than those that would certainly result from a rule making the validity of congressional enactments” depend upon the journals of the respective houses.²⁵

²¹ *Id.* at 673.

²² *Id.*

²³ *Id.* at 670.

²⁴ *Id.* at 672–73.

²⁵ *Id.* at 673; *see also id.* at 675 (“Better, far better, that a provision should occasionally find its way into the statute through mistake, or even fraud, than that every act, state and national, should, at any and all times, be liable to be put in issue and impeached by the journals, loose papers of the legislature and parol evidence. Such a state of uncertainty in the statute laws of

C. The Doctrine and Its Justifications Today

Marshall Field & Co. v. Clark was never reversed by the Supreme Court. EBD is, therefore, still consistently applied in the federal system today, mostly by lower courts.²⁶ The doctrine is also still followed in a number of states.²⁷ In fact, some state supreme courts have recently reaffirmed their adherence to the doctrine.²⁸

As in *Field*, the principal contemporary justification for EBD continues to be the respect due to a coequal branch (which is also commonly framed as a separation-of-powers argument).²⁹ Modern-day supporters of the doctrine

the land would lead to mischiefs absolutely intolerable.” (quoting *Sherman v. Story*, 30 Cal. 253, 275 (1866) (internal quotation marks omitted))).

²⁶ See, e.g., *Public Citizen II*, 486 F.3d 1342, 1351 (D.C. Cir. 2007); *OneSimpleLoan v. U.S. Sec’y of Educ.*, 496 F.3d 197, 203 (2d Cir. 2007). For other recent examples, not related to the DRA, see *United States v. Miles*, No. 06-2899, 2007 WL 1958623, at *1 (7th Cir. July 3, 2007); *United States v. Campbell*, No. 06-3418, 2007 WL 1028785, at *1 (7th Cir. Apr. 3, 2007); *United States v. Chillemi*, No. CR-03-0917-PHX-PGR, 2007 WL 2995726, at *7 (D. Ariz. Oct. 12, 2007); *United States v. Harbin*, No. C-01-221(3), 2007 WL 2777777, at *4–6 (S.D. Tex. Sept. 21, 2007); *United States v. McCuiston*, No. C-04-676, 2007 WL 2688502, at *7–8 (S.D. Tex. Sept. 12, 2007); and discussion *infra* section IV.D.

²⁷ See 1 NORMAN J. SINGER, *SUTHERLAND STATUTES AND STATUTORY CONSTRUCTION* §15:3 (6th ed. 2002 & Supp. 2006).

²⁸ See, e.g., *Wash. State Grange v. Locke*, 105 P.3d 9, 22–23 (Wash. 2005); *Birmingham-Jefferson Civic Ctr. Auth. v. City of Birmingham*, 912 So. 2d 204, 219–21 (Ala. 2005); *Med. Soc’y of S.C. v. Med. Univ. of S.C.*, 513 S.E.2d 352, 356–57 (S.C. 1999).

²⁹ See, e.g., *OneSimpleLoan*, 496 F.3d at 202, 208; *Public Citizen II*, 486 F.3d at 1349–50, 1354; *Med. Soc’y of S.C.*, 513 S.E.2d at 356–57; *Wash. State Grange*, 105 P.3d at 22–23; WILLIAM N. ESKRIDGE, JR. ET AL., *CASES AND MATERIALS ON LEGISLATION: STATUTES AND THE CREATION OF PUBLIC POLICY* 388–89 (3d ed. 2001); SINGER, *supra* note 27, §15:3, at 820–22; Bernard W. Bell, *R-E-S-P-E-C-T: Respecting Legislative Judgments in Interpretive Theory*, 78 N.C. L. REV. 1253, 1278 (2000); Allen Crigler, Comment, *Judicial Review of the Legislative Enactment Process: Louisiana’s “Journal Entry” Rule*, 41 LA. L. REV. 1187, 1190 (1981); Kristen L. Fraser, “Original Acts,” “Meager Offspring,” and Titles in a Bill’s Family

argue that this justification is “as powerful today as when *Marshall Field* was decided.”³⁰ The public’s interest in the certainty of the law is also still commonly cited as a justification for the doctrine.³¹ “Mutual regard between the coordinate branches and the interest of certainty” were also the two grounds Justice Scalia relied upon in his solitary concurrence in *United States v. Munoz-Flores*, in which he endorsed continued adherence to *Field*’s EBD.³²

In contrast, the other original reason enunciated by the *Field* Court in support of EBD—the unreliability of legislative records—is much less common in contemporary sources.³³ Nevertheless, part of the debate about EBD still revolves around the evidentiary question of the probative value of the enrolled bill in comparison with other sources of evidence, and some still argue that the enrolled bill constitutes more reliable evidence than legislative

Tree: A Legislative Drafter’s Perspective on City of Fircrest v. Jensen, 31 SEATTLE U. L. REV. 35, 65 (2007); Robert F. Williams, *State Constitutional Limits on Legislative Procedure: Legislative Compliance and Judicial Enforcement*, 48 U. PITT. L. REV. 797, 817 (1987); see also *Public Citizen I*, 451 F. Supp. 2d at 126 (noting that the respect due to a coequal branch is the primary rationale currently stated by state courts that still adhere to the EBD).

³⁰ Brief for the Respondent in Opposition at 6, 12–14, *Public Citizen v. U.S. Dist. Court for Dist. of Columbia*, 128 S. Ct. 823 (2007) (No. 07-141); see also *OneSimpleLoan*, 496 F.3d at 208 (“[T]he separation-of-powers concerns at the forefront of *Marshall Field* . . . are surely undiminished by the passage of time . . .”).

³¹ See, e.g., *Baker v. Carr*, 369 U.S. 186, 214 (1962) (discussing the cases regarding validity of enactments and noting that judicial reluctance to review the enacting process is based on the respect due to coequal and independent departments and the need for finality and certainty about the status of a statute); ESKRIDGE, JR. ET AL., *supra* note 29, at 388; SINGER, *supra* note 27, §15:3, at 820–22.

³² *United States v. Munoz-Flores*, 495 U.S. 385, 408–10 (1990) (Scalia, J., concurring); see also *infra* section IV.D.

³³ See SINGER, *supra* note 27, §15:10, at 838; see also *infra* section III.A.

journals or other evidence.³⁴ Hence, rather than completely disappearing, the justification for EBD based on the unreliability of legislative records has evolved into the “comparative probative value” argument.³⁵

An additional argument in favor of EBD in current sources is the “doctrine of convenience.” According to this argument, allowing courts to look behind the enrolled bill will place an undue burden upon the legislature to preserve its records and will unnecessarily complicate litigation and raise litigation costs.³⁶

Another possible reason for EBD is the argument that judicial review of the enactment process is not needed because Congress (coupled with the inherent check of the Presidential veto power) can be relied upon to police itself.³⁷ Arguably, the fact that cases such as the DRA have been rare proves that the possibility of abuse of EBD is, as *Field* contended, “too remote to be seriously considered.”³⁸ It has also been argued that even if violations of

³⁴ See Crigler, *supra* note 29, at 1190; Comment, *Judicial Review of the Legislative Process of Enactment: An Assessment Following Childers v. Couey*, 30 ALA. L. REV. 495, 497 n.23 (1978); William J. Lloyd, *Judicial Control of Legislative Procedure*, 4 SYRACUSE L. REV. 6, 12–13 (1952).

³⁵ See Lloyd, *supra* note 34, at 12–13.

³⁶ See, e.g., SINGER, *supra* note 27, §15:3, at 822; Adam M. Samaha, *Undue Process*, 59 STAN. L. REV. 601, 636 (2006).

³⁷ Jesse H. Choper, *The Political Question Doctrine: Suggested Criteria*, 54 DUKE L.J. 1457, 1505-07 (2005); cf. Hans A. Linde, *Due Process of Lawmaking*, 55 NEB. L. REV. 197, 243–44 (1976) (supporting judicial review of the legislative process, but stressing that “[o]ther participants than courts have the opportunity, and the obligation, to insist on legality in lawmaking”).

³⁸ *Marshall Field & Co. v. Clark*, 143 U.S. 649, 672–73 (1892); Brief for the Respondent in Opposition at 13, *Public Citizen v. U.S. Dist. Court for Dist. of Columbia*, 128 S. Ct. 823 (2007) (No. 07-141) (“[I]t is not clear how often this issue arises. With *Marshall Field* in

constitutional requirements, procedural abuses, and other defects in the legislative process do occur, they are better remedied by the elected branches or the electorate.³⁹

II. THE DOCTRINE IN ACTION: THE DRA CASE

The DRA was signed into law by President Bush on February 8, 2006. Shortly after its enactment, members of Congress and other plaintiffs challenged DRA's constitutionality in several lawsuits, arguing that it was invalid because it was not passed by the House and Senate in the same form, as mandated by Article I, Sections 1 and 7. It was alleged that the House voted on a version of the bill that was identical to the version of the bill passed by the Senate in all but one provision.⁴⁰ In budgetary terms, this seemingly minor difference had significant consequences, amounting to an estimated \$2 billion over five years.⁴¹ When the enrolled bill was prepared, a Senate clerk apparently "corrected" this discrepancy by changing this provision back to the

place, the issue appears to have recurred only rarely, which provides another reason for not overruling such a well-settled precedent.”)

³⁹ See 4 JOHN H. WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW § 1350, at 832–34 (J. Chadbourn ed., 1972); Crigler, *supra* note 29, at 1190.

⁴⁰ Specifically, it was alleged that when preparing the Senate's version of the bill for transmittal to the House, a Senate clerk changed the text of Section 5101 of the bill, altering the duration of Medicare payments for certain durable medical equipment, stated as thirteen months in the version passed by the Senate, to thirty-six months. It was further alleged that the House voted on the version of the bill that contained the clerk's error and, therefore, was not identical to the version of the bill passed by the Senate.

⁴¹ *Public Citizen I*, 451 F. Supp. 2d at 111 n.7.

Senate's version (in violation of Senate and House rules, which clearly state that only the two Houses, by concurrent resolution, may authorize the correction of an error when enrollment is made).⁴² It was also alleged that the Speaker of the House, the President pro tempore of the Senate, and President Bush were all aware, prior to the signing ceremony, that the bill presented to the President reflected the Senate bill but was never passed in identical form by the House. Nevertheless, the Speaker and President pro tempore signed the enrolled bill, in attestation that the bill had duly passed both houses, and the bill so attested was presented to and signed by the President. As noted, some plaintiffs even alleged that there existed a "legally improper arrangement among certain representatives of the House, Senate and Executive Branch to have the President sign legislation that had not been enacted pursuant to the Constitution."⁴³ Based on these factual allegations, supported by congressional documents and other evidence, the plaintiffs contended that, because the version of the DRA signed by the President was never passed by the House,

⁴² See 110th Congress House Rules Manual, H.R. Doc. No. 109-157, at 202, 277, 302 (2007), available at <http://www.gpoaccess.gov/hrm/index.html> [hereinafter House Rules Manual]; Robert B. Dove, *Enactment of a Law* 23-24 (1997), available at <http://thomas.loc.gov/home/enactment/enactlaw.pdf>.

⁴³ *OneSimpleLoan v. U.S. Sec'y of Educ.*, 496 F.3d 197, 200-01(2d Cir. 2007) (internal quotation marks omitted).

the Act did not meet the lawmaking requirements of the Constitution and was thus invalid.⁴⁴

There is no dispute that a bill that does not meet the lawmaking requirements of Article I, Section 7 of the Constitution (including the requirement that the same bill—that is, the same text—be passed by both chambers of Congress) does not become law.⁴⁵ Nor is there doubt that “[t]here is no authority in the presiding officers of the house of representatives and the senate to attest by their signatures . . . any bill not passed by congress.”⁴⁶ Even most of the facts in this case are largely undisputed.⁴⁷ And yet, all district and appellate courts that have ruled upon these constitutional challenges felt compelled to dismiss them without examining whether the Act was passed in violation of the Constitution. The reason that the courts were unable to exercise any meaningful judicial review and enforce the Constitution in these cases was their adherence to EBD. As one court put it, “[t]he argument is a sound one, as far as it can go—a bill that does not pass both houses in the same form is not good law, no matter what the president does—but, under *Marshall Field*, it

⁴⁴ This factual background is based primarily on the allegations in *Conyers v. Bush*, 2006 WL 3834224, at *4 (E.D. Mich. Nov. 6, 2006), *Public Citizen I*, 451 F. Supp. 2d at 110–13, and *OneSimpleLoan*, 496 F.3d at 200–01.

⁴⁵ *Public Citizen I*, 451 F. Supp. 2d at 115 (“Certain fundamental principles are not in dispute. The bicameral requirement embodied in Article I, Sections 1 and 7, requires that the same bill—that is, the same text—be passed by both chambers of Congress. . . . Absent bicameral passage, a bill does not become a law”); *Public Citizen II*, 486 F.3d at 1343; see also *Clinton v. City of New York*, 524 U.S. 417, 448 (1998).

⁴⁶ *Marshall Field & Co. v. Clark*, 143 U.S. 649, 669 (1892).

⁴⁷ *Public Citizen II*, 486 F.3d at 1344.

comes to an abrupt stop with the attestation of the leadership of both houses of Congress that they [sic] did pass the bill in question.”⁴⁸ Some of the courts expressed misgivings about the soundness and propriety of EBD, but concluded that they were bound by it in the absence of an express overruling of *Field*.⁴⁹ The Supreme Court denied petitions for writ of certiorari in these cases,⁵⁰ indicating, perhaps, that it is disinclined to reconsider *Field* for the time being.

The DRA case demonstrates part of the far-reaching ramifications of EBD: it forces courts to close their eyes to constitutional violations and to treat statutes as valid even in the face of (apparently) clear evidence to the contrary. Furthermore, as one appellate court explicitly held, there is no exception to this doctrine even in cases allegedly involving a deliberate conspiracy by the presiding officers of Congress to violate the constitutional provisions of lawmaking or to enact legislation not passed by both houses of Congress.⁵¹ Admittedly, even if the allegations in the DRA case are true, this case is an example of a relatively minor constitutional violation in the legislative process. However, as we shall see in the next Part, examples from the states

⁴⁸ *Cookeville Reg’l Med. Ctr. v. Leavitt*, No. 04-1053 (JR), 2006 WL 2787831, at *4 (D.D.C. Sept. 26, 2006).

⁴⁹ *See, e.g., OneSimpleLoan*, 496 F.3d at 203, 208; *Public Citizen I*, 451 F. Supp. 2d at 115–16, 124.

⁵⁰ *See OneSimpleLoan*, 128 S. Ct. 1220 (2008); *Public Citizen*, 128 S. Ct. 823 (2007).

⁵¹ *OneSimpleLoan*, 496 F.3d at 208.

demonstrate that the doctrine forces courts to enforce statutes even when it is obvious that they were enacted in deliberate and much more egregious violation of the Constitution.

III. THE DOCTRINE'S SOUNDNESS IN LIGHT OF FACTUAL DEVELOPMENTS

It is “common wisdom,” as the Supreme Court noted, that “the rule of *stare decisis* is not an ‘inexorable command,’ and certainly it is not such in every constitutional case.”⁵² One of the recognized considerations for overruling an earlier case is significant change in circumstances that undermines the factual assumptions of the earlier case.⁵³ Sections III.A to III.D describe some of the major developments since *Field* was decided that undermine its factual foundations. In light of these developments, section III.E reconsiders the “comparative probative value” justification of EBD.

A. Improvements in Legislative Record-Keeping and Other Technological Developments

One of *Field*'s reasons for adopting EBD was the Court's mistrust of legislative journals.⁵⁴ Some even argue that “much of the *Marshall Field* ruling

⁵² *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 854 (1992) (quoting *Burnet v. Coronado Oil & Gas Co.*, 285 U.S. 393, 405 (1932) (Brandeis, J., dissenting)).

⁵³ *Id.* at 854–55, 861–64; *see also* *Randall v. Sorrell*, 548 U.S. 230, 244 (2006).

⁵⁴ *See* *Marshall Field & Co. v. Clark*, 143 U.S. 649, 673–74, 676–77 (1892).

appeared to rest on an empirical sense of the undependability of the legislative Journals,” noting that the *Field* Court “canvassed many state court cases disparaging the accuracy and scrupulousness of legislative Journal recordkeeping.”⁵⁵ Indeed, the Court relied on arguments from state supreme court cases that “[l]egislative journals are made amid the confusion of a dispatch of business, and therefore much more likely to contain errors than the certificates of the presiding officers to be untrue,”⁵⁶ and that “these journals must have been constructed out of loose and hasty memoranda made in the pressure of business and amid the distractions of a numerous assembly.”⁵⁷ These decisions also stressed “the danger . . . from the intentional corruption of evidences of this character.”⁵⁸

This argument was a widespread justification for EBD in the late nineteenth century.⁵⁹ When the doctrine was originally formulated in the United States, legislative record keeping was “so inadequate”⁶⁰ that in almost every instance in the earlier cases “it was an excuse for sustaining the enrolled

⁵⁵ Vikram David Amar, *Why the “Political Question Doctrine” Shouldn’t Necessarily Prevent Courts from Asking Whether a Spending Bill Actually Passed Congress*, FIND LAW, Apr. 13, 2006, <http://writ.news.findlaw.com/amar/20060413.html>.

⁵⁶ *Field*, 143 U.S. at 677 (quoting *Weeks v. Smith*, 81 Me. 538, 547 (1889)).

⁵⁷ *Id.* at 674 (citing *Pangborn v. Young*, 32 N.J.L. 29, 37 (N.J. 1886)).

⁵⁸ *Id.*

⁵⁹ SINGER, *supra* note 27, §15:10, at 837–38 & nn.1–2.

⁶⁰ *D & W Auto Supply v. Dep’t of Revenue*, 602 S.W.2d 420, 423 (Ky. 1980).

bill on the theory that a careless record should not impeach an act solemnly signed.”⁶¹ Under these factual conditions, there seems to be much sense in the argument adopted by the *Field* Court: “Can any one deny that, if the laws of the state are to be tested by a comparison with these journals, so imperfect, so unauthenticated, that the stability of all written law will be shaken to its very foundation?”⁶²

With the improvement of record-keeping in the legislatures, however, this argument’s strength significantly diminished and it has largely been abandoned in modern cases.⁶³ In fact, some state supreme courts based their decision to overrule EBD, at least in part, on their conclusion that “[m]odern automatic and electronic record-keeping devices now used by legislatures remove one of the original reasons for the rule.”⁶⁴ To be sure, this section is certainly not arguing that legislative records today are immune from mistakes or manipulation (albeit, neither is the enrolled bill, as the next section demonstrates).⁶⁵ It is undeniable, however, that there has been dramatic

⁶¹ SINGER, *supra* note 27, §15:10, at 837–38.

⁶² *Field*, 143 U.S. at 674 (quoting *Pangborn*, 32 N.J.L. at 37).

⁶³ SINGER, *supra* note 27, §15:10, at 838 (“Modern cases have not stressed the poor quality of legislative records. Apparently the records are constantly being improved, and their authenticity is receiving a higher repute.”).

⁶⁴ *See, e.g., D & W Auto*, 602 S.W.2d at 424.

⁶⁵ *OneSimpleLoan v. U.S. Sec’y of Educ.*, 496 F.3d 197, 207–08 (2d Cir. 2007) (“[A]lthough technological advances in printing and copying since the late nineteenth century may have removed some of the sources of unreliability in congressional documents, . . . even engrossed bills printed today are subject to error or mishandling.”); *Public Citizen I*, 451 F. Supp. 2d 109, 126 (“*Marshall Field* rested [in part] on concerns about the reliability of outside evidence.

improvement in legislative record-keeping and that the reliability of legislative journals has significantly improved since *Field* was decided.

Moreover, technological developments provide additional means that were not available at the time of *Field*, which make it easier to reconstruct what actually happened in the legislative process.⁶⁶ The rules of the House have provided for unedited radio and television broadcasting and recording of its floor proceedings since 1979, and the Senate has had similar rules since 1986.⁶⁷ Since 1996, there has also been live webcast coverage of House and Senate floor proceedings and committee hearings.⁶⁸ These recordings provide an effective check on the official legislative records.⁶⁹

However, such reliability concerns are alleviated, at least in part, by the ability of modern technology (for example, recording devices and computers) accurately to transcribe proceedings and make them readily accessible. Of course, even modern technology does not eliminate the problem of typographical and clerical errors, or mistakes arising from misunderstandings and hastily conducted business.” (citation omitted).

⁶⁶ THOMAS, the Library of Congress website, which makes legislative records and much more information on legislative activity easily and freely available, is a good example. *See* About Thomas, http://thomas.loc.gov/home/abt_thom.html (last visited Aug. 20, 2008).

⁶⁷ *See* Ron Garay, *U.S. Congress and Television*, THE MUSEUM OF BROADCAST COMMUNICATIONS, <http://www.museum.tv/archives/etv/U/htmlU/uscongress/uscongress.htm> (last visited Feb. 27, 2008); Johnson, *supra* note 13, at 35.

⁶⁸ *See* Fednet, <http://www.fednet.net> (last visited Sept. 12, 2008); *see also* Office of the Clerk, U.S. House of Representatives, *Electronic Technology in the House of Representatives*, http://clerk.house.gov/art_history/house_history/technology/internet.html (last visited Feb. 27, 2008) (detailing the history of the House’s adoption of computer technology).

⁶⁹ The *Hamdan* case provides a remarkable example. In that case, it was alleged that statements had been inserted into the *Congressional Record* after the Senate debate on the Detainee Treatment Act of 2005, presumably in order to influence the courts’ interpretation of the Act based on its “legislative history.” The Petitioner was able to show, based on a C-SPAN recording, that the statements were inserted in the *Record* after the fact. As a result, the Court gave no weight to these statements. *See* *Hamdan v. Rumsfeld*, 126 S. Ct. 2749, 2766 n.10 (2006); Reply Brief for the Petitioner at 5 n.6, *Hamdan*, 126 S. Ct. 2749 (2006) (No. 05-184); *see also* Posting of Lyle Denniston to SCOTUSblog,

B. Changes in the Process of Enrollment

Another, largely overlooked, factual development is the fact that the procedure for authenticating and signing the enrolled bill has changed significantly since *Field* was decided. As a result, the significance that should be attributed to the signatures of the presiding officers on the enrolled bill should be reassessed, as should the assumption of infallibility of the enrolled bill.

The First Congress established in its joint rules an enrollment process that provided, *inter alia*, that the enrolled bill will be prepared by the Clerk of the House or by the Secretary of the Senate, examined for accuracy by a joint standing committee (the Committee on Enrolled Bills), and signed in open session in the respective houses by the Speaker of the House and by the President of the Senate.⁷⁰ This was the enrollment process the *Field* Court had in mind when it adopted EBD:

The signing by the speaker of the house of representatives, and by the president of the senate, *in open session*, of an enrolled bill, is an official attestation by the two houses of such bill as one that has passed congress. It is a declaration by the two houses, through their presiding officers, to the president, that a

<http://www.scotusblog.com/wp/analysis-hamdan-and-a-few-minutes-in-the-senate> (Mar. 23, 2006, 17:17 EST).

⁷⁰ J.A.C. Grant, *Judicial Control of the Legislative Process: The Federal Rule*, 3 W. POL. Q. 364, 366 (1950) (citing 1 ANNALS OF CONG. 57 (Joseph Gales ed., 1834)).

bill, thus attested, has received, in due form, the sanction of the legislative branch⁷¹

This was the enrollment process the *Field* Court had in mind when it held that the enrolled bill represents an “official attestation” and a “solemn assurance” by the two houses of Congress (or at least by the legislative officers themselves), and that, consequently, the “respect due to coequal and independent departments requires the judicial department to act upon that assurance.”⁷² Moreover, this was the enrollment process the *Field* Court had in mind when it flatly rejected the possibility that the presiding officers may “impose upon the people as a law a bill that was never passed by congress” as “too remote to be seriously considered”⁷³ because it “suggests a deliberate conspiracy to which the presiding officers, the committees on enrolled bills, and the clerks of the two houses must necessarily be parties”⁷⁴ Hence, the specific enrollment procedure witnessed by the *Field* Court influenced both its assumption of the reliability of the enrolled bill and its holding about the deference it deserves.

⁷¹ *Marshall Field & Co. v. Clark*, 143 U.S. 649, 672 (1892) (emphasis added). The joint rules were abandoned in 1875, but the same practice (with very slight changes, if any) continued to exist at the time *Field* was decided in 1892. See Grant, *supra* note 70, at 366, 381 n.99 (noting that the *Field* Court was summarizing the then-current practice).

⁷² *Field*, 143 U.S. at 672.

⁷³ *Id.* at 672–73.

⁷⁴ *Id.* at 673.

The modern process of enrollment, however, is quite different than the enrollment procedure described in *Field*. The original procedure of enrollment was molded to fit a Congress that passed only 118 bills in its two years.⁷⁵ However, with the dramatic increase in the number and length of bills passed by Congress in the twentieth century, “the pressure of legislative business had forced each house to rely largely upon its clerical staff to check on the accuracy of enrolled bills.”⁷⁶ The Committee on Enrolled Bills was abolished, and today the responsibility for the enrollment process, and for examining and authenticating bills, has been transferred to the Clerk of the House and the Secretary of the Senate.⁷⁷ The enrolled bill is prepared by the enrolling clerk of the House or the enrolling clerk of the Senate (depending on where the bill originated). The enrolling clerk receives all the relevant documents and prepares the final form of the bill, which must reflect precisely the effect of all amendments (either by way of deletion, substitution, or addition) agreed to by both legislative houses (with occasionally as many as 500 amendments!).⁷⁸ The enrolled bill is then printed, and the Clerk of the House or Secretary of the Senate (depending on where the bill originated) certifies that the bill originated in her legislative house and examines its accuracy. When satisfied with the

⁷⁵ Grant, *supra* note 70, at 366.

⁷⁶ *Id.*

⁷⁷ House Rules Manual, *supra* note 42, at 362–63; Dove, *supra* note 42, at 23; Johnson, *supra* note 13, at 50–51.

⁷⁸ Johnson, *supra* note 13, at 50–51.

accuracy of the bill, the Clerk of the House (or Secretary of the Senate with regard to Senate bills) attaches a slip stating that she finds the bill truly enrolled and sends it to the legislative officers for signature.⁷⁹ Furthermore, the presiding officers no longer sign the enrolled bill in open session. By the first half of the twentieth century, the presiding officers of both houses had abandoned the practice of signing the enrolled bill in open session;⁸⁰ and at least since the 1980s, they have regularly signed enrolled bills when their houses are not in session.⁸¹

In the modern-day Congress, therefore, both the arduous and painstaking task of preparing the enrolled bill and the task of examining and authenticating it are inevitably performed by legislative clerks. As a result of these changes, the signatures of the presiding officers on the enrolled bill “soon meant little more than that the bill had been checked by persons in whom they had confidence”⁸² Indeed, under the current enrollment process, and in light of the present workload of Congress, it defies belief that the legislative officers, let alone the two houses of Congress, play any significant (as opposed to

⁷⁹ *Id.* at 51; *see also* Dove, *supra* note 42, at 23–24.

⁸⁰ Grant, *supra* note 70, at 366.

⁸¹ The current House rule, granting the Speaker standing authority to sign enrolled bills, even if the House is not in session, was added in 1981. Hence, today, the Speaker of the House may sign enrolled bills whether or not the House is in session. The President of the Senate, on the other hand, may sign bills only while the Senate is actually sitting, but advance permission is normally granted to sign during a recess or after adjournment. *See* House Rules Manual, *supra* note 42, at 341; Johnson, *supra* note 13, at 51.

⁸² Grant, *supra* note 70, at 366.

merely symbolic) role in authenticating bills. Today, the enrolled bill represents, in effect, more an attestation by legislative clerks that the bill has been duly passed by both houses than an attestation by Congress as a whole or even by the presiding officers themselves. To the extent that the *Field* decision rested on the premise that the enrolled bill deserves reverence because the legislative officers have personally attested that the bill was properly enacted, this rationale is significantly weaker today. Similarly, the argument that questioning the validity of the enrolled bill evinces lack of respect because it doubts the “solemn assurance” of the legislative officers is also less convincing today. Contrary to *Field*’s assumption, moreover, questioning the validity of the enrolled bill does not necessarily entail doubting the personal integrity of the legislative officers and legislative clerks or suggesting a deliberate conspiracy. It simply entails a realistic view of the enrollment process in the modern Congress to conclude that “an occasional error is certain to occur.”⁸³ Indeed, both federal and state experiences provide evidence that errors do occur in the enrollment process from time to time (including rare cases where even defeated bills were “impose[d] upon the people as a law”).⁸⁴

⁸³ *Id.* at 368.

⁸⁴ *Id.* (“[A]ll the evidence indicates that on more than one instance a measure as enrolled and approved failed to contain a clause that had been in the bill as passed by Congress. State experiences demonstrate that even a defeated bill may on occasion be enrolled, approved, and published as law; and there is at least one such instance in the history of national legislation.”).

In sum, the changes in the process of enrollment raise doubts as to the infallibility of the enrolled bill, as well as to the significance that should be attributed to the attestations of the presiding officers. At the very least, they warrant reexamination of the *Field* Court’s assumption that the possibility that the legislative officers will (intentionally or mistakenly) “impose upon the people as a law a bill that was never passed by congress” is “too remote to be seriously considered.”⁸⁵

C. Changes in Congress’s Legislative Process

Along with changes in the process of enrollment, there have also been significant changes in the congressional legislative process since *Field* was decided. One significant change is the demise of “regular order” (the regular rules of procedure, which guarantee adequate time for discussion, debate, and votes), and the rise of unorthodox processes of legislation.⁸⁶ One of these unorthodox legislative practices, of which the DRA is an example, is “omnibus legislation”—that is, the practice of combining numerous measures from

⁸⁵ *Marshall Field & Co. v. Clark*, 143 U.S. 649, 672–73 (1892).

⁸⁶ THOMAS E. MANN & NORMAN J. ORNSTEIN, *THE BROKEN BRANCH: HOW CONGRESS IS FAILING AMERICA AND HOW TO GET IT BACK ON TRACK* 170–75 (2006); BARBARA SINCLAIR, *UNORTHODOX LAWMAKING: NEW LEGISLATIVE PROCESSES IN THE U.S. CONGRESS* (2d ed. 2000); see also Chad W. Dunn, *Playing by the Rules: The Need for Constitutions to Define the Boundaries of the Legislative Game with a One-Subject Rule*, 35 *UWLA L. REV.* 129, 135 (2003) (“Despite the many rules in place to handle legislation, the major initiatives, which are likely to cause high amending activity on the floor, are rarely heard under the standard rules.”).

disparate policy areas in one highly complex and long bill.⁸⁷ These huge bills are often passed by Congress via all-night sessions under tight deadlines, without any notice or time for members to read or understand them.⁸⁸ As one Representative described the passage of the (merely) 342-page-long Patriot Act in Congress: “No one read it. That’s the whole point. They wait ‘til the middle of the night. They drop it in the middle of the night. It’s printed in the middle of the night. And the next morning when we come in, it passes.”⁸⁹

Indeed, the length, scope, and complexity of omnibus bills, coupled with the highly accelerated pace of their enactment, means that representatives often vote for major legislation without knowing—or sometimes even without an opportunity to know—the contents of the bills.⁹⁰ As one Congress member depicted the process of enacting a Budget Reconciliation Act:

So voluminous was this monster bill that it was hauled into the chamber in an oversized corrugated box. . . . While reading it was obviously out of the question, it’s true that I was permitted to walk around the box and gaze upon it from several angles, and even to touch it.⁹¹

⁸⁷ GLEN S. KRUTZ, *HITCHING A RIDE: OMNIBUS LEGISLATING IN THE U.S. CONGRESS* 1 (2001).

⁸⁸ MANN & ORNSTEIN, *supra* note 86, at 173.

⁸⁹ PETER L. STRAUSS, *LEGISLATION: UNDERSTANDING AND USING STATUTES* 264 (2006).

⁹⁰ Dunn, *supra* note 86, at 137 (“[W]hen all the provisions are rolled into one bill, it is impossible for any member to know the contents of the bills voted on Indeed, many votes are for legislation in which the individual member has no idea what is contained therein. This process of legislating has become the rule of the United States Congress.”).

⁹¹ Lars Noah, *Divining Regulatory Intent: The Place for a “Legislative History” of Agency Rules*, 51 *HASTINGS L.J.* 255, 271 n.58 (2000). I thank Peter Strauss for drawing my attention to this citation.

Some argue that most bills that make their way through the current process are “very large so that each member can have little hope of reviewing it,” and that, consequently, the policy ends up being decided by the chamber leaders, “a few members, and more often their staffs.”⁹²

Other recent changes in Congress and its legislative process—such as the decline of committees and the ascendancy of conference committees, and the growing power of legislative leaders at the expense of rank-and-file members—have joined the growth of omnibus legislation in diminishing the importance of debate in committees and on the floor, shifting the real decisionmaking to less formal and less public arenas.⁹³ Some scholars argue that much of the action now takes place behind closed doors, with bills put together by a small group of leadership staff, committee staff, industry representatives, and a few majority party members, and then rammed through the formal legislative process.⁹⁴

Scholarship about the contemporary Congress provides ample evidence that these new legislative processes occasionally produce errors,⁹⁵ as well as

⁹² Dunn, *supra* note 86, at 138; *see also* MANN & ORNSTEIN, *supra* note 86, at 174.

⁹³ MANN & ORNSTEIN, *supra* note 86, at 7–13, 170–73; Seth Grossman, *Tricameral Legislating: Statutory Interpretation in an Era of Conference Committee Ascendancy*, 9 N.Y.U. J. LEGIS. & PUB. POL’Y 251, 262–73 (2006).

⁹⁴ MANN & ORNSTEIN, *supra* note 86, at 170; Dunn, *supra* note 86, at 138, 150.

⁹⁵ In December 2004, for example, it was discovered that a giant appropriation bill had a provision that would allow appropriations staff access to individual tax returns and would exempt them from criminal penalties for revealing the contents of those returns. The provision had surfaced between 3 a.m. and 5 a.m. during an all-night staff negotiation just before the

enable stealth legislation serving rent-seeking interest groups that has not really passed majority muster.⁹⁶ To be sure, this Article is certainly not arguing that the contemporary Congress is worse than the late-nineteenth-century Congress.⁹⁷ It simply argues that the contemporary practices in the congressional legislative process should also be taken into account when reconsidering EBD. Several scholars argue that the pathologies in the current legislative process justify, in and of themselves, more robust judicial review of the legislative process.⁹⁸ This Article, however, makes a more modest

final 3,000-page document was sent to the floor. When the mistake was discovered, after the bill had passed, Subcommittee Chair Ernest Istook said that even he had no idea that language was in the bill. MANN & ORNSTEIN, *supra* note 86, at 173–74. The DRA case is apparently another example. *Cf.* Sorenson v. Sec’y of Treasury of U.S., 475 U.S. 851, 867 n.2 (1986) (Stevens, J., dissenting) (citing Francis X. Clines, *O’Neill Ready to Rejoin Battle over the Budget*, N.Y. TIMES, July 1, 1981, at A16).

⁹⁶ E. Bolstad, *Young Accused of Changing Bill After Vote*, ANCHORAGE DAILY NEWS, Aug. 10, 2007, at B1, available at <http://www.adn.com/news/politics/story/9208370p-9124529c.html> (allegations that after bill’s passage, as the bill was being prepared to be sent to the President, lawmaker or his staff changed earmark for general road-widening project to one that benefited a specific interchange opposed by many local officials but desired by developer with ties to frequent contributor to lawmaker). For other examples (not necessarily at the enrollment stage), see Grossman, *supra* note 93, at 272–88; Richard J. Lazarus, *Congressional Descent: The Demise of Deliberative Democracy in Environmental Law*, 94 GEO. L.J. 619 (2006); Andrew J. Schwartzman et al., *Section 202(h) of the Telecommunications Act of 1996: Beware of Intended Consequences*, 58 FED. COMM. L.J. 581 (2006); Charles Tiefer, *How To Steal a Trillion: The Uses of Laws About Lawmaking in 2001*, 17 J.L. & POL. 409, 442–47 (2001); Sandra Beth Zellmer, *Sacrificing Legislative Integrity at the Altar of Appropriations Riders: A Constitutional Crisis*, 21 HARV. ENVTL. L. REV. 457 (1997); Victor Goldfeld, Note, *Legislative Due Process and Simple Interest Group Politics: Ensuring Minimal Deliberation Through Judicial Review of Congressional Processes*, 79 N.Y.U. L. REV. 367, 368 (2004).

⁹⁷ *But see* MANN & ORNSTEIN, *supra* note 86, at 17 (“Congress has had its ups and downs in realizing the intentions of the framers. Sadly, today it is down – very much the broken branch of government.”).

⁹⁸ *See, e.g.*, DANIEL A. FARBER & PHILIP P. FRICKEY, *LAW AND PUBLIC CHOICE: A CRITICAL INTRODUCTION* 116–31 (1991); Goldfeld, *supra* note 96; John Martinez, *Rational Legislating*, 34 STETSON L. REV. 547 (2005); Cass R. Sunstein, *Interest Groups in American Public Law*, 38 STAN. L. REV. 29 (1985).

argument. It argues that the new unorthodox processes of legislation in Congress increase the danger of mistakes (or abuse) in the legislative process and in the process of enrollment. It argues, moreover, that the ability of members of Congress to notice such errors and mishandlings, and to check the work of legislative officers and their clerks, significantly diminishes.

D. The State of the Doctrine in the Several States

Today, only a minority of state courts still follow EBD while most have modified or completely rejected this doctrine.⁹⁹ Although care must be exercised in making any generalization, the current tendency in the states seems to be in favor of the “extrinsic evidence rule,” which considers the enrolled bill as prima facie correct, but allows evidence from the journals and other extrinsic sources to attack the presumption of validity.¹⁰⁰ Hence, to the extent that the *Field* Court found support for its decision in the fact that “[t]he views we have expressed are supported by numerous adjudications in this country,”¹⁰¹ this argument is much less persuasive today. The experiences from

⁹⁹ See *Ass’n of Tex. Prof’l Educators v. Kirby*, 788 S.W.2d 827, 829–30 (Tex. 1990) (“[T]he present tendency [in the states] favors giving the enrolled version only prima facie presumptive validity, and a majority of states recognize exceptions to the enrolled bill rule.”); William D. Popkin, *The Collaborative Model of Statutory Interpretation*, 61 S. CAL. L. REV. 541, 559 n.79 (1988) (“[T]he enrolled bill rule . . . is adopted by only a minority of state courts.”); see also SINGER, *supra* note 27, §15:2, at 816–18.

¹⁰⁰ SINGER, *supra* note 27, §15:2, at 816–18; see also *Public Citizen I*, 451 F. Supp. 2d 109, 126 (D.D.C. 2006). For a good example of the “extrinsic evidence rule,” see *D & W Auto Supply v. Dep’t of Revenue*, 602 S.W.2d 420, 423–25 (Ky. 1980).

¹⁰¹ *Marshall Field & Co. v. Clark*, 143 U.S. 649, 673 (1892).

the states, moreover, are instructive in the reconsideration of additional grounds in *Field*. The states' experiences may help to demonstrate that the *Field* Court has overestimated the "evils" that "would certainly result" from allowing courts to look behind the enrolled bill, as well as underestimated the costs of the doctrine.¹⁰²

The argument that overruling EBD will significantly raise litigation costs and the amount of litigation, and undermine the certainty and stability of the law, requires further empirical research. Even without further research, however, it seems that the experiences from states that rejected EBD provide reason to believe that *Field's* fears of allowing courts to look beyond the enrolled bill were highly exaggerated. Several states have for decades allowed consideration of evidence beyond the enrolled bill, and yet, there seems to be a relatively small number of reported cases of procedural challenges to legislation in these jurisdictions. New Jersey law, for example, has allowed challenges to the validity of a statute that was not duly or constitutionally enacted (within a year of its enactment) and permitted courts to examine the journals and even hear testimony to determine such challenges since 1873.¹⁰³ And yet, between 1873 and 1950 only nine challenges were brought, and since

¹⁰² See *id.* (concluding that the "evils that may result" from EBD "would be far less than those that would certainly result" from allowing courts to look behind the enrolled bill).

¹⁰³ N.J. STAT. ANN. §§ 1:7-1–1:7-7 (West 1992 & Supp. 2008); *In re Low*, 95 A. 616, 617 (1915) (discussing the enactment of this statute in 1873); see also J.A.C. Grant, *New Jersey's "Popular Action" In Rem to Control Legislative Procedure*, 4 RUTGERS L. REV. 391, 397–98 (1950).

1950, there have been apparently only seven reported challenges.¹⁰⁴ Similarly, in the twenty-eight years since Kentucky overruled EBD in favor of the “extrinsic evidence rule,” there was apparently only one challenge to the validity of an enrolled version of a statute, and this challenge was rejected by the lower courts.¹⁰⁵ Moreover, there seems to be no indication in any of these states that the stability of the law was substantially undermined.

The experiences from the states are also illustrative in suggesting that the *Field* Court underestimated the costs of EBD. The Court seemed to assume that the “evils that may result” from the doctrine are limited to the possibility that “a provision should occasionally find its way into the statute through mistake, or even fraud”¹⁰⁶ and seemed to dismiss this possibility as “too remote to be seriously considered.”¹⁰⁷ States’ experiences demonstrate, however, that errors in the enrollment process do occur from time to time, including extreme cases where even defeated bills were “enrolled, approved, and published as law.”¹⁰⁸ Moreover, state courts have often noted (and demonstrated) that EBD “frequently . . . produces results which do not accord

¹⁰⁴ Martinez, *supra* note 98, at 570 n.75.

¹⁰⁵ A Westlaw search of all Kentucky cases, conducted on February 13, 2008, found only *Munn v. Commonwealth*, 889 S.W.2d 49 (Ky. Ct. App. 1994) (holding that defendant failed to offer competent proof that governor’s attempted veto of the Kentucky General Assembly’s Senate Bill 263 was untimely and therefore invalid).

¹⁰⁶ *Field*, 143 U.S. at 673.

¹⁰⁷ *Id.* at 672–73.

¹⁰⁸ Grant, *supra* note 70, at 368.

with facts,”¹⁰⁹ and is “conducive to fraud, forgery, corruption and other wrongdoings.”¹¹⁰ Hence, the *Field* Court may have underestimated the probability of errors (or mishandlings) in the enrollment process.

More importantly, the experiences from states that still follow EBD demonstrate that the costs of the doctrine are not limited to occasional mistakes or mishandlings in the enrollment process. The bigger malady of this doctrine is that it permits (and perhaps even encourages) deliberate and flagrant disregard of the lawmaking provisions of the Constitution. A case before the Supreme Court of Washington, which follows EBD, provides a vivid example.¹¹¹ In that case, respondents asserted that a bill was unconstitutional, among other things, because the legislature “flagrantly violated” the state constitution’s requirement that “[n]o amendment to any bill shall be allowed which shall change the scope and object of the bill.”¹¹² As the court reported, the appellants did not bother to deny that this constitutional provision was violated: “Their position, briefly stated, is: ‘So what? There isn’t anything the court can do about it, because, under its repeated decisions, there is no way it

¹⁰⁹ See, e.g., *D & W Auto Supply v. Dep’t of Revenue*, 602 S.W.2d 420, 423–24 (Ky. 1980); *Save Our Springs Alliance, Inc. v. Lazy Nine Mun. Util. Dist. ex rel. Bd. of Dirs.*, 198 S.W.3d 300, 315 (Tex. App. 2006) (“[T]his case illustrates the dangers of the enrolled bill rule which may produce results inconsistent with the actual facts.”).

¹¹⁰ See, e.g., *Bull v. King*, 286 N.W. 311, 313 (Minn. 1939); see also *D & W Auto Supply*, 602 S.W.2d at 423–24; SINGER, *supra* note 27, § 15:3, at 822 and authorities cited there.

¹¹¹ *Power, Inc. v. Huntley*, 235 P.2d 173, 180–81 (Wash. 1951).

¹¹² *Id.* at 180 (citing WASH. CONST. art. II, § 38).

can know what happened.”¹¹³ The court indicated (and other state cases confirm) that it is not rare that such a position is taken in argument when questions are raised concerning the validity of legislation that was allegedly enacted in violation of constitutional restrictions.¹¹⁴ Hence, as the Supreme Court of Washington seemed to concede, under EBD, “courts must perpetually remain in ignorance of what everybody else in the state knows,” and, consequently, constitutional procedural requirements become “binding only upon the legislative conscience.”¹¹⁵

The experience of Illinois is also particularly interesting. EBD was adopted in Illinois through a new section in the 1970 state constitution.¹¹⁶ In 1992, the Supreme Court of Illinois summarized the results as follows:

[It] is apparent to this court . . . that the General Assembly has shown remarkably poor self-discipline in policing itself. Indeed, both parties agree that ignoring the [constitutional] three-readings requirement has become a procedural regularity. This is quite a different situation than that envisioned by the Framers, who enacted the enrolled bill doctrine on the assumption that the General Assembly would police itself and judicial review

¹¹³ *Id.* at 180.

¹¹⁴ *Id.*; *see also* *Geja’s Cafe v. Metro. Pier & Exposition Auth.*, 606 N.E.2d 1212, 1220–21 (Ill. 1992) (“Plaintiffs . . . argue that . . . the General Assembly did not comply with constitutionally required procedures when it passed the Act The Authority does not dispute that the three-readings requirement was violated. Rather, it urges us to reaffirm our adherence to the longstanding enrolled bill doctrine.”); *D & W Auto Supply*, 602 S.W.2d at 422–23 (“It is conceded by all parties . . . that the [statute’s] passage did not comply with a clear constitutional mandate. . . . However, we are immediately confronted with the huge stumbling block of . . . the ‘enrolled bill’ doctrine.”).

¹¹⁵ *Huntley*, 235 P.2d at 180–81.

¹¹⁶ ILL. CONST. art. 4, § 8(d).

would not be needed because violations of the constitutionally required procedures would be rare.¹¹⁷

The court added that “plaintiffs make a persuasive argument” that EBD should be abandoned “because history has proven that there is no other way to enforce the constitutionally mandated three-readings requirement.”¹¹⁸ Several later decisions by Illinois courts reaffirm this conclusion.¹¹⁹

Professor Williams’s research about state legislatures also indicates that legislators often do not follow the lawmaking requirements of state constitutions, particularly where courts do not enforce the constitutional restrictions,¹²⁰ and suggests that increased judicial enforcement would likely result in greater legislative compliance with constitutional requirements.¹²¹ Some scholars even argue that EBD not only permits, but also “no doubt encourages” “cut[ting] procedural corners” in the enactment process.¹²² Even one of the federal appellate courts in the DRA cases seemed to concede that “the enrolled bill rule has come to serve as an incentive for politicians to avoid

¹¹⁷ *Geja’s Cafe*, 606 N.E.2d at 1221.

¹¹⁸ *Id.*

¹¹⁹ *See, e.g.*, *Friends of the Parks v. Chi. Park Dist.*, 786 N.E.2d 161, 171 (Ill. 2003) (“We noted in [a couple of decisions] that the legislature had shown remarkably poor self-discipline in policing itself in regard to the three-readings requirement.”); *Cutinello v. Whitley*, 641 N.E.2d 360, 367 (Ill. 1994) (same); *McGinley v. Madigan*, 851 N.E.2d 709, 724 (Ill. App. Ct. 2006) (noting the supreme court’s frustration with the legislature’s continuing failure to abide by the three-readings requirement).

¹²⁰ Williams, *supra* note 29, at 800.

¹²¹ *Id.* at 826–27.

¹²² Linde, *supra* note 37, at 242.

the rigors of constitutional law-making.”¹²³ Undeniably, further research is required in order to determine the empirical soundness of these arguments and the applicability of the state examples to the federal system. However, the existing examples do demonstrate, at the very least, that the doctrine permits deliberate, habitual, and blatant disregard of the Constitution in the legislative process (even if it does not necessarily lead to this result). These examples also suggest that the assumption that judicial review of the legislative process is not needed because defects in this process are rare, or because the legislature can be relied upon to police itself, may require reexamination.

E. Reconsidering the “Comparative Probative Value” Argument

Section III.A suggested that legislative records today are significantly more reliable than in the times of *Field* and that technological advancements provide additional reliable sources that did not exist in the nineteenth century. Sections III.B to III.D suggested that the enrolled bill is not necessarily as trustworthy and immune from mistakes or mishandling as the *Field* Court assumed. This calls for a reconsideration of the “comparative probative value” argument, which justifies EBD strictly on evidentiary grounds.¹²⁴ Indeed, some scholars have argued that the whole EBD debate can be “reduced to an evidentiary question: . . . [w]hat is the best evidence of compliance with

¹²³ *OneSimpleLoan v. U.S. Sec’y of Educ.*, 496 F.3d 197, 208 (2d Cir. 2007).

¹²⁴ *See Lloyd, supra* note 34, at 12–13.

constitutional [lawmaking] mandates?”¹²⁵ Others have argued, in contrast, that “the question . . . is not merely evidentiary” because “[b]asic questions of justiciability and the judicial function in constitutional interpretation and enforcement are involved,”¹²⁶ or have stressed the doctrine’s power to shield the legislative process from judicial review in concluding that it “transcends the merely procedural.”¹²⁷ While this Article certainly adopts the latter position, this section argues that EBD can no longer be justified even from a strictly evidentiary point of view.

Admittedly, some still seem to argue that the enrolled bill constitutes more reliable evidence than legislative journals or other evidence.¹²⁸ It is indeed possible that, notwithstanding the significant technological and political developments described above, the enrolled bill still has greater probative value than other evidence. It is also quite possible that, more often than not, the enrolled bill is a reliable indication that the bill has properly passed Congress

¹²⁵ *Id.* at 7, 13 (“With all due respect to the arguments from the separation of powers [and] certainty in the law, it is submitted that the position a court will take with respect to them will depend upon its judgment on the comparative reliability as evidence of enrolled bill and legislative journals.”); *see also* Denis V. Cowen, *Legislature and Judiciary Reflections on the Constitutional Issues in South Africa: Part 2*, 16 MOD. L. REV. 273, 280 (1953) (“[T]he conclusiveness . . . of what is stated in the enrolled copy of an Act . . . is simply a rule of evidence determining how far courts may pursue an inquiry into the observance of legal rules. The point at which the line is to be drawn depends [only] on considerations of practical convenience . . .”) (emphasis omitted).

¹²⁶ Williams, *supra* note 29, at 824.

¹²⁷ John C. Roberts & Erwin Chemerinsky, *Entrenchment of Ordinary Legislation: A Reply to Professors Posner and Vermeule*, 91 CAL. L. REV. 1773, 1790 n.63 (2003).

¹²⁸ *See* Lloyd, *supra* note 34, at 12–13; *cf.* Crigler, *supra* note 29, at 1190 (“[L]egislative journals are subject to error and fraud.”).

in the manner required by the Constitution. However, even conceding this point would not justify a conclusive presumption that the enrolled bill is “complete and unimpeachable” evidence that a bill has been properly enacted.¹²⁹ At most, it will justify considering the enrolled bill as *prima facie* valid and granting it greater weight in assessing the evidence or requiring a high evidentiary threshold for impeaching the enrolled bill.

As Professors Adler and Dorf argue, to be justified on epistemic grounds, the doctrine must allow exceptions for epistemic failures (such as incapacity, insincerity, corruption, or just simple honest mistakes) on the part of the enrolling officers.¹³⁰ As a conclusive presumption, however, it forces courts to hold statutes valid based on the attestation of the presiding officers in the enrolled bill, even in light of overwhelming and clear evidence that this attestation is wrong. As *Harwood v. Wentworth* demonstrated, the doctrine forces courts to rely on the enrolled bill, even when the presiding officers and chief clerks of each house themselves testify that the bill as enrolled omitted a clause that was in the bill as passed.¹³¹ And, as several state cases demonstrate, the doctrine compels courts to hold statutes valid even when it is openly admitted by all parties, and is clear beyond any doubt, that the statute was

¹²⁹ *Marshall Field & Co. v. Clark*, 143 U.S. 649, 673 (1892).

¹³⁰ Adler & Dorf, *supra* note 13, at 1177–78.

¹³¹ *Harwood v. Wentworth*, 162 U.S. 547 (1896); *see also* Grant, *supra* note 70, at 364, 382.

enacted in violation of the constitutional requirements for lawmaking.¹³² Indeed, several state supreme courts have pointed out that “[c]ourts applying such a rule are bound to hold statutes valid which they and everybody know were never legally enacted”¹³³ and that the doctrine “frequently . . . produces results which do not accord with facts.”¹³⁴ EBD, therefore, is “contrary to modern legal thinking,” which does not favor artificial presumptions, especially conclusive ones that may produce results that do not accord with fact.¹³⁵ It “disregards the primary obligation of the courts to seek the truth.”¹³⁶

From a strictly evidentiary point of view, courts should adopt the evidentiary rule that will produce the most accurate and reliable results. In order to do so, the most sensible approach seems to be to “resort to any source of information which in its nature is capable of conveying to the judicial mind a clear and satisfactory answer . . . ; always seeking first for that which in its

¹³² See, e.g., *D & W Auto Supply*, 602 S.W.2d at 422–23 (“It is conceded by all parties and clearly established by the record that...the passage [of the Act] did not comply with a clear constitutional mandate. . . . At this point, logic suggests that the decision of this Court is obvious. . . . However, we are immediately confronted with the huge stumbling block of what is described as the ‘enrolled bill’ doctrine.”); see also *Power, Inc. v. Huntley*, 235 P.2d 173, 180–81 (Wash. 1951); *Geja’s Cafe v. Metro. Pier & Exposition Auth.*, 606 N.E.2d 1212, 1220–21 (Ill. 1992).

¹³³ *Bull v. King*, 286 N.W. 311, 313 (Minn. 1939).

¹³⁴ *D & W Auto Supply*, 602 S.W.2d at 423–24 (Ky. 1980).

¹³⁵ *Ass’n of Tex. Prof’l Educators v. Kirby*, 788 S.W.2d 827, 829; see also *D & W Auto Supply*, 602 S.W.2d at 423–24; SINGER, *supra* note 27, § 15:3, at 822.

¹³⁶ *D & W Auto Supply*, 602 S.W.2d at 423–24.

nature is most appropriate,” as the *Gardner* Court had suggested in 1867.¹³⁷ Perhaps when *Field* was decided, it was plausible to argue that legislative journals were so utterly unreliable that the enrolled bill was, as a practical matter, the only reliable source of evidence. Today, however, with the developments described above, there are certainly additional sources of information that are sufficiently reliable for “conveying to the judicial mind a clear and satisfactory” picture of what occurred in the legislative process. EBD, therefore, can no longer be justified strictly on evidentiary grounds.

IV. THE DOCTRINE’S SOUNDNESS VIS-À-VIS LATER SUPREME COURT

DECISIONS

An additional recognized consideration for overruling an earlier case is when its doctrinal foundations have sustained serious erosion from subsequent rulings by the Court.¹³⁸ This Part describes some of the major Supreme Court rulings, as well as doctrinal developments, that render *Field*’s doctrinal underpinnings increasingly incoherent and unstable.

¹³⁷ *Gardner v. Collector of Customs*, 73 U.S. (6 Wall.) 499, 511 (1867).

¹³⁸ *See, e.g.*, *Leegin Creative Leather Prods., Inc. v. PSKS, Inc.*, 127 S. Ct. 2705, 2721 (2007) (“[W]e have overruled our precedents when subsequent cases have undermined their doctrinal underpinnings,” or “when the views underlying [them] had been eroded by this Court’s precedent”) (internal quotation marks and citations omitted); *Lawrence v. Texas*, 539 U.S. 558, 573–74, 576–77 (2003); *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 854–55 (1992).

A. Nineteenth-Century Decisions

By the time *Field* was decided, state courts had already expressed a variety of positions on the enrolled bill question.¹³⁹ In fact, before *Field*, in cases that were decided on state law, the U.S. Supreme Court had indicated receptiveness to the position that in deciding the question of whether a statute was duly and constitutionally passed, “any . . . accessible competent evidence may be considered.”¹⁴⁰ Additionally, in *Gardner v. Collector* from 1867, the Court stated:

[H]ow can it be held that the judges, upon whom is imposed the burden of deciding what the legislative body has done, when it is in dispute, are debarred from resorting to the written record which that body makes of its proceedings in regard to any particular statute?

We are of opinion, therefore, on principle as well as authority, that whenever a question arises in a court of law of the existence of a statute, or of the time when a statute took effect, or of the precise terms of a statute, the judges who are called upon to decide it, have a right to resort to any source of information which in its nature is capable of conveying to the judicial mind a clear and satisfactory answer to such question; always seeking first for that which in its nature is most appropriate¹⁴¹

Moreover, in *United States v. Ballin*, decided the same day as *Field*, the Court looked beyond the enrolled bill and examined the journal of the House

¹³⁹ William H. Lloyd, *Pylkinton’s Case and Its Successors*, 69 U. PA. L. REV. 20, 23–29 (1920).

¹⁴⁰ *Walnut v. Wade*, 103 U.S. 683, 689 (1880); *see also* *Post v. Kendall County Supervisors*, 105 U.S. 667, 670 (1881); *S. Ottawa v. Perkins*, 94 U.S. 260 (1876) (all decided on state law).

¹⁴¹ *Gardner*, 73 U.S. (6 Wall.) at 510–11; *see also* *Adler & Dorf*, *supra* note 13, at 1180; *Grant*, *supra* note 70, at 379–80; *Lloyd*, *supra* note 34, at 20.

of Representatives to determine whether a quorum had been present in the House when passing a bill.¹⁴² Hence, *Field* seems to be inconsistent even with the decisions that existed around the time it was decided. Nevertheless, *Field* was reaffirmed in 1896 in *Harwood v. Wentworth*,¹⁴³ and EBD became the dominant approach in the federal courts.¹⁴⁴

B. Powell v. McCormack, Ins v. Chadha, Clinton v. New York

An important modern decision that seems to be at odds with *Field* is *Powell v. McCormack*,¹⁴⁵ which held that the House of Representatives did not have authority to exclude a member-elect of Congress on grounds other than those expressed in the Constitution.¹⁴⁶ The Court noted that it is “competent and proper for this court to consider whether . . . the legislature’s proceedings are in conformity with the Constitution”¹⁴⁷ The Court added that “it is the province and duty of the judicial department to determine . . . whether the powers of any branch of the government, and even those of the legislature in

¹⁴² *United States v. Ballin*, 144 U.S. 1, 4-5 (1892); *see also* ESKRIDGE JR. ET AL., *supra* note 29, at 386; Adler & Dorf, *supra* note 13, at 1181. *But see* Grant, *supra* note 70, at 381–82; *OneSimpleLoan v. U.S. Sec’y of Educ.*, 496 F.3d 197, 205–06 (2d Cir. 2007).

¹⁴³ *Harwood v. Wentworth*, 162 U.S. 547, 558–62 (1896).

¹⁴⁴ Lloyd, *supra* note 34, at 22; *Public Citizen II*, 486 F.3d 1342, 1351–52 (D.C. Cir. 2007); *Public Citizen I*, 451 F. Supp. 2d 109, 120–21 (D.D.C. 2006).

¹⁴⁵ *Powell v. McCormack*, 395 U.S. 486 (1969).

¹⁴⁶ *Id.* at 550; *cf.* Frickey & Smith, *supra* note 10, at 1712–13 (citing *Powell v. McCormack* as “the best federal example of the model of procedural regularity”).

¹⁴⁷ *Powell*, 395 U.S. at 506 (quoting *Kilbourn v. Thompson*, 103 U.S. 168, 199 (1881)).

the enactment of laws, have been exercised in conformity to the Constitution; and if they have not, to treat their acts as null and void.”¹⁴⁸

The *Powell* Court also held that the case was justiciable and not barred by the political question doctrine.¹⁴⁹ Rejecting the claim that judicial resolution of the case would produce a “potentially embarrassing confrontation between coordinate branches of the Federal Government,” the Court found that a judicial determination of the case did not involve a lack of the respect due a coordinate branch.¹⁵⁰

Other important decisions include *INS v. Chadha*,¹⁵¹ invalidating the legislative veto, and *Clinton v. New York*,¹⁵² striking down the line-item veto.¹⁵³ In both cases, the Court invalidated statutes that authorized an exercise of legislative power in a process that is inconsistent with the constitutional procedural requirements for lawmaking. The Court emphasized in these cases that the power to enact statutes must be exercised in accord with the procedure set out in the Constitution, and that Congress cannot alter this procedure

¹⁴⁸ *Id.* (quoting *Kilbourn*, 103 U.S. at 199).

¹⁴⁹ *Id.* at 516–49.

¹⁵⁰ *Id.* at 548 (internal quotation marks omitted).

¹⁵¹ *INS v. Chadha*, 462 U.S. 919 (1983).

¹⁵² *Clinton v. City of New York*, 524 U.S. 417 (1998).

¹⁵³ *Frickey & Smith, supra* note 10, at 1712–13.

without amending the Constitution.¹⁵⁴ *Clinton v. New York* also lends support to the proposition that the “Constitution explicitly requires” that the procedural steps prescribed in Article I, Section 7 (including the requirement that “precisely the same text” be passed by both chambers of Congress) must be followed in order for a bill to “become a law,” and to the argument that a statute whose enactment violated these procedural requirements is not a “law.”¹⁵⁵

In *INS v. Chadha* the Court also rejected arguments that the case presented a political question.¹⁵⁶ The Court emphasized that “[n]o policy underlying the political question doctrine suggests that Congress or the Executive, or both acting in concert . . . can decide the constitutionality of a statute; that is a decision for the courts,”¹⁵⁷ and that “[r]esolution of litigation challenging the constitutional authority of one of the three branches cannot be evaded by courts because the issues have political implications”¹⁵⁸

¹⁵⁴ *Chadha*, 462 U.S. at 945–46, 951, 954; *Clinton*, 524 U.S. at 438–40, 446, 448–49; see also ESKRIDGE JR. ET AL., *supra* note 29, at 383.

¹⁵⁵ *Clinton*, 524 U.S. at 448–49.

¹⁵⁶ *Chadha*, 462 U.S. at 940–43.

¹⁵⁷ *Id.* at 941–42.

¹⁵⁸ *Id.* at 943. The Court also held, *inter alia*, that Article I provides “judicially discoverable and manageable standards” for resolving the case, that there is no “showing of disrespect for a coordinate branch” in resolving the case, and that “since the constitutionality of [the] statute is for this Court to resolve, there is no possibility of multifarious pronouncements on this question.” *Id.* at 942 (internal quotation marks omitted).

To be sure, these decisions did not directly address EBD. Their central holdings, however—that the power to enact statutes may only be exercised in accord with the precise procedure set out in Article I,¹⁵⁹ and that it is the Court’s duty to ensure that Congress did not violate this procedure and to determine the constitutionality of statutes—are certainly in tension with *Field*. EBD, which effectively bars judicial enforcement of the Constitution’s lawmaking provisions, renders these holdings practically meaningless.

C. The Decline of the Prudential Political Question Doctrine

Some scholars argue that *Powell v. McCormack* is part of a larger trend in the Supreme Court’s jurisprudence: the decline of the “prudential political question doctrine.”¹⁶⁰ While the “classical” political question doctrine holds that the doctrine applies only when the Constitution itself commits an issue to another branch of government,¹⁶¹ the “prudential” doctrine is not based on an interpretation of the Constitution, but on a set of prudential considerations “that courts have used at their discretion to protect their legitimacy and to

¹⁵⁹ *Chadha*, 462 U.S. at 951; *Clinton*, 524 U.S. at 439–40; Bradford R. Clark, *Separation of Powers as a Safeguard of Federalism*, 79 TEX. L. REV. 1321, 1381, 1387 (2001) (noting that *Chadha* and *Clinton* made clear that Article I, Section 7 establishes the exclusive procedure by which Congress may legislate).

¹⁶⁰ See, e.g., Rachel E. Barkow, *More Supreme than Court? The Fall of the Political Question Doctrine and the Rise of Judicial Supremacy*, 102 COLUM. L. REV. 237, 268–69 (2002).

¹⁶¹ *Id.* at 246–53.

avoid conflict with the political branches.”¹⁶² In identifying the factors that characterize a political question, *Baker v. Carr* has famously adopted both factors that represent the classical approach and factors that represent the prudential approach, including “the respect due coordinate branches of government” from *Field*.¹⁶³

This Article expresses no opinion about the political question doctrine, which has been sufficiently debated in legal scholarship.¹⁶⁴ The relevant point for present purposes is that as a descriptive matter, many scholars seem to agree that in the forty-five years since *Baker*, the Court has indicated that prudential considerations such as “respect due coordinate branches” are no longer favored. According to these scholars, in the vast majority of the cases since *Baker*, the Court has, in effect, followed the classical doctrine, both when rejecting political question claims and in the rare cases in which the Court

¹⁶² *Id.* at 253.

¹⁶³ *Baker v. Carr*, 369 U.S. 186, 217 (1962); see also Barkow, *supra* note 160, at 265. Interestingly, the *Baker* Court adopted “the respect due coordinate branches” consideration directly from *Field* and seemed to view EBD as a type of political question doctrine. See *Baker*, 369 U.S. at 214. In fact, several lower courts seemed to perceive EBD as “closely related to—if not inherent in—the political question doctrine” or as “an application of the political question doctrine.” See *Public Citizen II*, 486 F.3d 1342, 1348 (D.C. Cir. 2007), and decisions cited therein.

¹⁶⁴ See, e.g., HAROLD H. KOH, *THE NATIONAL SECURITY CONSTITUTION: SHARING POWER AFTER THE IRAN-CONTRA AFFAIR* 218–24 (1990); Adler & Dorf, *supra* note 13, at 1181–88; Barkow, *supra* note 160, at 330–35; Alexander M. Bickel, *The Supreme Court, 1960 Term Foreword: The Passive Virtues*, 75 HARV. L. REV. 40 (1961); Henkin, *supra* note 11, at 622–25; Martin H. Redish, *Judicial Review and the “Political Question,”* 79 NW. U. L. REV. 1031, 1033, 1059–60 (1985); Herbert Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1 (1959).

found a political question.¹⁶⁵ Some scholars argue, moreover, that *Powell* and *Chadha* effectively eliminated *Baker*'s "respect due coordinate branches" factor,¹⁶⁶ and that the Court refrained from expressly relying on it in subsequent decisions.¹⁶⁷ Hence, the Court's contemporary political question jurisprudence seriously undermines the major basis of EBD.

D. United States V. Munoz-Flores

The most important decision that eroded *Field* and rendered it doctrinally unstable is the 1990 decision of *United States v. Munoz-Flores*.¹⁶⁸ Munoz-Flores challenged a statute on the ground that its enactment process violated the Constitution's Origination Clause requiring that "[a]ll Bills for raising Revenue shall originate in the House of Representatives."¹⁶⁹ He argued that the Act was a bill for raising revenue and that it had originated in the Senate and,

¹⁶⁵ Barkow, *supra* note 160, at 267–72; *see also* Adler & Dorf, *supra* note 13, at 1182–85; Mark Tushnet, *Law and Prudence in the Law of Justiciability: The Transformation and Disappearance of the Political Question Doctrine*, 80 N.C. L. REV. 1203, 1206–14 (2002); *cf.* Jonathan R. Siegel, *A Theory of Justiciability*, 86 TEX. L. REV. 73, 112–13 (2007). *But see* Louis Michael Seidman, *The Secret Life of the Political Question Doctrine*, 37 J. MARSHALL L. REV. 441 (2004) (arguing that certain decisions, while not expressly invoking the prudential political question doctrine, in effect still apply it; that this doctrine is hidden, but nonetheless ubiquitous).

¹⁶⁶ *See, e.g.*, JOHN H. ELY, WAR AND RESPONSIBILITY: CONSTITUTIONAL LESSONS OF VIETNAM AND ITS AFTERMATH 177 n.54 (1993) (citing *Powell v. McCormack*, 395 U.S. 486, 549 (1969); *INS v. Chadha*, 462 U.S. 919, 942 (1983)).

¹⁶⁷ Amanda L. Tyler, *Is Suspension a Political Question?*, 59 STAN. L. REV. 333, 369 (2006).

¹⁶⁸ *United States v. Munoz-Flores*, 495 U.S. 385 (1990).

¹⁶⁹ U.S. CONST. art. I, § 7, cl. 1.

thus, was passed in violation of the Clause.¹⁷⁰ The Government countered that the “most persuasive factor suggesting nonjusticiability” is the concern that courts might express a lack of respect for the House of Representatives.¹⁷¹ It argued that the House’s passage of a bill conclusively established that the House had determined that the bill originated in the House (or that it is not a revenue bill), and therefore, a “judicial invalidation of a law on Origination Clause grounds would evince a lack of respect for the House’s determination.”¹⁷²

This argument was expressly rejected by the Court. The Court stated that the Government “may be right that a judicial finding that Congress has passed an unconstitutional law might in some sense be said to entail a ‘lack of respect’ for Congress’ judgment.”¹⁷³ The Court held, however, that this cannot be sufficient to render an issue nonjusticiable.¹⁷⁴ “If it were,” the Court added, “every judicial resolution of a constitutional challenge to a congressional enactment would be impermissible.”¹⁷⁵ The Court noted that Congress often explicitly considers whether bills violate constitutional provisions, but adopted

¹⁷⁰ *Munoz-Flores*, 495 U.S. at 387–88.

¹⁷¹ *Id.* at 390.

¹⁷² *Id.*

¹⁷³ *Id.*

¹⁷⁴ *Id.*

¹⁷⁵ *Id.*

Powell v. McCormack's position that “[o]ur system of government requires that federal courts on occasion interpret the Constitution in a manner at variance with the construction given the document by another branch. The alleged conflict that such an adjudication may cause cannot justify the courts’ avoiding their constitutional responsibility.”¹⁷⁶

In his solitary concurrence, Justice Scalia invoked *Field* in concluding that the Court may not look behind the enrolled bill to examine whether the bill originated in the House or in the Senate.¹⁷⁷ Justice Scalia quoted *Field* and stated that the “same principle, if not the very same holding, leads me to conclude that federal courts should not undertake an independent investigation into the origination of the statute at issue here.”¹⁷⁸ Noting that the enrolled bill of the Act in question bore the indication “H.J. Res.,” which attests that the legislation originated in the House, Justice Scalia observed:

The enrolled bill’s indication of its House of origin establishes that fact as officially and authoritatively as it establishes the fact that its recited text was adopted by both Houses. With respect to either fact a court’s holding, based on its own investigation, that the representation made to the President is incorrect would, as *Marshall Field* said, manifest a lack of respect due a coordinate branch and produce uncertainty as to the state of the law.¹⁷⁹

¹⁷⁶ *Id.* at 390–91 (quoting *Powell v. McCormack*, 395 U.S. 486, 549 (1969)).

¹⁷⁷ *Id.* at 408.

¹⁷⁸ *Id.* at 409 (Scalia, J., concurring).

¹⁷⁹ *Id.* at 409–10 (Scalia, J., concurring).

In rejecting Justice Scalia’s argument, the Court stated that Congress’s determination in the enrolled bill that the bill originated in the House did not foreclose subsequent judicial scrutiny of the law’s constitutionality and emphasized that “this Court has the duty to review the constitutionality of congressional enactments.”¹⁸⁰ The Court added in a footnote that Justice Scalia’s argument could not be supported by *Field*.¹⁸¹ The Court further noted, citing *Field*, that “[i]n the absence of any constitutional requirement binding Congress . . . [t]he respect due to coequal and independent departments’ demands that the courts accept as passed all bills authenticated in the manner provided by Congress. Where, as here, a constitutional provision is implicated, *Field* does not apply.”¹⁸²

There have been various opinions as to the impact of this footnote on the applicability of *Field*’s EBD.¹⁸³ It seems plausible to read this passage as limiting the applicability of this doctrine to cases where there is no purported violation of constitutional lawmaking requirements, such as in cases where it is only argued that the legislature violated its own internal procedural rules.¹⁸⁴

¹⁸⁰ *Id.* at 391.

¹⁸¹ *Id.* at 391 n.4.

¹⁸² *Id.* (emphasis omitted).

¹⁸³ See, e.g., Adler & Dorf, *supra* note 13, at 1181; Amar, *supra* note 55; Goldfeld, *supra* note 96, at 417 n.173.

¹⁸⁴ See *Birmingham-Jefferson Civic Ctr. Auth. v. City of Birmingham*, 912 So. 2d 204, 221 (Ala. 2005) (“The Supreme Court of the United States has explained that . . . *Field* . . . does not apply in the presence of a clear constitutional requirement that binds Congress.” (citing

Other scholars argue that *Munoz-Flores* limits EBD to the bicameralism provision rather than other constitutional requirements.¹⁸⁵ Others still suggest that *Munoz-Flores* created a distinction between binding constitutional provisions with respect to valid enactment (such as bicameralism and the Origination Clause) and constitutional provisions that do not affect valid enactment (such as the Journal Clause, which requires Congress to keep journals of its proceedings).¹⁸⁶ According to this interpretation, *Munoz-Flores* limits EBD to constitutional provisions of the second kind.¹⁸⁷ Some even argue that *Munoz-Flores* “effectively overruled” *Field*.¹⁸⁸

The district and appellate courts in the DRA cases, however, held that *Munoz-Flores* does not overrule or limit the holding of *Field*.¹⁸⁹ The position of the lower federal courts seems to be that *Munoz-Flores* has, at most,

Munoz-Flores, 495 U.S. at 391 n.4)); Goldfeld, *supra* note 96, at 417 n.173 (“The Court [in *Munoz-Flores*] has stated that the enrolled bill rule of *Field v. Clark* is inapplicable when ‘a constitutional provision is implicated.’” (quoting *Munoz-Flores*, 495 U.S. at 391 n.4)); Adrian Vermeule, *The Constitutional Law of Congressional Procedure*, 71 U. CHI. L. REV. 361, 426 n.209 (2004) (“The Court clearly limited the enrolled-bill rule in *Munoz-Flores*, saying that the rule does not apply when ‘a constitutional provision is implicated.’” (quoting *Munoz-Flores*, 495 U.S. at 391 n.4)).

¹⁸⁵ See, e.g., Adler & Dorf, *supra* note 13, at 1181.

¹⁸⁶ This was the Appellant’s argument in *Public Citizen II*, 486 F.3d 1342,1353 (D.C. Cir. 2007).

¹⁸⁷ *Id.*

¹⁸⁸ See, e.g., Amar, *supra* note 55.

¹⁸⁹ See, e.g., *Public Citizen II*, 486 F.3d at 1354–55; *OneSimpleLoan v. U.S. Sec’y of Educ.*, 496 F.3d 197, 206–07 & n.7 (2d Cir. 2007); *Conyers v. Bush*, No. 06-11972, 2006 WL 3834224, at *5 (E.D. Mich. Nov. 6, 2006); *Public Citizen I*, 451 F. Supp. 2d 109, 123 (D.D.C. 2006).

declined to extend EBD to Origination Clause cases and that in all other cases EBD “remains in full effect today.”¹⁹⁰ This position can perhaps be explained by *Agostini v. Felton*, which warned lower courts not to assume that an earlier precedent has been overruled by implication, even if it appears to rest on reasons rejected in some other line of decisions.¹⁹¹ Some of the lower courts in the DRA cases explicitly stated that “[t]here are suggestions in *Munoz-Flores* that, if the Supreme Court were to reconsider the enrolled bill rule of *Marshall Field* today, it might reach a different result. . . . But this Court does not have the discretion to find that a Supreme Court case has been overruled by implication.”¹⁹²

At any rate, it is clear that *Munoz-Flores* is hard to reconcile with *Field*. As Professor Vikram Amar argued, these two decisions “cannot peacefully coexist,” for it makes no sense for courts “to police Article I’s Origination Clause requirement (which focuses on where a bill started, not whether it was ever passed), but not to police Article I’s requirement of bicameral approval as

¹⁹⁰ *Public Citizen I*, 451 F. Supp. 2d at 116; see also *Public Citizen II*, 486 F.3d at 1354–55; *OneSimpleLoan*, 496 F.3d at 206–07; *Conyers*, 2006 WL 3834224, at *4; Cal. Dep’t of Soc. Servs. v. Leavitt, 444 F. Supp. 2d 1088, 1096–97 (E.D. Cal. July 18, 2006).

¹⁹¹ *Agostini v. Felton*, 521 U.S. 203, 237–38 (1997); see also *Rodriguez de Quijas v. Shearson /American Express, Inc.*, 490 U.S. 477, 484 (1989).

¹⁹² *Public Citizen I*, 451 F. Supp. 2d at 124; see also *OneSimpleLoan*, 496 F.3d at 208; *Public Citizen II*, 486 F.3d at 1355 (“The Supreme Court has repeatedly cautioned that we ‘should [not] conclude [that its] more recent cases have, by implication, overruled an earlier precedent.’ Therefore, even if we were inclined to think that the *Munoz-Flores* footnote offers some *implicit* support for Public Citizen’s position—and we are not—this would not change the outcome that we reach today.” (quoting *Agostini*, 521 U.S. at 237)).

a precondition for lawmaking.”¹⁹³ Moreover, as at least one lower court conceded, *Munoz-Flores*’s reasoning substantially undermines the soundness of *Field*.¹⁹⁴

In rejecting Justice Scalia’s position, as well as the government’s nonjusticiability claim, the *Munoz-Flores* Court rejected the most important justification for EBD, both in *Field* and in contemporary sources: that it is required by the respect due to coequal branches.

The *Munoz-Flores* Court also rejected another modern argument in favor of EBD—that judicial review of the enactment process is not needed because Congress and the President can be relied upon to police themselves.¹⁹⁵ The Court noted that the fact that the other branches of government have both the incentive and institutional mechanisms to guard against violations of the Origination Clause does not “obviate the need for judicial review” and “does not absolve this Court of its responsibility to consider constitutional challenges to congressional enactments.”¹⁹⁶

The Court also rejected the Government’s argument that judicial intervention is unwarranted because the case does not involve individual

¹⁹³ Amar, *supra* note 55; see also *OneSimpleLoan*, 496 F.3d at 207 n.7 (“[W]e do agree with plaintiffs that the Supreme Court has been less than clear in explaining why courts may probe congressional documents when adjudicating some types of constitutional claims [Origination Clause claims] but not others.”).

¹⁹⁴ *Public Citizen I*, 451 F. Supp. 2d at 124.

¹⁹⁵ See *supra* section I.C.

¹⁹⁶ *United States v. Munoz-Flores*, 495 U.S. 385, 392 (1990).

rights.¹⁹⁷ Significantly, the Court seemed to suggest that judicial review of the legislative process is essentially no different than substantive, *Marbury*-type judicial review, and that courts should equally enforce the lawmaking provisions of the Constitution as they enforce the Bill of Rights provisions. Relying on *Marbury v. Madison*, the Court stated that “the principle that the courts will strike down a law when Congress has passed it in violation of [a constitutional] command has been well settled for almost two centuries.”¹⁹⁸

The Court also stated:

To survive this Court’s scrutiny, the “law” must comply with all relevant constitutional limits. A law passed in violation of the Origination Clause would thus be no more immune from judicial scrutiny because it was passed by both Houses and signed by the President than would be a law passed in violation of the First Amendment.¹⁹⁹

Considering the merits, the Court held that the statute in question did not violate the Origination Clause, as it was not a revenue bill.²⁰⁰ However, given *Munoz-Flores*’s reasoning, it is difficult to see how *Field*’s EBD can continue to exist.

¹⁹⁷ *Id.* at 392–96.

¹⁹⁸ *Id.* at 396–97 (citing *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 176–80 (1803)).

¹⁹⁹ *Id.* at 397.

²⁰⁰ *Id.* at 397–401.

E. The Doctrine and Textualism

This section makes the (perhaps counterintuitive) argument that EBD is also inconsistent with textualism, the legislative interpretation theory advanced by Justice Scalia and other members of the Court. Formally, EBD is distinct from textualism, for, as the Supreme Court has expressly clarified, EBD does not apply to statutory interpretation.²⁰¹ However, examining the relationship between EBD and textualism is worthwhile because the greatest supporter of EBD on the Court, Justice Scalia,²⁰² is also the great champion of textualism on the Court.²⁰³

At first glance, textualism and EBD seem perfectly compatible because they share reluctance to give legislative records any weight in determining the validity or meaning of the law. Moreover, both seem to base this reluctance, at least in part, on mistrust of the reliability of legislative records. Justice Scalia and other textualists argue that legislative records and committee reports are untrustworthy because they are subject to manipulation by legislators, or even worse, by congressional staff, lobbyists, and interest groups.²⁰⁴ Indeed, several

²⁰¹ U.S. Nat'l Bank of Or. v. Indep. Ins. Agents of America, Inc., 508 U.S. 439, 455 n.7 (1993).

²⁰² United States v. Munoz-Flores, 495 U.S. 385, 408–10 (Scalia, J., concurring).

²⁰³ See, e.g., ANTONIN SCALIA, A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW (1997); see also ESKRIDGE JR. ET AL., *supra* note 29, at 407 (describing Justice Scalia as “the leading proponent of textualism in statutory interpretation”).

²⁰⁴ See Bell, *supra* note 29, at 1266–70; see also, e.g., Blanchard v. Bergeron, 489 U.S. 87, 98–99 (1989) (Scalia, J., concurring) (“As anyone familiar with modern-day drafting of congressional committee reports is well aware, the references to the cases were inserted, at best

scholars have argued (in a slightly different context) that examining the legislative record to determine the validity of legislation is inconsistent with a textualist approach to statutory interpretation, which discounts the use of legislative history.²⁰⁵

Statutory interpretation scholars, on the other hand, argue that Justice Scalia's theory of statutory interpretation is hard to reconcile with his support of EBD, and, specifically, with his argument that this doctrine is required by the respect due to a coequal branch. Professor Peter Strauss, for example, argued that "respect due to a coordinate branch" is "hard to square with realpolitik concerns for possible legislative manipulations," and criticized textualism as "grounded in disdain for the internal procedures of a coordinate branch."²⁰⁶ Similarly, Professor Bernard Bell argued that Justice Scalia's "deference to legislative judgments when legislative procedures are directly challenged clashes with the antipathy for legislative judgments reflected in

by a committee staff member on his or her own initiative, and at worst by a committee staff member at the suggestion of a lawyer-lobbyist; and the purpose of those references was not primarily to inform the Members of Congress . . . but rather to influence judicial construction."); SCALIA, *supra* note 203, at 32–34.

²⁰⁵ See, e.g., William W. Buzbee & Robert A. Schapiro, *Legislative Record Review*, 54 STAN. L. REV. 87, 148–53 (2001); Ruth Colker & James J. Brudney, *Dissing Congress*, 100 MICH. L. REV. 80, 136–41 (2001); Frickey & Smith, *supra* note 10, at 1750–51; see also Eric F. Citron, Note, *Sudden Death: The Legislative History of Future Dangerousness and the Texas Death Penalty*, 25 YALE L. & POL'Y REV. 143, 147–48 & nn.21–22 (2006) (linking textualism and its rejections of legislative history to EBD); cf. Goldfeld, *supra* note 96, at 419 (noting that "some have argued that legislative record review seems inconsistent with a textualist approach to statutory interpretation, which discounts the use of legislative history," but rejecting the argument).

²⁰⁶ Peter L. Strauss, *The Courts and the Congress: Should Judges Disdain Political History?*, 98 COLUM. L. REV. 242, 255–256 & n.50 (1998) (internal quotation marks omitted).

[his] interpretative approach.”²⁰⁷ In addition, if indeed the textualists’ arguments “are deeply rooted in a suspicion of legislators and their motives,”²⁰⁸ this general suspicion seems to be at odds with total and unquestioning trust in the enrolled bill. The enrolled bill is also a legislative document that is prepared by congressional clerks, so theoretically the textualists’ general mistrust of legislators, congressional staff, and the legislative documents they produce should also apply to this legislative document. The object here is not to express an opinion about the merits of textualism. Rather, this section argues that some of the major arguments of Justice Scalia and the new textualists in support of textualism are in fact equally applicable as arguments against treating the enrolled bill as conclusive and unimpeachable evidence of due enactment.

The textualists’ constitutional argument against using legislative history in statutory interpretation is particularly germane for our purpose. In arguing against judicial reference to legislative history, Justice Scalia and other textualists argue that courts must only treat as “law” the statutory text that has actually passed bicameralism and presentment according to Article I, Section 7.²⁰⁹ In the context of defending textualism, Justice Scalia has argued, for

²⁰⁷ Bell, *supra* note 29, at 1279.

²⁰⁸ John C. Roberts, *Are Congressional Committees Constitutional?: Radical Textualism, Separation of Powers, and the Enactment Process*, 52 CASE W. RES. L. REV. 489, 494 (2001).

²⁰⁹ See Paul E. McGreal, *A Constitutional Defense of Legislative History*, 13 WM. & MARY BILL RTS. J. 1267, 1268 (2005) (summarizing Justice Scalia’s constitutional argument for

example, that “[t]he Constitution sets forth the only manner in which the Members of Congress have the power to impose their will upon the country: by a bill that passes both Houses and is either signed by the President or repassed by a supermajority after his veto”²¹⁰ and that “[t]he law as it passed is the will of the majority of both houses, and the only mode in which that will is spoken is in the act itself”²¹¹

However, the same argument can in fact serve as a strong argument against EBD. It is important to remember that the “enrolled bill” is not in itself the “law” (that is, the statute that has actually been passed by Congress). It is merely a legislative document prepared by congressional clerks and signed by the presiding officers. It is not voted upon by the two Houses and is not passed according to the requirements of Article I, Section 7.²¹² As Professor Wigmore aptly elucidated, the enrolled bill “is only somebody’s certificate and copy, because the effective legal act of enactment is the dealing of the legislature with the original document The legislature has not dealt by vote with the enrolled document; the latter therefore can be only a certificate and copy of the

textualism); Roberts, *supra* note 208, at 497–501 (discussing Justice Scalia’s and other textualists’ Article I critique of references to legislative history).

²¹⁰ *United States v. Estate of Romani*, 523 U.S. 517, 535–36 (1998) (Scalia, J., concurring) (citing U.S. CONST. art. I, § 7).

²¹¹ *Conroy v. Aniskoff*, 507 U.S. 511, 519 (1993) (Scalia, J., concurring) (quoting *Aldridge v. Williams*, 44 U.S. (3 How.) 9, 24 (1845)) (emphasis omitted); *see also* *W. Va. Univ. Hosps. v. Casey*, 499 U.S. 83, 98–99 (1991) (Scalia J., writing the opinion of the Court).

²¹² On the enrollment process, *see supra* section III.B.

transactions representing the enactment.”²¹³ In this sense, it is no different than legislative journals or committee reports.²¹⁴ It can perhaps serve as an important source of information about the content of the law that was actually passed by Congress or about the events that took place in the legislative process. However, treating it as the “law” itself and favoring it over the actual text passed by Congress is, in principle, as unconstitutional as replacing the law passed by Congress with the committee report. While even intentionalist and purposivist approaches of statutory interpretation do not suggest giving legislative records such a binding status,²¹⁵ EBD does exactly that by treating the enrolled bill as “conclusive in every sense”²¹⁶ and excluding any evidence to show a divergence between it and the actual law passed by Congress. Abandoning EBD, on the other hand, will enable courts to ensure that only the statutory text that has actually passed bicameralism and presentment according to Article I, Section 7 is treated as law.

A similar argument can be made about Justice Scalia’s nondelegation argument in favor of textualism: that the use of legislative history materials by

²¹³ WIGMORE, *supra* note 39, §1350, at 816 (emphasis omitted).

²¹⁴ *Id.* (stressing that both the enrolled bill and legislative journals are official reports and copies and that the only difference between them is in the “degree of solemnity and trustworthiness”).

²¹⁵ *See, e.g.,* McGreal, *supra* note 209, at 1287 (“[T]he real choice is not between text and legislative history, but rather between text understood within its legislative history and text understood within some other context.”) (emphasis omitted).

²¹⁶ WIGMORE, *supra* note 39, §1350, at 818 (emphasis omitted).

courts in effect permits Congress to engage in delegation of its authority to subunits of the legislature, in violation of the separation of powers.²¹⁷ Emphasizing the Constitution’s decree that “[a]ll legislative Powers . . . shall be vested in a Congress . . . which shall consist of a Senate and House of Representatives,”²¹⁸ Justice Scalia argues that “[i]t has always been assumed that these powers are nondelegable . . . that legislative power consists of the power ‘to make laws, . . . not to make legislators.’”²¹⁹ Hence, argues Justice Scalia, Congress may not leave to its committees the details of legislation or the formation of Congress’s intent.²²⁰ “The only conceivable basis for considering committee reports authoritative,” he concludes, “is that they are a genuine indication of the will of the entire house—which, as I have been at pains to explain, they assuredly are not.”²²¹ However, as will be elaborated in the next Part, EBD can similarly be seen as permitting an impermissible delegation of Congress’s lawmaking authority to the presiding officers of Congress.²²² The only conceivable basis for considering the enrolled bill

²¹⁷ SCALIA, *supra* note 203, at 35; *Bank One Chi., N.A. v. Midwest Bank & Trust Co.*, 516 U.S. 264, 280 (1996) (Scalia, J., concurring); *see also* John F. Manning, *Textualism as a Nondelegation Doctrine*, 97 COLUM. L. REV. 673, 695–99 (1997); Roberts, *supra* note 208, at 498–501.

²¹⁸ U.S. CONST. art. I, § 1.

²¹⁹ *Bank One Chi.*, 516 U.S. at 280 (Scalia, J., concurring) (quoting JOHN LOCKE, SECOND TREATISE ON GOVERNMENT 87 (R. Cox ed., 1982) (1960)); SCALIA, *supra* note 203, at 35.

²²⁰ *Bank One Chi.*, 516 U.S. at 280 (Scalia, J., concurring).

²²¹ SCALIA, *supra* note 203, at 35.

²²² *See infra* section V.B.

authoritative, to paraphrase Justice Scalia, is that it is a genuine indication of the will of the entire Congress. When there is sufficient evidence that the enrolled bill is not a genuine indication of the will of Congress, judicial adherence to EBD amounts to an acceptance that the will of the legislative officers (or their clerks), rather than “the will of the majority of both houses,”²²³ should be treated as “law.”

Finally, Justice Scalia’s textualism can in fact be seen in itself as a type of “due process of lawmaking” approach, for it is based, in part, on “his view of the judiciary’s role in encouraging lawmakers to improve the quality of decisionmaking and drafting.”²²⁴ Some scholars argue that textualism is “intended to change congressional behavior in the future as much as [it is] used to reach decisions about the meaning of a statute in the immediate case.”²²⁵ Indeed, in arguing for textualism, Justice Scalia seemed to suggest that judicial resort to legislative history may “produce [an improper] legal culture” in the congressional legislative process, and argued that the Court should prefer

²²³ *Conroy v. Aniskoff*, 507 U.S. 511, 519 (1993) (Scalia, J., concurring) (internal quotation marks omitted).

²²⁴ ESKRIDGE JR. ET AL., *supra* note 29, at 407.

²²⁵ *Id.*; see also Bell, *supra* note 29, at 1255 (“[N]ew textualist judges, like Justice Antonin Scalia, have assumed the task of disciplining Congress to correct its inadequacies.”); Elizabeth Garrett, *Legal Scholarship in the Age of Legislation*, 34 TULSA L.J. 679, 685 (1999) (“[I]nterpretative methods like textualism . . . are best understood as efforts to improve the quality of the decisionmaking in the politically accountable branches.”); Adrian Vermeule, *The Judiciary Is a They, Not an It: Interpretive Theory and the Fallacy of Division*, 14 J. CONTEMP. LEGAL ISSUES 549, 564 (2005) (“Textualists often argue for the primacy of statutory text over legislative history on democracy-forcing grounds. A central argument for textualism is that it improves legislative performance: judicial refusal to remake enacted text forces Congress to legislate more responsibly ex ante.”).

textualism because “we have an obligation to conduct our exegesis in a fashion which fosters that democratic process.”²²⁶ Hence, in arguing for textualism, Justice Scalia seemed to accept one of the arguments also raised by supporters of judicial review of the legislative process: that there are defects in the legislative process and that the courts can and should cure such process failures.²²⁷ This Article focuses on other justifications for judicial enforcement of the Constitution’s lawmaking provisions. The important conclusion for present purposes, however, is that some of the major arguments raised by textualists such as Justice Scalia seem to be equally applicable as arguments against EBD.

V. THE DOCTRINE AS AN IMPERMISSIBLE DELEGATION

Section V.A argues that the doctrine entails an impermissible delegation of judicial power to the presiding officers of Congress, whereas section V.B argues that the doctrine permits an impermissible delegation of Congress’s lawmaking authority to these presiding officers.

²²⁶ *United States v. Taylor*, 487 U.S. 326, 345–46 (1988) (Scalia, J., concurring).

²²⁷ *See, e.g.*, FARBER & FRICKEY, *supra* note 98, at 116–31; Goldfeld, *supra* note 96; Martinez, *supra* note 98; Sunstein, *supra* note 98; *cf.* Marci A. Hamilton, *Discussion and Decisions: A Proposal to Replace the Myth of Self-Rule with an Attorneyship Model of Representation*, 69 N.Y.U. L. REV. 477, 502–19 (1994).

A. The Doctrine as an Impermissible Delegation of Judicial Authority

EBD requires complete judicial deference to the determination of the Speaker of the House and the President of Senate in the enrolled bill that a statute has been validly enacted in compliance with the Constitution. The practical result, therefore, is that the Court has de facto relinquished its power to interpret and enforce the constitutional provisions of lawmaking and its authority to determine the validity of legislation. The Court ceded these judicial powers not to Congress as a whole, but to the exclusive and final authority of the legislative officers of Congress.

This argument can be illustrated by considering Professor Mitchell Berman's suggestion of conceptualizing EBD as a "constitutional decision rule."²²⁸ Professor Berman distinguishes between constitutional doctrines that are "constitutional operative propositions" and doctrines that are "constitutional decision rules."²²⁹ The former are constitutional doctrines that represent the "judiciary's understanding of the proper meaning of a constitutional power, right, duty, or other sort of provision" (judicial determinations of what the Constitution means).²³⁰ "Constitutional decision rules," on the other hand, are "doctrinal rules that direct how courts—faced, as they inevitably are, with epistemic uncertainty—are to determine whether [a

²²⁸ Berman, *supra* note 4, at 72.

²²⁹ *Id.* at 9.

²³⁰ *Id.*

constitutional operative proposition] has been complied with.”²³¹ Under this distinction, the following judicial proposition, adapted from *Clinton v. City of New York*, would be an example of a “constitutional operative proposition”:

The Constitution explicitly requires that each of those three steps [(1) a bill containing its exact text was approved by a majority of the Members of the House of Representatives; (2) the Senate approved precisely the same text; and (3) that text was signed into law by the President] be taken before a bill may “become a law.” If one paragraph of that text had been omitted at any one of those three stages, [the bill] would not have been validly enacted.²³²

EBD, on the other hand, can perhaps be conceptualized as a “constitutional decision rule,” for it directs courts how to decide whether this “constitutional operative proposition” was satisfied in a concrete case.²³³

However, even if we accept that EBD is simply a “constitutional decision rule,” it is a highly problematic decision rule which inevitably leads to delegation of judicial powers to the legislative officers. EBD directs courts to conclusively presume that a bill signed by these legislative officers was passed in accordance with all the procedural requirements of Article I. As the discussion of the “comparative probative value” argument demonstrated, this decision rule is a deficient epistemic rule which “frequently . . . produces

²³¹ *Id.*; cf. Richard H. Fallon Jr., *The Supreme Court, 1996 Term Foreword: Implementing the Constitution*, 111 HARV. L. REV. 54, 57 (1997) (making a similar distinction between two judicial functions: determining the meaning of the Constitution and implementing the Constitution; and discussing judicially crafted doctrines that concern implementing the Constitution, rather than identifying its meaning).

²³² *Clinton v. City of New York*, 524 U.S. 417, 448–49 (quoting U.S. CONST. art. I, § 7).

²³³ Berman, *supra* note 4, at 72–74.

results which do not accord with facts or constitutional provisions.”²³⁴ As a conclusive presumption, which does not allow exceptions for epistemic failures, this rule cannot be justified merely as a rule of epistemic deference to the legislative officers.²³⁵ More fundamentally, however, the question of whether a bill has been properly enacted in compliance with the Constitution inevitably raises both questions of constitutional interpretation and questions of fact. This point was accepted, in essence, in several decisions that were decided on state law prior to *Field*. For example, *Walnut v. Wade* held (in a slightly different context) that the question whether an alleged statute was duly and constitutionally passed was a question of law, not of fact, and hence, a judicial one, “to be settled and determined by the court and judges.”²³⁶ The questions of what exactly are the procedural requirements set forth in Article I and what constitutes compliance with these requirements (for example, what constitutes “passage”) are undeniably questions of legal interpretation rather than questions of fact.²³⁷ The problem is that EBD takes the authority to

²³⁴ *D & W Auto Supply v. Dep’t of Revenue*, 602 S.W.2d 420, 424 (Ky. 1980).

²³⁵ Adler & Dorf, *supra* note 13, at 1177–78; *see also supra* section III.E.

²³⁶ *Walnut v. Wade*, 103 U.S. 683, 689 (1880); *see also Post v. Kendall County Supervisors*, 105 U.S. 667 (1881); *S. Ottawa v. Perkins*, 94 U.S. 260 (1876). These cases were all decided based on state law.

²³⁷ *See* Adler & Dorf, *supra* note 13, at 1178 (“[W]hat Article I, Section 7 means for members of Congress might be different from what it means for courts.”); Saikrishna B. Prakash & John C. Yoo, *The Origins of Judicial Review*, 70 U. CHI. L. REV. 887, 908–09 (2003) (“In determining whether a law actually met the requirements of bicameralism and presentment, a court would have to interpret the Constitution . . . to determine what exactly constituted bicameralism, what constituted presentment to the President, and ultimately what constituted a federal law.”); Roberts, *supra* note 207, at 522–28 (arguing that the requirements of bicameral

answer these two questions away from the courts and places it exclusively in the hands of the Speaker of the House and the President of the Senate. Hence, it delegates the authority to determine what the Constitution means—to make “constitutional operative propositions”—from the courts to the legislative officers. In essence, it is the practical equivalent of a doctrine that would require courts to accept as conclusive the presiding officers’ attestation that an Act does not violate the Bill of Rights. The result, therefore, is an abdication of the courts’ authority to interpret the Constitution and to enforce it according to the judicial understanding of what the Constitution means.²³⁸ This result is in sharp contrast with the prevailing judicial position that this authority is “emphatically the province and duty of the judicial department,”²³⁹ and seems out of place in an age when this position enjoys widespread approbation by judges, lawyers, politicians, the general public, and the majority of law professors.²⁴⁰ To clarify, this Article does not argue for judicial exclusivity or

passage and presentment are in fact much more open to interpretation than is often assumed). Professor Berman also concedes that the “constitutional operative proposition” regarding the requirements of lawmaking in Article I, Section 7 and compliance with it (such as the debate over just what “passage” entails) are open to interpretation. *See* Berman, *supra* note 4, at 74 n.233.

²³⁸ Williams, *supra* note 29, at 827 (“The courts should not abdicate their inherent function of interpreting and enforcing the written constitution” in procedural challenges to the validity of legislation.).

²³⁹ *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803); *see also, e.g., City of Boerne v. Flores*, 521 U.S. 507, 519, 529 (1997); *United States v. Munoz-Flores*, 495 U.S. 385, 391 (1990); *Powell v. McCormack*, 395 U.S. 486, 549 (1969); *Cooper v. Aaron*, 358 U.S. 1, 18 (1958).

²⁴⁰ *See, e.g.,* Larry D. Kramer, *The Supreme Court, 2000 Term Foreword: We the Court*, 115 HARV. L. REV. 4, 6–8 (2001) (“[T]he notion that judges have the last word when it comes to

even supremacy in the interpretation and enforcement of the Constitution.²⁴¹ It concedes that Congress and the President may have an important role to play in constitutional interpretation.²⁴² The problem with EBD, however, is that it designates the legislative officers as the only interpreters and enforcers of the lawmaking provisions of the Constitution.

Furthermore, EBD is not only a judicial doctrine that “takes the Constitution away from the courts.”²⁴³ It is also at odds with the courts’ inherent and inevitable role of determining the validity (or authenticity) of legislation. As Professor H.L.A. Hart has argued, if one accepts that courts are empowered to make authoritative determinations of the fact that a primary rule (such as a statute) has been broken, it is unavoidable that they will make authoritative determinations of what the primary rules are.²⁴⁴ Hence, determining the validity of primary rules, in the sense of recognizing them as

constitutional interpretation and that their decisions determine the meaning of the Constitution for everyone . . . has . . . found widespread approbation It seems fair to say that, as a descriptive matter, judges, lawyers, politicians, and the general public today accept [this] principle I am certain that the vast majority of law professors also shares this view”).

²⁴¹ For a defense of the proposition that all branches should enforce the Constitution according to the judicial understanding of what the Constitution means, see, for example, Larry Alexander & Frederick Schauer, *Defending Judicial Supremacy: A Reply*, 17 CONST. COMMENT. 455 (2000); Larry Alexander & Frederick Schauer, *On Extrajudicial Constitutional Interpretation*, 110 HARV. L. REV. 1359 (1997).

²⁴² For recent reviews of the different academic views on the question, see, for example, Michael C. Dorf, *Fallback Law*, 107 COLUM. L. REV. 303, 342–52 (2007); Lee Epstein, “*Who Shall Interpret the Constitution?*”, 84 TEX. L. REV. 1307 (2006); Trevor W. Morrison, *Suspension and the Extrajudicial Constitution*, 107 COLUM. L. REV. 1533, 1579–82 & n.227 (2007).

²⁴³ MARK TUSHNET, *TAKING THE CONSTITUTION AWAY FROM THE COURTS* (1999).

²⁴⁴ H.L.A. HART, *THE CONCEPT OF LAW* 97 (2d ed. 1994).

passing the tests provided by the rule of recognition, is an inherent and inevitable part of the judicial work in any legal system (even without a written Constitution).²⁴⁵ Professor Hart established, moreover, that secondary rules that specify the persons who are to legislate and define the procedure to be followed in legislation are inevitable in any legal system (even without a written constitution, and, in fact, even in nondemocratic legal systems)²⁴⁶ and that these rules “vitaly concern the courts, since they use such [rules] as a criterion of the validity of purported legislative enactments coming before them.”²⁴⁷ Indeed, several scholars in England and the British Commonwealth have relied on a similar logic in concluding that judicial review of the enactment process for the purpose of determining the authenticity of a putative Act of Parliament is legitimate and inevitable even under a system of parliamentary supremacy, where substantive judicial review is not permitted.²⁴⁸

²⁴⁵ *Id.* at 103, 148, 152.

²⁴⁶ *Id.* at 67–71, 95–96; see also Jeremy Waldron, *Legislating with Integrity*, 72 *FORDHAM L. REV.* 373, 375 (2003) (noting that legal positivists argue that “law-making cannot be understood except as a rule-governed process”).

²⁴⁷ HART, *supra* note 244, at 69.

²⁴⁸ See, e.g., PETER C. OLIVER, *THE CONSTITUTION OF INDEPENDENCE: THE DEVELOPMENT OF CONSTITUTIONAL THEORY IN AUSTRALIA, CANADA, AND NEW ZEALAND* 86 (2005); Katherine Swinton, *Challenging the Validity of an Act of Parliament: The Effect of Enrolment and Parliamentary Privilege*, 14 *OSGOODE HALL L.J.* 345, 360–61 (1976); Luc B. Tremblay, *Legitimacy of Judicial Review: Special or General?*, 21 *WINDSOR Y.B. ACCESS JUST.* 505, 511–15 (2002); see also *infra* section VI.A.

Professors Adler and Dorf developed a similar argument in the American constitutional context, in the following straightforward way:

If (1) the judge is under a legal duty to take account of some type of nonconstitutional law [such as statutes] in reaching her decisions, then (2) she is under a legal duty to determine whether putative legal propositions of that type, advanced by the parties, really do have legal force. Yet this entails (3) a legal duty to determine whether these putative legal propositions satisfy the [constitutional] existence conditions [of legislation].²⁴⁹

Professors Adler and Dorf developed this idea into a comprehensive theory that provides a novel justification for both judicial review of the legislative process and substantive judicial review in the United States. The relevant point for our purposes, however, is their claim that even if *Marbury v. Madison* and its arguments were to be overruled, it would still be the inevitable legal duty of judges to determine the validity of legislation, in the sense of determining whether a putative statute satisfied the “existence conditions” of lawmaking.²⁵⁰ As these scholars point out, Article I, Section 7 is “the clearest case of a constitutional existence condition.”²⁵¹ Even under the most minimalist rule of recognition in the United States, a “proposition constitutes a federal statute if

²⁴⁹ Adler & Dorf, *supra* note 13, at 1123–24.

²⁵⁰ *Id.* at 1107–08, 1123–25.

²⁵¹ *Id.* at 1172.

and only if it satisfies the procedures for promulgating statutes set forth in . . . Article I, Section 7.”²⁵²

Finally, it is fascinating to note that as early as 1852—long before Professors Adler and Dorf, and even Professor Hart, expounded their arguments—the Supreme Court of California rejected EBD, based in part on the following argument:

I hold the authority to inquire beyond the . . . [enrolled] act for the purpose of ascertaining whether the same has a constitutional existence to be incident to all courts of general jurisdiction, and necessary for the protection of public rights and liberties Courts are bound to know the law, both statute and common. It is their province to determine whether a statute be law or not [I]t must be tried by the judges, who must inform themselves in any way they can²⁵³

To be sure, EBD can theoretically be reconciled with the inevitable judicial duty of determining the validity of legislation by suggesting that the rule of recognition in the United States is that a proposition constitutes a federal statute if it has been signed by the presiding officers and approved by the President. This, however, inevitably entails a delegation of the power to interpret and enforce the Constitution’s lawmaking provisions, and to determine the validity of legislation, to the presiding officers. Worse still, it amounts to recognition that statutes may be created by the signatures of these

²⁵² *Id.* at 1131.

²⁵³ *Fowler v. Peirce*, 2 Cal. 165, 170–71 (1852), *overruled by* *Sherman v. Story*, 30 Cal. 253, 279–80 (1866).

two individuals, rather than by the whole Congress following the procedure of Article I, Section 7.

B. The Doctrine as an Impermissible Delegation of Lawmaking Authority

EBD can also be seen as enabling an impermissible delegation of Congress's lawmaking authority to the presiding officers. To be sure, the *Field* Court acknowledged that "[t]here is no authority in the presiding officers . . . to attest by their signatures . . . any bill not [duly] passed by congress."²⁵⁴ However, in practice, EBD permits them to do exactly that. If the allegations in the DRA cases are true, this is precisely what the congressional officers (and the President) have done: they were aware that the bill presented to the President reflected the Senate bill but was never passed in the same form by the House, and yet they "signed it into law."²⁵⁵ It is possible that they believed in good faith that the difference between the bill passed by the Senate and the bill passed by the House was merely a matter of clerical error. The problem, however, is that the presiding officers (and, in fact, a Senate clerk) took it upon themselves to "correct" the error and determine the "real will" of both houses on their own. This is a violation of Senate and House rules, which clearly state that only the two houses, by concurrent resolution, may authorize the

²⁵⁴ *Marshall Field & Co. v. Clark*, 143 U.S. 649, 669 (1892).

²⁵⁵ *See supra* Part II.

correction of an error when enrollment is made.²⁵⁶ These rules ensure that the correct and genuine will of both houses, rather than the will of the enrolling clerks or legislative officers, is enacted into law. Hence, their violation is problematic in itself. More importantly, however, it amounts to an assumption of an authority that even the *Field* Court emphasized the legislative officers may not constitutionally assume.

Theoretically, one can argue that Congress had acquiesced to such an exercise of “discretionary legislative power” by the legislative officers. One can argue that Congress is surely aware of *Field*’s EBD and is free to change its bill-enrollment and authentication procedure. Hence, the fact that Congress has not changed this procedure, and even codified it in a statute,²⁵⁷ serves as an indication that Congress tacitly accepted that the legislative officers will, from time to time, assume the authority they allegedly assumed in the DRA case. One can further argue that by entrenching its enrollment procedure in a statute, Congress has, in effect, instructed courts to treat as “law” any document attested by the legislative officers and signed by the President, regardless of whether that document passed both houses of Congress in full compliance with Article I.²⁵⁸

²⁵⁶ See House Rules Manual, *supra* note 42, at 202, 277, 302; Dove, *supra* note 42, at 23–24.

²⁵⁷ 1 U.S.C. § 106 (2002).

²⁵⁸ *Cf.* Adler & Dorf, *supra* note 13, at 1175–76.

This, however, amounts to an impermissible delegation of Congress's lawmaking power. The Court has repeatedly held (in other contexts) that "Congress may not delegate the power to legislate to its own agents or to its own Members,"²⁵⁹ and that "Congress may not exercise its fundamental power to formulate national policy by delegating that power . . . to an individual agent of the Congress such as the Speaker of the House of Representatives"²⁶⁰ These decisions clearly perceived "legislative self-delegation" by Congress to its own components as more objectionable than conventional delegations of lawmaking power to administrative agencies.²⁶¹ A major reason for this distinction is that "[i]f Congress were free to delegate its policymaking authority . . . to one of its agents, it would be able to evade 'the carefully crafted restraints spelled out in the Constitution.'"²⁶² This concern is particularly applicable here. By treating any bill signed by the presiding officers and the President as "law," and designating the presiding officers as the sole judges of the validity of laws, EBD allows, in effect, the creation of "law" through Congress's enrollment procedure, rather than by Congress as a

²⁵⁹ *Metro. Wash. Airports Auth. v. Citizens for the Abatement of Aircraft Noise, Inc.*, 501 U.S. 252, 275 (1991).

²⁶⁰ *Bowsher v. Synar*, 478 U.S. 714, 737 (1986) (Stevens, J., concurring); *see also* *Bank One Chi. v. Midwest Bank & Trust Co.*, 516 U.S. 264, 280 (1996) (Scalia, J., concurring); SCALIA, *supra* note 203, at 35.

²⁶¹ Clark, *supra* note 159, at 1379–80; Manning, *supra* note 217, at 715–18.

²⁶² *Bowsher*, 478 U.S. at 755 (Stevens, J., concurring) (citing *INS v. Chadha*, 462 U.S. 919, 959 (1983)).

whole through the procedure mandated by Article I, Section 7. The problem here is less that EBD allows an abduction of Congress's lawmaking power by the legislative officers, but rather that it permits Congress to abdicate some of its lawmaking authority to the legislative officers, in order to circumvent the procedure set out in Article I Section 7.

Imagine, for example, that Congress is interested in passing an extensive piece of legislation and that the House and Senate are able to agree on all of its provisions, save one specific issue. The Constitution provides the houses of Congress only two options: either agree on an identical form of the bill or not pass the bill at all. In certain situations the choice between succumbing to the other house and sacrificing the entire bill presents a real dilemma. Both options might carry heavy costs, such as sacrificing important policy preferences, antagonizing voters, losing prestige, and so forth. In such situations, EBD provides, in effect, a tempting third option: instead of choosing between these two evils (and taking responsibility for this choice), each house can pass its own version and effectively delegate the authority to choose between them to the legislative officers. This scenario is less imaginary than one might assume. According to some accounts, a similar scenario occurred in the DRA case. Some argue that the discrepancy between the bill passed by the Senate and the bill transmitted to the House was discovered before the House vote, but its resolution was intentionally left to the presiding officers at the enrollment stage, "because no agreement could be reached between the House and Senate

about how to resolve the difference from the Senate version”²⁶³ Although a bill that does not satisfy the bicameral requirement of Article I, Sections 1 and 7 does not become a law, under EBD, the signatures of the presiding officers effectively turn invalid law into valid law. Consequently, EBD recognizes and permits, in effect, an “alternative lawmaking procedure,” which is inconsistent with the Court’s constant avowals that Congress “must follow the procedures mandated by Article I of the Constitution—through passage by both houses and presentment to the President” in order to legislate.²⁶⁴

VI. THE DOCTRINE AND LEGISLATIVE SUPREMACY

This Part argues that EBD is intimately (if not inseparably) related to the traditional English concept of legislative sovereignty (or supremacy), which views lawmaking as an absolute sovereign prerogative and the legislative process as a sphere of unfettered legislative omnipotence. Section VI.A establishes the link between the doctrine and the traditional English view of legislative supremacy. Section VI.B argues that while the doctrine was never explicitly linked to legislative supremacy in the United States, the American doctrine still amounts, in effect, to a view of the legislative process as a sphere

²⁶³ Lederman, *supra* note 6 (internal quotation marks omitted).

²⁶⁴ *Bowsher*, 478 U.S. at 737 (Stevens, J., concurring); *see also Chadha*, 462 U.S. at 945–46, 951, 954; *Clinton v. City of New York*, 524 U.S. 417, 438, 439–40, 446, 448–49 (1998); *United States v. Estate of Romani*, 523 U.S. 517, 535–36 (1998) (Scalia, J., concurring).

of unfettered legislative supremacy. Section VI.C argues, therefore, that EBD is incompatible with the U.S. Constitution.

A. Establishing the Link between the Doctrine and Legislative Supremacy

The historical origins of the American EBD are rooted in English common law.²⁶⁵ Although these origins can perhaps be traced back to the time of Henry VI in fifteenth-century England,²⁶⁶ the most cited articulation of the English rule was stated in the 1842 decision of *Edinburgh & Dalkeith Railway v. Wauchope*:

All that a Court of Justice can do is look at the Parliamentary roll [the practical equivalent of the “enrolled bill”]: if from that it should appear that a bill has passed both Houses and received the Royal assent, no Court of Justice can inquire into the mode in which it was introduced into Parliament, nor into what was done previous to its introduction, or what passed in Parliament during its progress in its various stages through both Houses.²⁶⁷

This rule is based, to a large extent, on the traditional English view of parliamentary supremacy (or sovereignty).²⁶⁸ According to the orthodox view

²⁶⁵ See Lloyd, *supra* note 139, at 20–23; Seth Barrett Tillman, *Defending the (Not So) Indefensible*, 16 CORNELL J.L. & PUB. POL’Y 363, 375–76 (2007).

²⁶⁶ Lloyd, *supra* note 139 (discussing the English antecedents of the American EBD starting with *Pylkinton* in 1454).

²⁶⁷ *Edinburgh & Dalkeith Ry. v. Wauchope*, (1842) 8 Eng. Rep. 279, 285 (H.L.).

²⁶⁸ On the principle of parliamentary supremacy as the basis for the English EBD, see, for example, R. Elliot, *Rethinking Manner and Form: From Parliamentary Sovereignty to Constitutional Values*, 29 OSGOODE HALL L.J. 215, 220–22 (1991); Jonathan E. Levitsky, *The Europeanization of the British Legal Style*, 42 AM. J. COMP. L. 347, 349 (1994); Lloyd, *supra* note 139, at 21–22; Swinton, *supra* note 248, at 359–62. Admittedly, there are additional (and apparently earlier) historical explanations for this doctrine. See Swinton, *supra* note 248, at

of parliamentary supremacy, associated with thinkers such as Austin and Dicey, Parliament, as the legal sovereign, is the source of all law, and therefore, there can be no legal limitations on its legislative competence, and no person or body may override or set aside its legislation.²⁶⁹ The orthodox English view considers lawmaking as a sovereign prerogative and the legislative process as a sphere of unfettered omnipotence.²⁷⁰ Under this view, there can be no legal restrictions on the legislative process, and even the omnipotent Parliament cannot create restrictions—substantive or procedural—that would limit its future ability to legislate.²⁷¹

Following the orthodox view, English courts interpreted the principle of parliamentary supremacy as banning courts from questioning the validity of Parliament's legislation on any ground, including defects in the enactment process.²⁷² A good example is the oft-quoted 1870 decision of *Lee v. Bude & Torrington Junction Railway Co.*:

We sit here as servants of the Queen and the legislature. Are we to act as regents over what is done by parliament with the consent of the Queen, lords and commons? I deny that any such

362–64. However, even if the principle of parliamentary supremacy is a later historical ground for EBD, it has surely become the most dominant foundation for the English doctrine.

²⁶⁹ On this orthodox view of parliamentary sovereignty, see, for example, Elliot, *supra* note 268, at 221–22; Waldron, *supra* note 246, at 375.

²⁷⁰ Waldron, *supra* note 246, at 375.

²⁷¹ Elliot, *supra* note 268, at 221–22.

²⁷² See Lord Irvine of Lairg, *Sovereignty in Comparative Perspective: Constitutionalism in Britain and America*, 76 N.Y.U. L. REV. 1, 4 (2001).

authority exists. If an Act of Parliament has been passed improperly, it is for the legislature to correct it by repealing it; but, so long as it exists as law, the Courts are bound to obey it.²⁷³

Over a century later, English courts still rejected procedural challenges to the validity of Parliamentary Acts on the ground that:

The idea that a court is entitled to disregard a provision in an Act of Parliament on any ground must seem strange and startling to anyone with any knowledge of the history and law of our constitution [S]ince the supremacy of Parliament was finally demonstrated by the Revolution of 1688 any such idea has become obsolete.²⁷⁴

Hence, based on the orthodox view of parliamentary supremacy, the English courts concluded that courts must enforce every putative Act of Parliament (unless it is apparent on its face that it is not an authentic Act of Parliament), and may not inquire into the enactment process.²⁷⁵

The contemporary House of Lords still cites the rule of conclusiveness of the Parliamentary Roll (the English EBD) in tandem with the principle of parliamentary supremacy and seems to consider them as interlinked.²⁷⁶ Indeed, this rule is still so much tied to the principle of parliamentary supremacy in

²⁷³ Lee v. Bude & Torrington Junction Ry., (1871) 6 L.R. 576, 582 (P.C.).

²⁷⁴ British Rys. Bd. v. Pickin, [1974] A.C. 765, 782 (appeal taken from Eng. C.A.).

²⁷⁵ See, e.g., Manuel v. Att’y Gen., [1983] Ch. 77, 89 (C.A.) (rejecting a procedural challenge to the validity of the Canada Act of 1982 on the ground that “the duty of the court is to obey and apply every Act of Parliament, and . . . the court cannot hold any such Act to be *ultra vires*. [I]t is a fundamental of the English constitution that Parliament is supreme. As a matter of law the courts of England recognize Parliament as being omnipotent in all save the power to destroy its own omnipotence.”); Elliot, *supra* note 268, at 221–22.

²⁷⁶ See, e.g., R (Jackson) v. Attorney Gen., [2006] 1 A.C. 262 at para. 168 (H.L.) (appeal taken from Eng.) (U.K.).

British and Commonwealth thinking, that *Wauchope* (the most commonly cited articulation of the rule) is often cited as one of the major “judicial precedent[s] that firmly established the principle of Parliament’s supremacy.”²⁷⁷ Even scholars from the British Commonwealth that challenge the link between EBD and the principle of parliamentary supremacy acknowledge the doctrine’s effect in the development and entrenchment of parliamentary supremacy in England²⁷⁸ and concede that EBD “is inextricably related to . . . parliamentary sovereignty.”²⁷⁹

Hence, the origins of EBD establish the historical link between this doctrine and the orthodox view of parliamentary supremacy. The link between this doctrine and legislative supremacy goes far beyond the historical connection, however. The modern discussions of this doctrine in England and the Commonwealth—as well as the development of judicial review of the enactment process in several countries—demonstrate that the doctrine is viewed as logically contingent upon the orthodox view of parliamentary supremacy.

²⁷⁷ Douglas W. Vick, *The Human Rights Act and the British Constitution*, 37 TEX. INT’L L.J. 329, 338 & n.60 (2002); see also B.M. Selway, *The Constitution of the UK: A Long Distance Perspective*, 30 COMMON L. WORLD REV. 3 n.5 (2001); Swinton, *supra* note 248, at 359–60.

²⁷⁸ Swinton, *supra* note 248, at 363 (arguing that the enrollment rule preceded parliamentary supremacy as a historical matter, but recognizing that the rule assisted in the development of parliamentary supremacy).

²⁷⁹ *Id.* at 403.

The view that EBD is contingent upon the English principle of parliamentary supremacy—and that it is, consequently, not justified in legal systems that have a written constitution—seems to be widely accepted in England and the Commonwealth. Since the 1930s, several courts in Commonwealth countries, such as Australia and South Africa, distinguished the English doctrine that “a court has no jurisdiction to go behind a statute”²⁸⁰ and held that:

The principle that the courts may not examine the way in which the law-making process has been performed has no application where a legislature is established under or governed by an instrument which prescribes that laws . . . may only be passed if the legislature is constituted or exercises its functions in a particular manner²⁸¹

This position was also accepted by the English judges in the Privy Council.²⁸² *Bribery Commissioner v. Ranasinghe*, for example, distinguished the English authorities by stating that “in the Constitution of the United Kingdom there is no governing instrument which prescribes the law-making powers and the forms which are essential to those powers.”²⁸³ In legal systems where such an instrument does exist, however, “a legislature has no power to ignore the

²⁸⁰ *Victoria v. Commonwealth* (1975) 134 C.L.R. 81, 163 (Austl.) (Gibbs, J.).

²⁸¹ *Id.* and authorities cited therein; see also *Harris v Minister of the Interior* 1952 (2) SA 428 (A) (S. Afr.); *Att’y Gen. for New S. Wales v. Trethowan*, [1932] A.C. 526 (P.C. 1931) (appeal taken from Austl.); *Bribery Comm’r v. Ranasinghe*, [1965] A.C. 172 (P.C. 1964) (appeal taken from Ceylon).

²⁸² The Judicial Committee of the Privy Council hears cases from certain former colonies assenting to its jurisdiction.

²⁸³ *Ranasinghe*, [1965] A.C. at 195.

conditions of law-making that are imposed by the instrument which itself regulates its power to make law.”²⁸⁴ Stressing the judicial “duty to see that the Constitution is not infringed and to preserve it inviolate,”²⁸⁵ the Privy Council enforced procedural (or “manner and form”) lawmaking restrictions on Commonwealth legislatures in this and other cases.²⁸⁶ As the High Court of Australia summarized the decisions of the Privy Council and of courts in Commonwealth countries, “[t]he distinction is between legislatures which are, and those which are not, governed by an instrument which imposes conditions on the power to make laws.”²⁸⁷

Interestingly, moreover, EBD has been attacked recently even in England. Some scholars argue that recent changes in British constitutional law (such as membership in the European Union, devolution, and the incorporation of the European Convention on Human Rights) have eroded the principle of parliamentary supremacy in England²⁸⁸ and that this erosion warrants a

²⁸⁴ *Id.* at 197.

²⁸⁵ *Id.* at 194.

²⁸⁶ Anupam Chander, Note, *Sovereignty, Referenda, and the Entrenchment of a United Kingdom Bill of Rights*, 101 YALE L.J. 457, 464–65 (1991); see also Swinton, *supra* note 248, at 353–59.

²⁸⁷ *Victoria v. Commonwealth* (1975) 134 C.L.R. 81, 164 (Austl.) (Gibbs, J.).

²⁸⁸ On these changes and their effect on the principle of parliamentary supremacy in England, see, for example, Mark Elliott, *United Kingdom: Parliamentary Sovereignty Under Pressure*, 2 INT’L J. CONST. L. 545 (2004); David Judge, *Whatever Happened to Parliamentary Democracy in the United Kingdom?*, 57 PARLIAMENTARY AFF. 682, 690–96 (2004); cf. Jeffrey Goldsworthy, *Is Parliament Sovereign? Recent Challenges to the Doctrine of Parliamentary Sovereignty*, 3 N.Z. J. PUB. & INT’L L. 7, 29–36 (2005).

reconsideration of the English EBD.²⁸⁹ In the recent House of Lords decision regarding the validity of the Hunting Act,²⁹⁰ at least some of the judges indicated receptiveness to the argument about the erosion of parliamentary supremacy, albeit stressing that “the supremacy of Parliament is still the general principle of our constitution.”²⁹¹ While holding that the case can be resolved without looking behind the face of the Act, the House of Lords seemed to indicate that it is not prepared to overrule the English EBD for the time being.²⁹² Significantly, however, the House of Lords also seemed to

²⁸⁹ See, e.g., Patricia M. Leopold, *Parliamentary Free Speech, Court Orders and European Law*, 4 J. LEGIS. STUD. 53, 62–66 (1998) (considering the question whether English courts can intervene in the legislative process, and, specifically, grant an injunction to stop parliament from passing a bill, which would be in breach of European law, or to restrain a minister from presenting such a bill for the Royal Assent; and concluding that “the time may come when ‘proceedings in parliament’ might have to be ‘questioned’ in an English court to enable that court to give effect to a directly effective EC right”); Dennis Morris, ‘*A Tax By Any Other Name*’; *Some Thoughts on Money Bills and Other Taxing Measures: Part II*, 23 STATUTE L. REV. 147, 151 (2002) (“[B]ecause of the obligation arising from British membership of the EU, the dicta in *Wauchope* and *Pickin* as regards challenges to Parliament’s power to legislate must now be significantly qualified, which is of great constitutional significance. Accordingly, why must the position of UK courts in respect of compliance with internal Parliamentary procedure be assumed to have remained unchanged?”).

²⁹⁰ The Hunting Act 2004—which outlawed hunting a wild mammal with a dog—was passed through a special legislative procedure that bypassed the House of Lords. The claimants challenged both the validity of this Act and the validity of the Parliament Act 1949, which authorized this legislative procedure. For an overview of the decision and its background, see Mark Elliott, *Bicameralism, Sovereignty, and the Unwritten Constitution*, 5 INT’L J. CONST. L. 370 (2007).

²⁹¹ *R (Jackson) v. Att’y Gen.*, [2006] 1 A.C. 262, 102 (Lord Steyn) (emphasis omitted); see also *id.* at 104 (Lord Hope) (“Our constitution is dominated by the sovereignty of Parliament. But parliamentary sovereignty is no longer . . . absolute . . . Step by step, gradually but surely, the English principle of the absolute legislative sovereignty of Parliament which Dicey derived from Coke and Blackstone is being qualified.”); Mark Elliott, Comment, *The Sovereignty of Parliament, the Hunting Ban, and the Parliament Acts*, 65 CAMBRIDGE L. J. 1, 2–4 (2006); Michael C. Plaxton, *The Concept of Legislation: Jackson v. Her Majesty’s Att’y General*, 69 MOD. L. REV. 249, 257–61 (2006).

²⁹² *R (Jackson)*, [2006] 1 A.C. at 27, 49, 112, 116, 168.

reaffirm the Privy Council and Commonwealth courts' position that judicial enforcement is justified, and indeed required, where legislatures are governed by an instrument which imposes conditions on their power to make laws.²⁹³ Indeed, this position seems to be accepted even by supporters of the orthodox English view of parliamentary supremacy. As Professor Jeffrey Goldsworthy noted, "even those who most staunchly defend Dicey's thesis . . . do not extend it to any Parliament whose powers derive from some higher law, that is, some (logically and historically) prior law not laid down by itself."²⁹⁴

Some scholars in England and the Commonwealth argue, furthermore, that EBD is not warranted even under the principle of parliamentary supremacy or sovereignty, based on the "rapidly emerging 'new view' of parliamentary sovereignty."²⁹⁵ The orthodox English view of lawmaking as a sovereign prerogative (and its claim that there could be no legal limitations on the legislative process) has been increasingly challenged in the twentieth century,

²⁹³ *Id.* at 85 (citing with approval the holding in *Ranasinghe*); *see also id.* at 163 ("What the Commonwealth cases . . . suggest . . . is . . . that if Parliament is required to pass legislation on particular matters in a particular way, then Parliament is not permitted to ignore those requirements when passing legislation on those matters, nor is it permitted to remove or relax those requirements by passing legislation in the ordinary way."); *id.* at 174 ("[T]he decisions in cases related to colonial legislatures . . . establish . . . that . . . where . . . the founding legislation contains limitations, the enactments of the body founded will not be valid if they contravene those limitations.").

²⁹⁴ Jeffrey D. Goldsworthy, *Manner and Form in the Australian States*, 16 MELB. U. L. REV. 403, 403 & n.4 (1987) (internal quotations omitted).

²⁹⁵ Chander, *supra* note 286, at 463–64; *see also* Swinton, *supra* note 248, at 359–64, 403.

on several fronts, by legal philosophers and constitutional scholars.²⁹⁶ The relevant point for our purposes is the “new view” scholars’ argument that “legal sovereignty” “is merely a name indicating that the legislature has . . . power to make laws of any kind in the manner required by the law.”²⁹⁷ According to this argument, parliamentary supremacy entails an unlimited lawmaking power regarding the subject matter of legislation, whereas rules that simply define the procedures for enactment are not fetters on power and do not constitute limits on sovereignty.²⁹⁸ These scholars argue that lawmaking cannot be understood except as a law-governed process.²⁹⁹ Hence, the existence of procedural requirements for lawmaking (as opposed to substantive limits on the legislative power) is both inevitable and consistent with legislative sovereignty.³⁰⁰

Based on this “new view” of parliamentary sovereignty, several scholars in the British Commonwealth have argued that judicial review of the

²⁹⁶ For a good overview, see OLIVER, *supra* note 248, at 76–107. *See also* HART, *supra* note 244, at 66–78, 94–99, 147–52; Elliot, *supra* note 268, at 221–30; Waldron, *supra* note 246, at 375.

²⁹⁷ W.I. JENNINGS, *THE LAW AND THE CONSTITUTION*, 147–49 (4th ed. 1952).

²⁹⁸ *See* HART, *supra* note 244, at 68–70; OLIVER, *supra* note 248, at 77; Warren J. Newman, *The Principles of the Rule of Law and Parliamentary Sovereignty in Constitutional Theory and Litigation*, 16 NAT’L J. CONST. L. 175, 198–99 (2005).

²⁹⁹ *See, e.g.*, Waldron, *supra* note 246, at 375.

³⁰⁰ For a more detailed discussion of the “new view” and “revised view” of parliamentary sovereignty, *see* OLIVER, *supra* note 248, at 80–92; Elliot, *supra* note 268, at 221–30.

legislative process is consistent with parliamentary sovereignty.³⁰¹ Some have argued, for example, that parliamentary supremacy requires courts to enforce every Act of Parliament, but, in so doing, they have a duty to examine the enactment process to ensure that Parliament has really acted.³⁰² In order to ensure the authenticity of a putative Act, courts must determine compliance with those rules that are necessary “for the identification of the sovereign and for the ascertainment of [its] will.”³⁰³ Such judicial review does not interfere with the exercise of the sovereign’s will; it is a necessary condition for effectuating this will.³⁰⁴ In the words of Professor Denis Cowen, “in exercising jurisdiction to inquire into the authenticity of an alleged Act of Parliament, the courts plainly do not set themselves up as regents over Parliament. They do not seek to control the legislature. On the contrary, the inquiry is simply: has Parliament spoken?”³⁰⁵ These scholars argue that parliamentary sovereignty should be understood as limiting only substantive, *Marbury*-type judicial review, but not judicial review based on procedural flaws in the enactment process.³⁰⁶ This view was aptly summarized by Professor Heuston:

³⁰¹ Swinton, *supra* note 248, at 359–64, 403; *see also* Chander, *supra* note 286, at 463–67; Cowen, *supra* note 125, at 280; Elliot, *supra* note 268, at 221–30.

³⁰² Swinton, *supra* note 248, at 360.

³⁰³ *Id.* at 361; *see also* Adler & Dorf, *supra* note 13, at 1107–08, 1123–25.

³⁰⁴ Swinton, *supra* note 248, at 361; *see also* Tremblay, *supra* note 248, at 514–15.

³⁰⁵ Cowen, *supra* note 125, at 280.

³⁰⁶ Swinton, *supra* note 248, at 361.

(1) Sovereignty is a legal concept: the rules which identify the sovereign and prescribe its composition and functions are logically prior to it.

(2) There is a distinction between rules which govern, on the one hand, (a) the composition, and (b) the procedure, and, on the other hand, (c) the area of power of a sovereign legislature.

(3) The courts have jurisdiction to question the validity of an alleged Act of Parliament on grounds 2(a) and (b), but not on ground 2(c)³⁰⁷

The English courts have long preferred the orthodox view of parliamentary sovereignty,³⁰⁸ although some judges in the House of Lords have recently demonstrated some receptiveness to the “new view.”³⁰⁹ Courts in other common-law countries, at any rate, have been more receptive to the “new view” of legislative sovereignty. The Supreme Court of Canada, for example, relied, at least in part, on the “new view” of legislative sovereignty in concluding that courts may enforce not only constitutional lawmaking provisions, but also self-imposed statutory requirements for lawmaking.³¹⁰ The Israeli example is also interesting because, until the 1980s, Israeli courts followed the orthodox English view of parliamentary sovereignty quite

³⁰⁷ R.F.V. HEUSTON, *ESSAYS IN CONSTITUTIONAL LAW* 6–7 (1961).

³⁰⁸ Elliot, *supra* note 268, at 221–22.

³⁰⁹ Elliott, *supra* note 268, at 2 (arguing that Lord Steyn and Baroness Hale in *R (Jackson)* demonstrated receptiveness to the “new view”).

³¹⁰ Elliot, *supra* note 268, at 229–30 (*R. v. Mercure*, [1988] 1 S.C.R. 234 (Can.), “can, with some justification, be said to reflect a choice on the part of the current Supreme Court of Canada to prefer the new view of parliamentary sovereignty to that of Dicey.”); *see also* PETER W. HOGG, *CONSTITUTIONAL LAW OF CANADA* 309–14 (3d ed. 1992).

closely.³¹¹ Just like in England, the principle of parliamentary supremacy was long thought to be one of the fundamentals of the Israeli legal system, and, consequently, the enactment process and other parliamentary proceedings were considered nonjusticiable.³¹² However, in the late 1980s, the Supreme Court of Israel changed its position and recognized its authority to exercise judicial review of the enactment process.³¹³ This transition is particularly interesting for two reasons. First, it occurred several years before *Marbury*-type judicial review was established in Israel and before the Basic Laws that (arguably) mandated such substantive judicial review were enacted.³¹⁴ Second, and more significantly, the Israeli Court seemed to derive its authority to review the legislative process, to a large extent, from the idea that “[t]he legislative process, like any other governmental proceeding,” is a law-governed

³¹¹ David Kretzmer, *The Supreme Court and Parliamentary Supremacy*, in PUBLIC LAW IN ISRAEL 303, 303, 305–06 (Itzhak Zamir & Allen Zysblat eds., 1996); see also Michael J. Beloff, *Old Land – New Land: A Comparative Analysis of the Public Law of the United Kingdom & Israel*, in ISRAEL AMONG THE NATIONS: INTERNATIONAL AND COMPARATIVE LAW PERSPECTIVES 35, 39–40 (Alfred E. Kellermann et al. eds., 1998).

³¹² Kretzmer, *supra* note 311, at 303.

³¹³ The Israeli Court recognized its authority to review the legislative process in *Miary v. Knesset Speaker*, H CJ 761/86 *Miary v. Knesset Speaker* [1989] IsrSC 42(4) 868. See Suzie Navot, *Judicial Review of the Legislative Process*, 39 ISR. L. REV. 182, 192–94 (2006). Judicial review of parliamentary proceedings other than legislation began a few years earlier. See Kretzmer, *supra* note 311, at 305–06.

³¹⁴ Substantive judicial review was established by the Court six years later, in the “Israeli *Marbury*” decision of *Bank Hamizrahi v. Migdal Association Village*, CA 6821/94 *Bank Hamizrahi v. Migdal Assoc. Vill.* [1995] IsrSC 49(4) 22, following enactment of Basic Law: Human Dignity and Freedom and Basic Law: Freedom of Occupation in 1992. See Navot, *supra* note 313, at 192–94 (noting that judicial review of the legislative process in Israel preceded substantive judicial review).

process.³¹⁵ At least one justice, moreover, explicitly derived this authority from the “new view” of legislative sovereignty, while holding that substantive judicial review authority does not exist.³¹⁶

The argument that rejection of the orthodox view of legislative supremacy should lead to rejection of EBD also finds support in the development of judicial review of the legislative process in civil-law countries. In several European constitutional democracies, such as Germany and Spain, judicial review of the enactment process is viewed as deriving from the “transition from the model of parliamentary supremacy to the model of constitutional supremacy.”³¹⁷ Historically, these countries also had doctrines (such as the traditional *interna corporis acta* doctrine) that viewed the enactment process and other parliamentary proceedings as immune from judicial scrutiny, based on the English ideas of the sovereignty and independence of Parliament.³¹⁸ As part of their post-World-War-II transition into constitutional democracies,

³¹⁵ H CJ 975/89 *Nimrodi Land Dev. v. Knesset Speaker* [1991] IsrSC 45(3) 154, 157 (“The legislative process, like any other governmental proceeding, is a ‘normative’ proceeding, i.e., a proceeding whose stages are regulated by law. . . . [I]f there was a defect in one of the proceedings that goes to the heart of the process, the bill does not become legislation, and the court is authorized . . . to declare the ‘statute’ void.”); H CJ 761/86 *Miary*, at 873 (“Legislative processes are carried out by law, and the organs of [Parliament] that are involved in legislation hold a public office by law. It follows that even legislative activity is subject to the power of judicial review . . .”).

³¹⁶ CA 6821/94 *Bank Hamizrahi*, at 564–71 (Cheshin, J., concurring).

³¹⁷ Navot, *supra* note 313, at 194.

³¹⁸ Suzie Navot, *The “Sarid” Test After Twenty Years: Revisiting Judicial Review of Parliamentary Proceedings*, 19 MEHKAREI MISHPAT (BAR ILAN STUD. L.) 721, 733–36 (2002) [Isr.].

however, these countries rejected the view of Parliament as supreme, or as sovereign, in favor of constitutional supremacy and “constrained parliamentarianism.”³¹⁹ Constitutional courts in several of these countries (and most notably in Spain) concluded that these changes require reconsideration and reinterpretation of the doctrines that viewed the legislative process and other parliamentary proceedings as nonjusticiable.³²⁰ These courts concluded that, in constitutional democracies, legislative autonomy and independence should be balanced with the principle of constitutional supremacy, which requires that the legislature exercise all its powers (including in the legislative process) in accordance with the constitution.³²¹ Recognizing the judicial duty to ensure the legislature’s adherence to the constitution, courts in Spain,

³¹⁹ Bruce Ackerman, *The New Separation of Powers*, 113 HARV. L. REV. 633, 635–40 (2000) (arguing that after World War II, Germany, Italy, and other countries adopted “constrained parliamentarianism,” which is an alternative to the British model of parliamentary supremacy and also to the American model); Kenneth M. Holland, *Judicial Activism in Western Europe*, in HANDBOOK OF GLOBAL LEGAL POLICY 179, 192 (Stuart S. Nagel ed., 2000) (discussing the post-World-War-II constitutions in Germany, Italy, and France as “a conscious effort . . . to abandon, or at least modify, the principle of parliamentary supremacy”); Markus Ogorek, *The Doctrine of Parliamentary Sovereignty in Comparative Perspective*, 6 GERMAN L. J. 967, 969–70 (2005) (noting that in contrast to the English Parliament, the German Parliament is not granted any power which could be compared to sovereignty of the people, and that Parliament in Germany is viewed as a creature of the constitution and therefore under an obligation to abide by its regulations).

³²⁰ For a detailed discussion, see Navot, *supra* note 318, at 737–43, 747–65, as well as Paloma Bignilo Campos, *Los vicios en el procedimiento legislativo: La postura del Tribunal Constitucional en la Sentencia 99/87* [*Defects in the Legislative Process: The Position of the Constitutional Court in Decision 99/87*], 24 REVISTA ESPAÑOLA DE DERECHO CONSTITUCIONAL 211, 216–20, 226–28 (1998) and Ana Maria D’Ávila Lopes & José Antonio Tirado, *Controle Jurisdiccional Dos Interna Corporis Acta no Direito Espanhol* [*Judicial Review of Interna Corporis Acta in Spanish Law*], 44 REVISTA DA FACULDADE DE DIREITO DA UFPR 29 (2006). I thank Javier El-Hage and Ana Lorenzo Sobrado for assistance with Spanish and Portuguese materials.

³²¹ Navot, *supra* note 318, at 737–43, 747–65.

Germany, and other constitutional democracies gradually but dramatically expanded their review of the legislative process.³²² In short, judicial review of the legislative process was simply viewed as “a natural outgrowth of the explicit rejection of the English model [of] parliamentary supremacy.”³²³

The historical origins of EBD; the contemporary discussions of this doctrine in England and the Commonwealth; and the development of judicial review of the legislative process in common-law and civil-law countries all seem to yield a similar conclusion: EBD appears to be contingent upon the orthodox view of legislative supremacy. Judicial review of the legislative process is considered to be a natural consequence of rejecting this view, either in favor of the “new view” of legislative sovereignty, or in favor of constitutional supremacy and the principle that the legislature is constrained by a judicially enforceable Constitution.

B. The American Doctrine and Legislative Supremacy

The American EBD was never explicitly grounded on the principle of legislative supremacy. However, this section argues that the American doctrine did not completely divorce from its historic English origin. It argues that the

³²² *Id.*; see also Aharon Barak, *The Supreme Court, 2001 Term Foreword: A Judge on Judging: The Role of a Supreme Court in a Democracy*, 116 HARV. L. REV. 16, 129–30 (2002) (describing the position of the constitutional courts in Germany and Spain); Navot, *supra* note 313, at 193–94, 202–03 (describing judicial review of the legislative process in Spain, Germany, Italy, and France).

³²³ Navot, *supra* note 313, at 195.

American doctrine shares, in effect, the orthodox English view of the legislative process as a sphere of unfettered legislative supremacy, immune from judicial review.

Field's EBD effectively insulates the legislative process from judicial review and, consequently, establishes Congress's unfettered power to control this process.³²⁴ This doctrine has properly been characterized as "a prophylactic rule, which blocks all inquiry into the alleged procedural flaws in a bill's adoption"³²⁵ or as "insulating legislative enactments from challenges based on faulty enactment procedures."³²⁶ The doctrine represents, therefore, a judgment that the legislature may operate in the legislative process without any judicial oversight at all and, consequently, without any meaningful legal (as opposed to political) constraints.

Furthermore, EBD requires courts to shut their eyes even on the most obvious and egregious violations of the Constitution's lawmaking requirements and "to hold statutes valid which they and everybody know [sic] were never legally enacted."³²⁷ The doctrine compels courts to hold statutes valid even when it is clear beyond doubt and openly admitted that the statute was enacted in blatant violation of the constitutional requirements for

³²⁴ Roberts, *supra* note 207, at 527, 531; Roberts & Chemerinsky, *supra* note 127, at 1789–90.

³²⁵ Roberts, *supra* note 207, at 531.

³²⁶ Roberts & Chemerinsky, *supra* note 127, at 1790 & n.63.

³²⁷ *Bull v. King*, 286 N.W. 311, 313 (Minn. 1939).

lawmaking.³²⁸ To be sure, EBD leaves courts with the theoretical power to invalidate a statute when it is clear from its face that it was not validly enacted. However, violations of the lawmaking requirements set forth in the Constitution will rarely be discoverable from merely examining the enrolled bill.³²⁹ Thus, the practical result of EBD is non-enforcement of the procedural lawmaking requirements of the Constitution. Consequently, these constitutional requirements become “binding only upon the legislative conscience.”³³⁰ This permits habitual and flagrant disregard of the constitutional requirements in the legislative process.³³¹ Some state supreme courts have even argued that the consequence of EBD is that “the wholesome restrictions which the Constitution imposes on legislative and executive action become a dead letter”³³²

To be sure, critics of “court-centered” constitutional law argue that “it is a mistake to assume that constitutional prohibitions are somehow unreal unless

³²⁸ See *D & W Auto Supply*, 602 S.W.2d at 422–24; *Power, Inc. v. Huntley*, 235 P.2d 173, 180–81 (Wash. 1951).

³²⁹ SINGER, *supra* note 27, § 15:2, at 815 (“The failure to comply with procedures prescribed in the constitution for enactment of statutes is rarely discoverable from the face of an act itself.”). In the states, in contrast, there are some restrictions on the legislative process (such as title and single subject), the violation of which is discoverable from the face of the act. See Williams, *supra* note 29, at 798–99.

³³⁰ *Huntley*, 235 P.2d at 180–81.

³³¹ See *Geja’s Café v. Metro. Pier & Exposition Auth.*, 606 N.E.2d 1212, 1221 (Ill. 1992); see also *supra* section III.D.

³³² See *Fowler v. Peirce*, 2 Cal. 165, 168–69 (1852).

backed up by judicial review.”³³³ It should be clarified, therefore, that this section does not contest the theoretical view that under-enforced and non-enforced constitutional provisions maintain their legal status as supreme law.³³⁴ Nor does it deny that Congress and the President have an independent obligation to abide by such constitutional provisions, and that the political branches might have independent incentives and mechanisms to do so.³³⁵ The question of whether these branches can be relied upon to enforce the lawmaking provisions without any judicial review, however, requires further research. Such research requires complex examination of institutional competence, incentives, and mechanisms,³³⁶ as well as further empirical

³³³ Vermeule, *supra* note 184, at 436; *see also* J. Peter Mulhern, *In Defense of the Political Question Doctrine*, 137 U. PA. L. REV. 97, 153–62 (1988) (seeking to disprove argument that branches have no constitutional obligations other than those courts enforce and asserting that branches are involved in constitutional discourse).

³³⁴ Lawrence Gene Sager, *Fair Measure: The Legal Status of Underenforced Constitutional Norms*, 91 HARV. L. REV. 1212, 1220–27 (1978); Williams, *supra* note 29, at 825–27.

³³⁵ Linde, *supra* note 37, at 243–44 (supporting judicial review of the legislative process, but stressing that “[o]ther participants than courts have the opportunity, and the obligation, to insist on legality in lawmaking”); Williams, *supra* note 29, at 825–27 (same).

³³⁶ *See* Jacob E. Gersen & Eric A. Posner, *Timing Rules and Legal Institutions*, 121 HARV. L. REV. 543, 577–82 (2007) (comparing the institutional competence of Congress, the President, and the courts to enforce a specific type of procedural rule of the legislative process (timing rules) and concluding that although none of these institutional actors would be perfect enforcers, courts are the most competent and promising of the three; arguing, moreover, that “judicial competence is better tailored to the enforcement of procedural restraints . . . than to substantive review of legislation” and that “courts could do so cheaply and effectively”); Abner J. Mikva, *How Well Does Congress Support and Defend the Constitution?*, 61 N.C. L. REV. 587, 609–10 (1983) (doubting Congress’s competence to support and defend the Constitution); Barbara Sinclair, *Can Congress Be Trusted with the Constitution? The Effects of Incentives and Procedures*, in CONGRESS AND THE CONSTITUTION 293, 294, 296 (Neal Devins & Keith E. Whittington eds., 2005) (arguing that Congress has the incentives and procedures to interpret and uphold the Constitution, but conceding, in effect, that the possibility of judicial review is itself one of the incentives; Congress members who are truly motivated by their

research,³³⁷ which are beyond the scope of this Article. At any rate, the resolution of this question is not required here, for this section merely argues that the doctrine leaves the legislative process entirely to the control of the political branches. Whether this necessarily leads to constitutional violations is a separate question.

The important points for this section are that EBD amounts to a judicial declaration that the enactment process is completely beyond the reach of courts, that courts may not question the validity of legislation, and that the lawmaking provisions of the Constitution are (judicially) non-enforceable. This position comes very close to the orthodox English view of parliamentary supremacy, according to which there are no legal (as opposed to political) limitations on the legislative process and courts may not question the validity of legislation. Both American and English doctrines, moreover, share a view of the enactment process as a special sphere of governmental activity that is completely immune from judicial review.

desire to promote public policy have “instrumental reasons” to take into account the constitutionality of their legislation if they want it to survive judicial review).

³³⁷ See J. MITCHELL PICKERILL, CONSTITUTIONAL DELIBERATION IN CONGRESS: THE IMPACT OF JUDICIAL REVIEW IN A SEPARATED SYSTEM 3–6 (2004) (providing empirical support to the argument that constitutional considerations are generally given little weight in drafting, considering, and passing legislation in Congress, and that judicial review is required to encourage Congress to consider constitutional considerations in the legislative process); cf. Keith E. Whittington, *James Madison Has Left the Building*, 72 U. CHI. L. REV. 1137, 1152 (2005) (conceding that Professor Pickerill’s empirical study “generally support[s] his claim that the threat of judicial review is a necessary condition for serious constitutional deliberation in Congress”).

C. The Doctrine's Incongruity with the U.S. Constitution

Legislative sovereignty and the idea of a supreme, omnipotent legislature are, of course, entirely foreign to the U.S. Constitution.³³⁸ It is widely recognized that the Framers of the American Constitution rejected the traditional idea that sovereignty is lodged in parliament, or in any other governmental body, in favor of the idea that “in America, the only legitimate sovereign was the People, who could delegate different powers to different governments in any way.”³³⁹ It is likewise acknowledged as “axiomatic” that the Framers rejected the idea of a supreme, omnipotent legislature in favor of the principle of limited government and the idea of a legislature that is constrained by a supreme Constitution which is prior and superior to the powers of the legislature.³⁴⁰ *Marbury v. Madison* has famously taken the additional step of holding that constitutional supremacy and the principle that the legislature is constrained by the Constitution requires judicial enforcement

³³⁸ See Lord Irvine, *supra* note 272, at 5.

³³⁹ BRUCE ACKERMAN, 1 *WE THE PEOPLE: FOUNDATIONS* 216–17 (1991); see also Prakash & Yoo, *supra* note 237, at 914 (“According to the theory of popular sovereignty prevalent at the time of ratification, the Constitution is a creation of the people This understanding of government power represented a rejection of the notion that sovereignty itself lodged in the government or monarch.”); Andrzej Rapaczynski, *From Sovereignty to Process: The Jurisprudence of Federalism after Garcia*, 1985 SUP. CT. REV. 341, 357 (“If the Framers thought of anyone as ‘sovereign’ in the United States, they thought this of the people in whose name they purported to write the Constitution.”).

³⁴⁰ SINGER, *supra* note 27, at § 2:1, at 17 (“It is axiomatic in the American system of limited government that the existence and authoritative capacity of governmental instrumentalities for making law, their powers, and the methods by which their powers may legally be exercised, are subject to the higher law of the constitution.”); see also Lord Irvine, *supra* note 272, at 5; Prakash & Yoo, *supra* note 237, at 914–15; Rapaczynski, *supra* note 339, at 357.

of the Constitution.³⁴¹ Academic criticism of *Marbury* notwithstanding, constitutional supremacy and judicial review are as central and well-settled in America as parliamentary sovereignty was (until recently) in the United Kingdom.³⁴²

In treating lawmaking as a sovereign prerogative and the legislative process as a sphere of unfettered power immune from judicial review, EBD deviates from *Marbury* and from the fundamental and well-settled principles of American constitutionalism. In fact, the words of Chief Justice Marshall in *Marbury* rejecting the view that “courts must close their eyes on the Constitution” are strikingly applicable to EBD as well:

This doctrine would subvert the very foundation of all written constitutions. It would declare that an act, which, according to the principles and theory of our government, is entirely void; is yet, in practice, completely obligatory. It would declare, that if the legislature shall do what is expressly forbidden, such act, notwithstanding the express prohibition, is in reality effectual. It would be giving to the legislature a practical and real omnipotence, with the same breath which professes to restrict their powers within narrow limits. It is prescribing limits, and declaring that those limits may be passed at pleasure.³⁴³

As the previous section demonstrated, EBD forces courts to “close their eyes” on constitutional violations and to enforce unconstitutional and invalid statutes; it amounts to a declaration that constitutional limits on the enactment process

³⁴¹ *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 178 (1803).

³⁴² See Lord Irvine, *supra* note 272, at 5; see also Henkin, *supra* note 11, at 600 (“Judicial review is now firmly established as a keystone of our constitutional jurisprudence.”).

³⁴³ *Marbury*, 5 U.S. (1 Cranch) at 178.

may, in fact, “be passed at pleasure,” and consequently, it gives the legislature “a practical . . . omnipotence” in the legislative process.

Scholars, such as Professor Henkin, have argued that under American constitutionalism (at least since *Marbury*), there can be no domains of unlimited power or spheres of governmental activity that are completely exempt from judicial review.³⁴⁴ Others have similarly argued that courts may not carve exceptions to *Marbury* and abdicate their duty to enforce the Constitution, unless the Constitution itself has (explicitly or implicitly) committed the issue to another branch.³⁴⁵ This Article expresses no opinion about judicial abstention from reviewing other areas of governmental activity. Rather, it argues that there is no basis for exempting the legislative process from judicial review. This Part argues that there is no basis in the Constitution itself for committing the enforcement of Article I, Section 7 to the legislative officers of Congress. The next Part considers (and rejects) the major prudential argument underlying EBD.

The view that the legislative process is a sphere of legislative omnipotence, immune from judicial review, is at odds with the Constitution’s

³⁴⁴ Louis Henkin, *Constitutionalism, Democracy and Foreign Affairs*, 67 *IND. L.J.* 879, 885–86 (1992); Henkin, *supra* note 11, at 600; *cf.* Redish, *supra* note 164, at 1033, 1059–60 (arguing abandonment of political question doctrine and judicial review in each case).

³⁴⁵ Wechsler, *supra* note 164, at 9–10; *cf.* KOH, *supra* note 164, at 218–24 (arguing that Wechsler’s view applies both to domestic and foreign affairs, and that courts cannot use political question doctrine simply because case deals with foreign policy); Adler & Dorf, *supra* note 13, at 1182–88 (arguing that courts cannot use political question doctrine unless Constitution requires); Barkow, *supra* note 160, at 331–35 (same).

lawmaking provisions, their text, and their original understanding. As the Court noted in *INS v. Chadha*, the Constitution “defines [the legislative] powers and . . . sets out just how those powers are to be exercised.”³⁴⁶ It contains, *inter alia*, “[e]xplicit and unambiguous provisions” which “prescribe and define the respective functions of the Congress and of the Executive in the legislative process.”³⁴⁷ Moreover, that these provisions were meant to bind Congress is clear from the text of Article I, Section 7. This Section states that “[e]very Bill . . . shall” follow certain procedures in order to “become a Law,” and indicates that if its procedural requirements are not met, the bill “shall not be a Law.”³⁴⁸ The Supreme Court has interpreted the text of this Section as “explicitly requir[ing] that each of [its procedural] steps be taken before a bill may ‘become a law.’”³⁴⁹ Indeed, the Supreme Court has repeatedly interpreted the lawmaking provisions as binding, and as establishing the principle that the power to enact statutes may only be exercised in accord with the precise procedure set out in the Constitution.³⁵⁰ This conclusion, moreover, is buttressed by the lawmaking provisions’ underlying purposes and history.

³⁴⁶ *INS v. Chadha*, 462 U.S. 919, 945 (1983) (referring to U.S. CONST. art. I, §§ 1, 7).

³⁴⁷ *Id.*

³⁴⁸ U.S. CONST. art. I, § 7, cl. 2.

³⁴⁹ *Clinton v. City of New York*, 524 U.S. 417, 448–49 (1998).

³⁵⁰ *See Chadha*, 462 U.S. at 945–46, 951, 954; *see also Clinton*, 524 U.S. at 438, 439–40, 446, 448–49; *United States v. Munoz-Flores*, 495 U.S. 385, 397 (1990); *United States v. Estate of Romani*, 523 U.S. 517, 535–536 (1998) (Scalia, J., concurring); *Bowsher v. Synar*, 478 U.S. 714, 737 (1986) (Stevens, J., concurring).

Again, this was already recognized in *INS v. Chadha*, which examined the history and purposes of these provisions and concluded:

We see therefore that the Framers were acutely conscious that the bicameral requirement and the Presentment Clauses would serve essential constitutional functions. . . . It emerges clearly that the prescription for legislative action in Art. I, §§ 1, 7 represents the Framers’ decision that the legislative power of the Federal government be exercised in accord with a single, finely wrought and exhaustively considered, procedure.³⁵¹

Thus, EBD “is difficult to square with the . . . text and other sources of constitutional meaning” of Article I, Section 7.³⁵²

Nor is EBD required by any other constitutional provision.³⁵³

Admittedly, Professors Roberts and Chemerinsky suggested that EBD can be linked to the Rulemaking Clause of Article I, Section 5, which states: “Each House may determine the Rules of its Proceedings.”³⁵⁴ Even they conceded, however, that this requires an expansive interpretation of this Clause which is “not easily apprehended from the words alone”³⁵⁵ and apparently has no

³⁵¹ *Chadha*, 462 U.S. at 951.

³⁵² Adler & Dorf, *supra* note 13, at 1181.

³⁵³ See Paul Horwitz, *Three Faces of Deference*, 83 NOTRE DAME L. REV. 1061, 1097 (2008) (“[N]othing in the Constitution requires the courts to refrain from examining closely whether the political branches have, in fact, met the constitutional requirements for lawmaking in a given case.”).

³⁵⁴ See Roberts & Chemerinsky, *supra* note 127, at 1789–90; see also Roberts, *supra* note 207, at 527–28, 530.

³⁵⁵ Roberts & Chemerinsky, *supra* note 127, at 1790.

support in sources about original intent and understanding.³⁵⁶ As several other scholars have suggested, “plausibly the best reading” of this Clause is that its purpose is not to insulate the legislative process from judicial review, but rather to establish “cameral autonomy”—the authority of each house to enact procedural rules, independent of the other house and of Congress as whole.³⁵⁷ Furthermore, as *Powell* and *Nixon* established, a claim that a certain provision provides a constitutional commitment of unreviewable authority is defeated by the existence of a separate provision specifying “identifiable textual limits” on how this authority can be carried out.³⁵⁸ It is clear that Article I, Section 7 is “an identifiable textual limit” on Congress’s lawmaking authority and that it specifies how this authority should be carried out. Hence, even under the most expansive reading of the Rulemaking Clause, it cannot shield constitutional violations in the enactment process from judicial review.

³⁵⁶ Roberts, *supra* note 207, at 529 (“There is no record of discussion in the Convention on the inherent powers of the House and Senate to control the details of the enactment process or on the need for an explicit Rulemaking Clause . . . Likewise, no references to the Rulemaking Clause appear in the Federalist Papers . . . Early scholarly explanations and analyses of the Constitution likewise devote little attention to the Rulemaking Clause . . .”); *see also* James E. Castello, Comment, *The Limits of Popular Sovereignty: Using the Initiative Power to Control Legislative Procedure*, 74 CAL. L. REV. 491, 529–30 (1986).

³⁵⁷ Vermeule, *supra* note 184, at 384, 430; Eric A. Posner & Adrian Vermeule, *Legislative Entrenchment: A Reappraisal*, 111 YALE L.J. 1665, 1683 (2002); *see also* Adler & Dorf, *supra* note 13, at 1179 (rejecting the possibility that the Rulemaking Clause makes the legislative officers authoritative as to compliance with Article I, Section 7); Goldfeld, *supra* note 96, at 417–18 (arguing that the Rulemaking Clause simply spells out the powers of Congress to establish internal rules); Michael B. Miller, Comment, *The Justiciability of Legislative Rules and the “Political” Political Question Doctrine*, 78 CAL. L. REV. 1341, 1357–63 (1990) (arguing that the text, history, and possible rationales behind the Rulemaking Clause evince, at best, an intent to empower each house of Congress to adopt its own rules of procedure).

³⁵⁸ *Nixon v. United States*, 506 U.S. 224, 237–38 (1993) (discussing *Powell v. McCormack*, 395 U.S. 486, 519–22 (1969)).

Significantly, moreover, the *Field* Court itself did not base EBD on constitutional interpretation or argue that it is required by the Rulemaking Clause or any other constitutional clause.³⁵⁹ On the contrary, it stressed that the Constitution itself does not resolve the issue “either expressly or by necessary implication.”³⁶⁰ Instead, it concluded that prudential considerations—most notably, the respect due to a coequal branch—require EBD.³⁶¹

VII. RESPECT DUE TO A COEQUAL BRANCH AS PROXY TO PARLIAMENTARY SUPREMACY?

Lord Carswell of the English House of Lords has recently written on the English EBD: “[T]he sovereignty or supremacy of Parliament and the conclusiveness of the Parliamentary Roll . . . are judicial products of that carefully observed mutual respect which has long existed between the legislature and the courts.”³⁶² In the American justification of the doctrine, legislative supremacy disappears, but the argument remains that “[m]utual regard between the coordinate branches”³⁶³ or “[t]he respect due to coequal and independent departments” (and other prudential considerations) require

³⁵⁹ *Marshall Field & Co. v. Clark*, 143 U.S. 649, 671 (1892).

³⁶⁰ *Id.*

³⁶¹ *Id.* at 671–72.

³⁶² *R (Jackson) v. Att’y Gen.*, [2006] 1 A.C. 262, 168.

³⁶³ *United States v. Munoz-Flores*, 495 U.S. 385, 410 (1990) (Scalia, J., concurring).

EBD.³⁶⁴ As the previous Part demonstrated, despite the difference in justifications, the English and American doctrines demand the same degree of deference: complete immunity of the legislative process from judicial review. This Part argues that EBD represents excessive deference to the legislature, which is (perhaps) appropriate in a system of parliamentary supremacy, but not in a legal system in which the legislature is a coequal branch, operating under a supreme written Constitution. Section VII.A discusses the proper balance between respect to the legislature and respect to the Constitution. Section VII.B challenges the assumption that judicial review of the legislative process manifests disrespect to the legislature.

A. Respect to the Legislature and Respect to the Constitution

The English courts based EBD on the fact that they “sit . . . as servants of the Queen and the [supreme] legislature”³⁶⁵ and that in the “United Kingdom there is no governing instrument which prescribes the law-making powers and the forms which are essential to those powers.”³⁶⁶ In the United States, in contrast, the courts—and the coequal legislature—are “servants” of the supreme Constitution. Hence, in contrast to their English counterparts, the American courts must balance their duty to respect the legislature with their

³⁶⁴ *Field*, 143 U.S. at 672.

³⁶⁵ *Lee v. Bude and Torrington Junction Ry. Co.* (1871) 6 L.R. 576, 582 (P.C.).

³⁶⁶ *Bribery Commissioner v. Ranasinghe*, [1965] A.C. 172, 195 (P.C. 1964).

duty to uphold the Constitution. Unlike in England, in the United States, deference to the legislature in certain situations may carry a heavy cost: judicial disrespect to the Constitution. The next Part will argue that there are ways to alleviate the tension between these competing considerations. However, in the face of clear evidence that a statute was enacted in flagrant violation of the Constitution, collision between respect to the legislature and disrespect to the Constitution is unavoidable. This point was nicely put by the Supreme Court of Pennsylvania:

To preserve the delicate balance critical to a proper functioning of a tripartite system of government, this Court has exercised restraint to avoid an intrusion upon the prerogatives of a sister branch of government.

. . . .

. . . The countervailing concern is our mandate to insure that government functions within the bounds of constitutional prescription. We may not abdicate this responsibility under the guise of our deference to a co-equal branch of government. While it is appropriate to give due deference to a co-equal branch of government as long as it is functioning within constitutional constraints, it would be a serious dereliction on our part to deliberately ignore a clear constitutional violation.³⁶⁷

Other state supreme courts have similarly rejected “the premise that the equality of the various branches of government requires that we shut our eyes

³⁶⁷ *Consumer Party of Pa. v. Commonwealth*, 507 A.2d 323, 332–33 (Pa. 1986), *abrogated by Pa. Against Gambling Expansion Fund, Inc. v. Commonwealth*, 877 A.2d 383 (Pa. 2005) (holding constitutional challenge to legislation that has been amended requires two-part inquiry when changing original purpose) (internal citations omitted).

to constitutional failings . . . of our coparceners in government.”³⁶⁸ As we have seen in the previous Part, courts in several constitutional democracies, both in common-law and civil-law systems, reached the same conclusion and held that EBD (or its continental equivalent) is not applicable to constitutional violations.³⁶⁹ The “duty of the judicial department to determine . . . whether the powers . . . of the legislature in the enactment of laws have been exercised in conformity to the Constitution” was also recognized in *Kilbourn v. Thompson* and *Powell v. McCormack*, based on the notion that “living under a written constitution, no branch or department of the government is supreme.”³⁷⁰ Even the English courts have recognized that in constitutional legal systems “a legislature has no power to ignore the conditions of law-making that are imposed by the instrument which itself regulates its power to make law,”³⁷¹ and that courts, in turn, may not abdicate their “duty to see that the Constitution is not infringed and to preserve it inviolate.”³⁷²

Hence, due deference to a coequal legislature in a constitutional system cannot amount to the same degree of deference due to a supreme sovereign

³⁶⁸ *D & W Auto Supply v. Dep’t of Revenue*, 602 S.W.2d 420, 424 (Ky. 1980).

³⁶⁹ *See supra* section VI.A.

³⁷⁰ *Kilbourn v. Thompson*, 103 U.S. 168, 199 (1880); *see also Powell v. McCormack*, 395 U.S. 486, 506 (1969) (citing above passage from *Kilbourn* and adding that this is “language which time has not dimmed”); *cf. United States v. Munoz-Flores*, 495 U.S. 385, 391, 396–97 (1990).

³⁷¹ *Ranasinghe*, [1965] A.C. at 197.

³⁷² *Id.* at 194.

legislature; it cannot amount to absolutism and unfettered legislative power.³⁷³ Judicial review of the legislative process is, therefore, “consistent with the doctrine of the separation of powers [and mutual regard between coequal branches], construed, as it must be, to accommodate the doctrine of judicial review and the supremacy of the Constitution.”³⁷⁴

B. Judicial Review of the Legislative Process Does Not Manifest Disrespect

This section argues that the separation of powers and “lack of respect” concern underlying EBD rests, in effect, on two assumptions: (1) that questioning the enrolled bill manifests mistrust in the integrity of the legislative officers who signed it; or (2) that it entails a judicial “intrusion” into the internal workings of Congress. The section challenges both assumptions.

Field’s holding that the EBD is required by the respect due to coequal branches rested, to a very large extent, on the first premise—that questioning the validity of the enrolled bill necessarily manifests mistrust in the integrity of the presiding officers. The *Field* Court held that “the official attestations” of these presiding officers represent their “solemn assurance” that a bill was duly passed.³⁷⁵ Hence, it concluded that “[t]he respect due to coequal and independent departments requires the judicial department to act upon that

³⁷³ Cf. Barak, *supra* note 322, at 120–23.

³⁷⁴ Grant, *supra* note 70, at 368.

³⁷⁵ *Marshall Field & Co. v. Clark*, 143 U.S. 649, 672 (1892).

assurance.”³⁷⁶ Furthermore, the *Field* Court assumed that the argument that EBD may lead to enforcement of laws that were never duly passed by Congress necessarily “suggests a deliberate conspiracy [by] the presiding officers . . . to defeat an expression of the popular will in the mode prescribed by the constitution.”³⁷⁷ It concluded, therefore, that “[j]udicial action, based upon such a suggestion, is forbidden by the respect due to a co-ordinate branch of the government.”³⁷⁸ Justice Scalia’s argument—that “a court’s holding . . . that the representation made to the President [in the enrolled bill] is incorrect would . . . manifest a lack of respect due a coordinate branch”³⁷⁹—also seems to rest on the assumption that such judicial holding necessarily suggests a deliberate misrepresentation.

Indeed, “respect due to a coordinate branch” is perhaps “hard to square with realpolitik concerns for possible legislative manipulations.”³⁸⁰ However, judicial review of the enactment process need not rest on mistrust in the integrity of the legislative officers, nor does it necessarily evince such distrust. In contrast to *Field*’s assumption, an incorrect representation in the enrolled bill need not necessarily result from a “deliberate conspiracy” by the presiding

³⁷⁶ *Id.*

³⁷⁷ *Id.* at 673.

³⁷⁸ *Id.*

³⁷⁹ *United States v. Munoz-Flores*, 495 U.S. 385, 409 (1990) (Scalia, J., concurring).

³⁸⁰ Strauss, *supra* note 206, at 255.

officers or the legislative clerks. There is certainly evidence both at the federal and state level that simple, honest mistakes can also lead to signing enrolled bills that do not accurately represent the real bill passed by Congress. Indeed, a realistic view of the contemporary legislative process and of the modern enrollment process must lead to the conclusion that “an occasional error is certain to occur.”³⁸¹ In fact, several state supreme courts have based their decision to overrule or modify EBD not on mistrust of the legislative officers, but on the need “to avoid elevating clerical error over constitutional law.”³⁸² “To hold otherwise” stated the Supreme Court of Texas, “would raise form over substance, fiction over fact, and amount to government by clerical error.”³⁸³

Furthermore, there are additional reasons for judicial review of the enactment process that have nothing to do with the integrity of the legislative officers. For example, it is quite possible that the legislative officers will attest in good faith that a bill was constitutionally enacted, and that courts will still find that it was passed in violation of the Constitution, due to differences in their interpretation of the Constitution’s lawmaking requirements. As the Court noted in *Powell* and *Munoz-Flores*, “[o]ur system of government requires that

³⁸¹ Grant, *supra* note 70, at 368; *see also supra* section III.B–C.

³⁸² Ass’n of Tex. Prof’l Educators v. Kirby, 788 S.W.2d 827, 830 (Tex. 1990) (citing cases from Pennsylvania, Illinois, Kansas, and Missouri).

³⁸³ *Id.* at 830.

federal courts on occasion interpret the Constitution in a manner at variance with the construction given the document by another branch.”³⁸⁴ Contrary to *Field*’s assumption, therefore, questioning the validity of the enrolled bill does not necessarily entail doubting the personal integrity of the legislative officers; nor does judicial invalidation necessarily amount to a declaration that the presiding officers deliberately conspired to violate the Constitution.

To be sure, *Field* may also be interpreted as holding that courts must “act upon” the assurance of the legislative officers that the bill was enacted in full compliance with the Constitution and may not independently determine the constitutionality of enactment.³⁸⁵ The argument, in other words, is that doubting the legislative officer’s constitutional judgment also evinces lack of respect. This argument, however, was effectively rejected already in *Munoz-Flores*, which held that “such congressional consideration of constitutional questions does not foreclose subsequent judicial scrutiny of the law’s constitutionality. On the contrary, this Court has the duty to review the constitutionality of congressional enactments.”³⁸⁶ Furthermore, as the *Munoz-Flores* Court noted, this argument would mean that “every judicial resolution of a constitutional challenge to a congressional enactment would be

³⁸⁴ *Munoz-Flores*, 495 U.S. at 391 (quoting *Powell v. McCormack*, 395 U.S. 486, 549 (1969)).

³⁸⁵ *Marshall Field & Co. v. Clark*, 143 U.S. 649, 672 (1892).

³⁸⁶ *Munoz-Flores*, 495 U.S. at 391.

impermissible”³⁸⁷ because Congress often considers whether bills violate constitutional provisions and in all these cases it could theoretically be argued that a judicial determination entails “a lack of respect for Congress’ [sic] judgment.”³⁸⁸ Indeed, in criticizing *Baker*’s “lack of the respect” factor, political-question scholars similarly argued that “[a]ll cases reversing a political judgment of constitutionality express a similar ‘lack of the respect due coordinate branches of government.’”³⁸⁹ Some even asked, “why assume . . . that judicial review does not often—or perhaps even always—express ‘lack of respect’ for the other branches of government,”³⁹⁰ or argued that this argument has “the potential for swallowing judicial review entirely.”³⁹¹

Nevertheless, some still object to judicial review of the legislative process because they assume that it entails a judicial “intrusion” into the internal workings of Congress.³⁹² Justice Scalia, for example, assumed that compliance with the constitutional requirements for lawmaking constitutes a “matter[] of

³⁸⁷ *Id.* at 390 (emphasis omitted).

³⁸⁸ *Id.* (internal quotation marks omitted).

³⁸⁹ Barkow, *supra* note 160, at 333 (quoting *Baker v. Carr*, 369 U.S. 217 (1962)).

³⁹⁰ Robert F. Nagel, *Political Law, Legalistic Politics: A Recent History of the Political Question Doctrine*, 56 U. CHI. L. REV. 643, 647 (1989).

³⁹¹ ELY, *supra* note 166, at 177 n.54.

³⁹² See A. Christopher Bryant & Timothy J. Simeone, *Remanding to Congress: The Supreme Court’s New “On the Record” Constitutional Review of Federal Statutes*, 86 CORNELL L. REV. 328, 373 (2001).

internal process.”³⁹³ He concluded, therefore, that “[m]utual regard between the coordinate branches” demands judicial acceptance of the enrolled bill’s “official representations regarding such matters of internal process . . . at face value.”³⁹⁴

Compliance with the constitutional requirements for lawmaking, however, should not be seen as a “matter of internal process.” “Matters of internal process,” which deserve judicial deference, should be limited to truly internal legislative matters—that is, matters of “internal housekeeping” and intra-legislative proceedings that have an effect only inside Congress. Judicial deference cannot extend to legislative proceedings that have substantial external legal effects or to constitutional violations. This distinction is widely accepted in foreign scholarship about judicial review of legislative proceedings.³⁹⁵ This is also the well-established rule in the jurisprudence of the Rulemaking Clause:³⁹⁶ judicial deference to the power of each house to determine its rules of proceedings does not extend to cases where the rules violate constitutional restraints or affect rights of persons outside Congress.³⁹⁷

³⁹³ *Munoz-Flores*, 495 U.S. at 410 (Scalia, J., concurring).

³⁹⁴ *Id.*

³⁹⁵ See, e.g., Navot, *supra* note 318, at 749–53; Swinton, *supra* note 248, at 390–400, 405.

³⁹⁶ US CONST. art. I, § 5, cl. 2.

³⁹⁷ See *United States v. Ballin*, 144 U.S. 1, 5–7 (1892); *United States v. Smith*, 286 U.S. 6, 33 (1932); *Christoffel v. United States*, 338 U.S. 84, 87–90 (1949); *Yellin v. United States*, 374 U.S. 109, 114, 143 (1963).

Hence, judicial deference to internal legislative proceedings cannot apply to violations of Article I, Section 7. The legislative process, moreover, is clearly not an intra-legislative proceeding because its product—legislation—has far-reaching legal effects outside Congress. Its effects are first and foremost external. Constitutional violations in the legislative process affect the entire citizenry. They infringe upon the people’s right not to be governed by “laws” which were not really passed by their elected legislature, or which were not enacted in accord with the “finely wrought and exhaustively considered, procedure” set out in the instrument in which the people delegated the lawmaking power to the legislature.³⁹⁸ Indeed, “citizens are constitutionally entitled to a certain process in the enactment of statutes.”³⁹⁹ Thus, unlike judicial review of some purely internal legislative matters, judicial review of the legislative process does not constitute an intrusion into the internal workings of Congress.

Moreover, arguments about judicial intrusion into the legislative sphere are often leveled against judicial intervention in the enactment process while it is still in progress,⁴⁰⁰ or against judges creating and imposing on Congress

³⁹⁸ *INS v. Chadha*, 462 U.S. 919, 951 (1983).

³⁹⁹ Williams, *supra* note 29, at 826.

⁴⁰⁰ Swinton, *supra* note 248, at 400–02, 405 (“While an injunction to prevent further action with a bill is an interference with Parliament . . . relief in the form of a declaration after enactment is not.”).

lawmaking requirements beyond those mandated by the Constitution.⁴⁰¹ Judicial review of the legislative process can be limited, however, to an inquiry, exercised after the enactment is complete, whether the bill was enacted in compliance with Constitutional requirements. This mode of judicial review is no more intrusive than any other *Marbury*-type judicial review which examines the constitutional validity of the completed product of the legislative process.

In fact, in several countries, judicial review of the legislative process has preceded substantive judicial review and is considered much less intrusive.⁴⁰² Indeed, there are several features of judicial review of the lawmaking process that make it less intrusive and less problematic in terms of separation of powers than substantive judicial review. Unlike substantive judicial review, judicial review of the enactment process does not involve any intervention in the policy choices of the legislature. Judicial review of the enactment process does not interfere with the exercise of the legislature's will; it is a necessary condition for effectuating this will—for determining whether Congress “has spoken.”⁴⁰³ Moreover, unlike the American “strong-form” version of substantive judicial review, in which the courts’ constitutional judgments are

⁴⁰¹ Bryant & Simeone, *supra* note 392, at 373–75 (arguing that courts may not impose procedural requirements on Congress beyond those set forth in Article I, Section 7).

⁴⁰² Linde, *supra* note 37, at 243; *see also* Gottfried Dietze, *Judicial Review in Europe*, 55 MICH. L. REV. 539, 541 (1957); William W. Van Alstyne, *A Critical Guide to Marbury v. Madison*, 1969 DUKE L.J. 1, 20–21.

⁴⁰³ Cowen, *supra* note 125, at 280; Swinton, *supra* note 248, at 361.

considered final and unrevisable,⁴⁰⁴ judicial review of the legislative process simply remands the invalidated statute to the legislature, which is free to reenact the same legislation, provided that a proper legislative process is followed. Hence, “invalidating a statute on procedural grounds, and thus permitting legislative reconsideration, seems much less intrusive than invalidating the substance of a statute on constitutional grounds.”⁴⁰⁵

Finally, EBD itself can be seen as incompatible with the separation of powers because it entails an impermissible delegation of powers to the presiding officers and permits the concentration of judicial and lawmaking powers in the hands of these two individuals.⁴⁰⁶ As the Supreme Court of California articulated forty years before *Field*:

It is no sufficient answer that we must rely on the integrity of the executive, or other officers Our notions of free institutions revolt at the idea of placing so much power in the hands of one man, with no guard upon it but his integrity; and our constitution has so wisely distributed the powers of government as to make one a check upon the other, thereby preventing one branch from strengthening itself both at the expense of the co-ordinate branches, and of the public.⁴⁰⁷

⁴⁰⁴ Mark Tushnet, *New Forms of Judicial Review and the Persistence of Rights-and-Democracy-Based Worries*, 38 WAKE FOREST L. REV. 813, 817–18 (2003) (citing *Cooper v. Aaron*, 358 U.S. 1, 18 (1958); *City of Boerne v. Flores*, 521 U.S. 507, 519, 529 (1997)).

⁴⁰⁵ Williams, *supra* note 29, at 825 (emphasis omitted); *see also* Fullilove v. Klutznick, 448 U.S. 448, 551 & n.28 (1980) (Stevens, J., dissenting); Linde, *supra* note 37, at 243.

⁴⁰⁶ *See supra* Part V.

⁴⁰⁷ *Fowler v. Pierce*, 2 Cal. 165, 171 (1852).

Furthermore, to the extent that it is grounded on mistrust of legislative journals and concerns for their manipulation, EBD is itself hard to square with respect due to a coordinate branch.⁴⁰⁸ Judicial review of the legislative process, in contrast, manifests respect to Congress and to the view that the lawmaking power may only be exercised by Congress itself and ensures that it is truly the will of Congress that is treated as law.

VIII. ALTERNATIVES TO THE ENROLLED BILL DOCTRINE

Separation of powers, due respect to the legislature, and other prudential concerns (such as the interest of certainty and stability of the law) are important and legitimate considerations. However, these considerations should not lead to complete non-enforcement of the Constitution's lawmaking provisions and to turning the legislative process into a sphere of unfettered legislative omnipotence. Instead, these concerns counsel self-restraint and caution in exercising judicial review of the legislative process, which can be effectively achieved by other judicial means.

The *Field* Court seemed to assume that “[e]very other view subordinates the legislature, and disregards that coequal position in our system of the three departments of government,”⁴⁰⁹ and “would certainly result” in the

⁴⁰⁸ See *supra* section IV.E.

⁴⁰⁹ *Marshall Field & Co. v. Clark*, 143 U.S. 649, 676 (1892) (quoting *Ex parte Wren*, 63 Miss. 512, 527, 532 (1886)) (internal quotation marks omitted).

“evils” EBD aims to avoid.⁴¹⁰ Consequently, it favored these prudential considerations over judicial “fidelity to the Constitution.”⁴¹¹ However, there are, in fact, alternatives to EBD that represent a better balance between these competing considerations. These alternatives enable enforcement of the Constitution while being mindful of the respect due to the legislature and of other prudential and institutional considerations. Instead of carving an unjustified exception to *Marbury* and to the most fundamental principles of American constitutionalism, they provide flexibility for prudence and greater attention to the legitimacy of judicial action in the circumstances of every case.⁴¹² Rather than providing a complete taxonomy of the alternatives to EBD, this Part will only briefly mention some examples from the wide range of possible alternatives.

Most discussions about alternatives to EBD tend to focus on alternative evidentiary rules.⁴¹³ Indeed, the different evidentiary rules in the states provide a wide spectrum of alternatives that range from limited and defined exceptions to EBD to its complete rejection, and from rules that allow only a specific type of evidence (such as legislative journals) to the “extrinsic evidence rule,”

⁴¹⁰ *Id.* at 673.

⁴¹¹ *Id.* at 670.

⁴¹² *Cf.* Henkin, *supra* note 11, at 617–22 (arguing that federal courts traditionally used broad discretion to deny remedies on equitable grounds and such denials were conceptually different from exceptions to judicial review).

⁴¹³ *E.g.*, SINGER, *supra* note 27, §§15:2, 15:4–15:7; Williams, *supra* note 29, at 816–24.

which permits consideration of any authoritative source of information.⁴¹⁴ Even courts that follow the “extrinsic evidence rule” can adequately take into account the “comparative probative value” argument and other considerations underlying EBD by according the enrolled bill a prima facie presumption of validity and establishing a heavy burden of proof.⁴¹⁵ Kentucky, for example, requires “clear, satisfactory and convincing evidence” in order to overcome the prima facie presumption that an enrolled bill is valid,⁴¹⁶ and New Jersey follows a similar rule.⁴¹⁷

The possible alternatives to EBD are not limited, however, to the evidentiary question. The prudential concerns underlying EBD can also be addressed by other means that range from the justiciability stage to the remedial stage. One example in the justiciability stage is standing. Some scholars have already argued, in the context of criticizing the political question doctrine, that “interests . . . such as judicial respect for the processes of the coordinate branches . . . can be protected adequately by thoughtful adherence

⁴¹⁴ For a detailed discussion of these alternatives, see SINGER, *supra* note 27, §§15:2, 15:4–15:7; Williams, *supra* note 29, at 816–24.

⁴¹⁵ See *supra* section III.E.

⁴¹⁶ *D & W Auto Supply v. Dep’t of Revenue*, 602 S.W.2d 420, 425 (Ky. 1980); see also Williams, *supra* note 29, at 822.

⁴¹⁷ *In re An Act Concerning Alcoholic Beverages*, 31 A.2d 837, 838 (1943) (requiring “clear and convincing evidence”) (internal quotation marks omitted); see also Grant, *supra* note 103, at 410–11.

to the principles of standing.”⁴¹⁸ “Thoughtful adherence” to standing requirements can also address other concerns expressed by supporters of EBD, such as excessive litigation and misuse of judicial review of the legislative process by “an undeserving but resourceful litigant,” especially when this litigant is a legislator seeking a “judicial windfall” after losing in the legislature.⁴¹⁹ The current federal standing requirements, especially where legislators are concerned, seem to be demanding enough to alleviate these concerns.⁴²⁰

Another option in the justiciability stage is limiting the timing of judicial review. New Jersey, for example, adopted a mechanism for judicial review that allows the Governor or any two or more citizens of the state to challenge legislation on procedural grounds, and permits courts to go well beyond the enrolled bill to examine journals, testimonies, and other evidence.⁴²¹ Instead of

⁴¹⁸ Rebecca L. Brown, *When Political Questions Affect Individual Rights: The Other Nixon v. United States*, 1993 SUP. CT. REV. 125, 127, 143–44; see also Linda Sandstrom Simard, *Standing Alone: Do We Still Need the Political Question Doctrine?*, 100 DICK. L. REV. 303, 306 (1996). But see Tushnet, *supra* note 165, at 1214–22.

⁴¹⁹ Linde, *supra* note 37, at 245; Williams, *supra* note 29, at 824.

⁴²⁰ Aaron-Andrew P. Bruhl, *Return of the Line Item Veto? Legalities, Practicalities, and Some Puzzles*, 10 U. PA. J. CONST. L. 447, 490–92 (2008) (discussing the current federal legislator standing requirements); Helen Hershkoff, *State Courts and the “Passive Virtues”*: *Rethinking the Judicial Function*, 114 HARV. L. REV. 1833, 1853–57 (2001) (noting that the federal standing doctrine imposes strict entry requirements on litigants and particularly on elected representatives which are significantly more demanding than in many of the states and in some European countries); see also *Raines v. Byrd*, 521 U.S. 811 (1997). For an application in the context of the DRA cases, see *Conyers v. Bush*, No. 06-11972, 2006 WL 3834224 at *2–3 (E.D. Mich. Nov. 6, 2006).

⁴²¹ N.J. STAT. ANN. § 1:7-1–1:7-7 (West 1992); see also *In re Low*, 95 A. 616 (N.J. 1915); Grant, *supra* note 103, at 411–15; Martinez, *supra* note 98, at 570 & n.75.

EBD and standing, New Jersey adopted other limitations, such as limiting procedural challenges to one year after the law has been filed with the Secretary of State.⁴²² This limitation is aimed at alleviating *Field's* concerns about certainty and stability of the law and reliance interests.⁴²³ Timing limitations can also alleviate concerns about excessive judicial intervention in the legislative process by limiting judicial review to the post-enactment stage.⁴²⁴ Such timing limitations can be supplemented by the usual ripeness and mootness rules.

The remedial stage also provides ample means to address prudential considerations. As Professor Henkin argued in another context, such considerations can be adequately addressed through the courts' broad powers of equitable discretion to withhold relief for "want of equity."⁴²⁵ There are several remedial tools that can effectively address, for example, *Field's* fear from "the consequences that must result if this court should feel obliged . . . to declare that an enrolled bill, on which depend public and private interests of vast magnitude . . . did not become a law."⁴²⁶ One example is the doctrine of "relative voidability," which instead of treating any unconstitutional law as

⁴²² §§ 1:7-1-1:7-7.

⁴²³ *Marshall Field & Co. v. Clark*, 143 U.S. 649, 670, 675-77 (1892); *see also* *Grant*, *supra* note 103, at 416.

⁴²⁴ *Swinton*, *supra* note 248, at 400-02, 405.

⁴²⁵ *Henkin*, *supra* note 11, at 617-22 (internal quotation marks omitted).

⁴²⁶ *Field*, 143 U.S. at 670.

null and void, allows judicial discretion in choosing the remedy according to the essence (or degree) of the unconstitutionality and to the circumstances of the case.⁴²⁷ In the context of judicial review of the legislative process, courts that follow this doctrine examine considerations such as the severity of the defect in the legislative process, whether the statute would have been passed had it not been for the defect, the degree of reliance on the statute, the extent of the reasonable expectations that it created, and the consequences that will arise from declaring it void.⁴²⁸

Other remedial tools that can address the concerns underlying EBD include severability (that is, the judicial power to strike down only parts of the statute when the valid and invalid portions are severable from each other);⁴²⁹ the court's authority to grant its decisions only prospective application;⁴³⁰ or to give suspended declarations of invalidity.⁴³¹ The latter is particularly fitting for judicial review of the legislative process that is in its nature a remand to the

⁴²⁷ See Navot, *supra* note 313, at 226–29.

⁴²⁸ HCJ 4885/03 Isr. Poultry Farmers Ass'n v. Gov't of Isr. [2004] IsrSC 59(2) 14, 41 (English translation available at [2004] IsrLR 388); Navot, *supra* note 318, at 226–29.

⁴²⁹ Ernest E. Means, *Spurious Legislation and Spurious Mandamus in Florida*, 37 U. MIAMI L. REV. 1, 29–30 (1982). See generally Dorf, *supra* note 242 (discussing constitutional and other limits on severability and other “fallback” provisions).

⁴³⁰ See, e.g., *Ex parte Coker*, 575 So. 2d 43, 51–53 (Ala. 1990); Williams, *supra* note 29, at 827.

⁴³¹ See, e.g., Peter W. Hogg et al., *Charter Dialogue Revisited – or “Much Ado about Metaphors,”* 45 OSGOODE HALL L.J. 1, 14–18 (2007); Kent Roach, *Constitutional, Remedial, and International Dialogues about Rights: The Canadian Experience*, 40 TEX. INT'L L.J. 537, 546–53 (2005); cf. *N. Pipeline Constr. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 88 (1982).

legislature, which can reenact the same statute, provided the proper procedure is followed. The *Manitoba Language Rights* case provides one of the most striking examples.⁴³² In this case, the Supreme Court of Canada found that the province of Manitoba had for almost a century violated the constitutional manner-and-form requirement to enact and promulgate its laws in both English and French.⁴³³ The Court was well aware of the consequences of invalidating over ninety years of law in Manitoba, but did not shirk from its duty to enforce the Constitution. Instead, the Court gave the unconstitutional laws temporary effect and used the remedy of a suspended declaration of invalidity, thereby allowing the legislature sufficient time to translate, reenact, print and publish all its laws in both languages.⁴³⁴

Finally, prudence and self-restraint can also be incorporated in judgments on the merits.⁴³⁵ For example, courts can limit their review according to the severity of the defect in the legislative process. As the following examples illustrate, courts that exercise judicial review of the legislative process employ different formulations for the same idea that not every violation and flaw in the enactment process will justify judicial intervention, and that judicial review

⁴³² *Manitoba Language Rights*, [1985] 1 S.C.R. 721 (Can.) (per curiam).

⁴³³ *Id.* at 5–10.

⁴³⁴ *E.g.*, *id.* at 71–122; Newman, *supra* note 298, at 240–46; Roach, *supra* note 431, at 546.

⁴³⁵ *Cf.* Tushnet, *supra* note 165, at 1233–34 (discussing, in a different context, the position that incorporates prudence as a component of judgments on the merits, rather than in the justiciability stage).

would be limited only to severe defects. New Jersey courts, for example, emphasized that they will set aside legislation only when “the unconstitutionality of what has been done is manifest” and will therefore not set aside legislation for “immaterial trivialities.”⁴³⁶ Similarly, according to the German Constitutional Court’s case law, “only a legally evident error in the legislative procedure leads to the nullity of the legal provisions in question.”⁴³⁷ The Spanish Constitutional Court also held that only a flaw in the legislative process that “substantively impede[s] the crystallization of the House’s will” will lead to the invalidation of the law,⁴³⁸ and the Israeli Supreme Court will intervene only when a “defect that goes to the heart of the process” occurred in the legislative process.⁴³⁹

⁴³⁶ *In re Fisher*, 194 A.2d 353, 357 (N.J. Super. Ct. App. Div. 1963) (quoting *In re McGlynn*, 155 A.2d 289, 303–04 (N.J. Super. Ct. App. Div. 1959)), *aff’d per curiam*, 204 A.2d 841 (N.J. 1964).

⁴³⁷ BVerfG, 2 BvF 1/02 of 12/18/2002, para.176 (JJ. Osterloh & Lubbe-Wolf, dissenting), English translation available at http://www.bverfg.de/entscheidungen/fs20021218_2bvf000102en.html; Nina Arndt & Rainer Nickel, *Federalism Revisited: Constitutional Court Strikes Down New Immigration Act For Formal Reasons*, 4 GERMAN L.J. 72, 82 & n.46 (2003).

⁴³⁸ Navot, *supra* note 313, at 212 (quoting S.T.C. 99/1987).

⁴³⁹ HCJ 4885/03 Isr. Poultry Farmers Ass’n v. Israel, [2004] IsrSC 59(2) 14, 42. The High Court of Justice noted that:

not every . . . defect in the legislative process . . . will lead to the intervention of this court. . . . [T]he court should examine each case on the merits as to whether a ‘defect that goes to the heart of the process’ occurred in the legislative process . . . and only a defect that involves a *severe and substantial* violation of the basic principles of the legislative process in our parliamentary and constitutional system will justify judicial intervention . . .

Courts may also limit the grounds for judicial review of the legislative process according to the status of the norm violated in the enactment process (for example, limiting their review to violations of constitutional requirements, as opposed to violations of lawmaking requirements in statutes and internal rules,⁴⁴⁰ or distinguishing between mandatory and directory provisions in the Constitution).⁴⁴¹

All these are means that courts in the states or in other countries successfully employ to address the same concerns underlying *Field*. New Jersey is an excellent example for the effectiveness of alternatives to EBD in addressing *Field*'s prudential concerns. New Jersey adopted its mechanism for judicial review of the legislative process in 1873.⁴⁴² From 1873 to 2005, there were apparently only sixteen reported procedural challenges, and only four of them were successful.⁴⁴³ According to Professor Grant, the “reason for so few petitions” and the success of this mechanism in New Jersey is the heavy burden of proof the courts employed and their general “judicious self-

Id.

⁴⁴⁰ See Navot, *supra* note 313, at 201–10.

⁴⁴¹ See Swinton, *supra* note 248, at 373–87, 404–05; see also *Consumer Party of Pa. v. Commonwealth*, 507 A.2d 323, 332–33 (Pa. 1986) (discussing the distinction between directory and mandatory constitutional provisions as a form of self-restraint in judicial review of the legislative process).

⁴⁴² See, e.g., N.J. STAT. ANN. § 1:7 (West 1992); Martinez, *supra* note 98, at 570 n.75.

⁴⁴³ Martinez, *supra* note 98, at 570 n.75.

restraint.”⁴⁴⁴ Moreover, evidence from several other states also seems to suggest that even without the constraint of EBD, state courts generally exercise self-restraint and only rarely invalidate legislation based on defects in the lawmaking process.⁴⁴⁵ Similarly, while recognizing their authority to review the legislative process in the late 1980s, to this day Israeli courts did not strike down even a single statute based on defects in its enactment process.⁴⁴⁶ The reason for this telling fact is that “the court has created and built around itself reservations, restraints and constraints, when it is asked to exercise a power of review over the [legislature].”⁴⁴⁷ These examples suggest that the concerns underlying EBD can be adequately addressed by other means.

Admittedly, some of these alternatives will be more easily applicable to the federal system than others.⁴⁴⁸ This Article does not necessarily recommend wholesale adoption of all the alternatives described above, nor does it prescribe a specific solution. The aim is merely to demonstrate that there is a wide range

⁴⁴⁴ Grant, *supra* note 103, at 411, 415.

⁴⁴⁵ Even challenges based on state constitutional lawmaking provisions that are not blocked by EBD, such as cases involving single subject, clear title, or original purpose (which can be determined from the face of the act), are rarely successful in state courts, as most state courts (apart, perhaps, from Missouri and Illinois in recent years) exercise significant self-restraint. ESKRIDGE JR. ET AL., *supra* note 29, at 332–34; Martha J. Dragich, *State Constitutional Restrictions on Legislative Procedure: Rethinking the Analysis of Original Purpose, Single Subject, and Clear Title Challenges*, 38 HARV. J. ON LEGIS. 103, 105–09 (2001).

⁴⁴⁶ Navot, *supra* note 313, at 196. As of February, 13, 2008, this was still true.

⁴⁴⁷ H CJ 4885/03 Isr. Poultry Farmers Ass’n v. Israel, [2004] IsrSC 59(2) 14, 40.

⁴⁴⁸ And some alternatives, such as the use of advisory opinions (which are commonly used in the states to evaluate the propriety of various lawmaking procedures), are not applicable at all. See Hershkoff, *supra* note 420, at 1844–50.

of possible means that are significantly less costly (at least in the sense of infidelity to the Constitution) and apparently no less effective in addressing the justifications for EBD. This in itself also suggests that it is becoming increasingly hard for EBD to meet Justice Cardozo's challenge and "justify [its] existence as means adapted to an end."⁴⁴⁹

CONCLUSION

EBD has been consistently followed by federal courts for over a century and its common-law roots can perhaps be traced back to the time of Henry VI. Hence, reluctance to reconsider this time-honored doctrine is understandable. However, this Article has demonstrated that the grounds upon which this doctrine was laid down no longer justify its existence. Thus, having started this Article with the words of Justice Cardozo, it is only fitting to end it with the forceful words of another great Justice:

It is revolting to have no better reason for a rule of law than that so it was laid down in the time of Henry IV. It is still more revolting if the grounds upon which it was laid down have vanished long since, and the rule simply persists from blind imitation of the past.⁴⁵⁰

⁴⁴⁹ CARDOZO, *supra* note 1, at 98.

⁴⁵⁰ Oliver W. Holmes, *The Path of the Law*, 10 HARV. L. REV. 457, 469 (1897).

SECOND ARTICLE: LAWMAKERS AS LAWBREAKERS

INTRODUCTION

How would Congress act in a world without judicial review? Can lawmakers be trusted to police themselves? When it comes to “the law of congressional lawmaking”—the constitutional, statutory, and internal rules that govern Congress’s legislative process¹—this question is not merely theoretical. Federal courts have consistently refused to enforce this body of law,² leaving its enforcement entirely to Congress.³ This largely overlooked area of law is therefore a useful laboratory for evaluating Congress’s behavior in the absence of judicial review.

This Article examines whether Congress has the capacity and incentives to enforce upon itself the law of congressional lawmaking. It explores the major

¹ For an overview of the rules that govern Congress’s legislative process, see *infra* Part I.A.

² See, e.g., *Field v. Clark*, 143 U.S. 649, 670-71 (1892); *OneSimpleLoan v. U.S. Sec’y of Educ.*, 496 F.3d 197, 202 (2d Cir. 2007), *cert. denied sub nom. OneSimpleLoan v. Spellings*, 552 U.S. 1180 (2008); *Pub. Citizen v. U.S. Dist. Court*, 486 F.3d 1342, 1349 (D.C. Cir. 2007), *cert. denied*, 552 U.S. 1076 (2007); *Metzenbaum v. FERC*, 675 F.2d 1282, 1287 (D.C. Cir. 1982).

³ Ittai Bar-Siman-Tov, *Legislative Supremacy in the United States?: Rethinking the Enrolled Bill Doctrine*, 97 GEO. L.J. 323, 373 (2009) (stating that *Field v. Clark*’s enrolled bill doctrine “effectively insulates the legislative process from judicial review and, consequently, establishes Congress’s unfettered power to control this process”); see also Stanley Bach, *The Nature of Congressional Rules*, 5 J.L. & POL. 725, 731 (1989) (“No outside force compels Congress to abide by its rules. If these rules are enforced rigorously and consistently, it is only because Congress chooses to do so.”); Rebecca M. Kysar, *Listening to Congress: Earmark Rules and Statutory Interpretation*, 94 CORNELL L. REV. 519, 526 (2009) (“[A]t present, legislative rules rely wholly upon internal enforcement by Congress.”).

“political safeguards”⁴ that can be garnered from the legal, political science, political economy, and social psychology scholarship about self policing and rule following. It then evaluates each safeguard by drawing on a combination of theoretical, empirical, and descriptive studies about Congress. This Article’s main argument is that the political safeguards that scholars and judges commonly rely upon to constrain legislative behavior actually have the opposite effect: these “safeguards” in fact motivate lawmakers to be lawbreakers.

This Article also explores Congress’s capacity to enforce upon itself the law of congressional lawmaking by examining Congress’s enforcement mechanisms and presenting three cases that demonstrate the circumstances under which these mechanisms can fail. The Article argues that congressional enforcement is fallible both in terms of lawmakers’ capacity to police themselves and in terms of their incentives to do so.

This examination has crucial importance for at least three areas of legal scholarship. The first is the debate about judicial review of the legislative process. The question of whether courts should enforce the rules governing lawmaking and other principles of “due process of lawmaking” is “currently

⁴ This phrase was famously coined in Herbert Wechsler, *The Political Safeguards of Federalism: The Role of the States in the Composition and Selection of the National Government*, 54 COLUM. L. REV. 543, 543 (1954).

the subject of vigorous debate ... in the scholarly literature.”⁵ One of the prominent objections to judicial enforcement is “the argument that judicial review of the enactment process is not needed because Congress (coupled with the inherent check of the presidential veto power) can be relied upon to police itself.”⁶ Indeed, opponents of judicial oversight claim that Congress has “adequate incentives” and “numerous, effective techniques” to enforce compliance with the law of lawmaking.⁷ This assumption is also at least partly responsible for the Supreme Court’s reluctance to enforce this body of law.⁸ In some states, this assumption even contributed to the enactment of constitutional amendments barring judicial review of the legislative process.⁹ Hence, although this Article expresses no opinion on other arguments underlying the debate about judicial review of the legislative process, by

⁵ Glen Staszewski, *Rejecting the Myth of Popular Sovereignty and Applying an Agency Model to Direct Democracy*, 56 VAND. L. REV. 395, 465 (2003).

⁶ Bar-Siman-Tov, *supra* note , at 331.

⁷ Jesse H. Choper, *The Political Question Doctrine: Suggested Criteria*, 54 DUKE L.J. 1457, 1505-07 (2005).

⁸ See *United States v. Munoz-Flores*, 495 U.S. 385, 403-04 & n.2 (1990) (Stevens, J., concurring) (stating that courts should not enforce Article I, Section 7’s Origination Clause because the House can be relied upon to protect its origination power); see also *infra* Part III.E; cf. *Field v. Clark*, 143 U.S. 649, 672-73 (1982) (assuming that because Congress’s enrollment procedure involves the committees on enrolled bills, the presiding officers and the clerks of the two houses, and the President, this constitutes a sufficient institutional check against enactment of legislation in violation of constitutional lawmaking requirements).

⁹ See, e.g., *Geja’s Cafe v. Metro. Pier & Exposition Auth.*, 606 N.E.2d 1212, 1221 (Ill. 1992) (suggesting that the framers of Illinois’s 1970 Constitution “enacted the enrolled bill doctrine on the assumption that the General Assembly would police itself and judicial review would not be needed because violations of the constitutionally required procedures would be rare”).

refuting the prevalent underlying assumption of judicial review opponents, it contributes to a crucial aspect of this debate.

Second, this Article's examination also contributes to the debate about whether political safeguards can reduce or eliminate the need for judicial review in other areas. Assumptions about political safeguards and about Congress's incentives and capacities have long been influential in normative debates about federalism,¹⁰ and are becoming increasingly influential in broader debates about judicial review, judicial supremacy, and congressional constitutional interpretation.¹¹ This Article's examination may be particularly helpful to these debates,¹² responding to the need for scholarship examining

¹⁰ For an overview of this vast scholarship, see generally Saikrishna B. Prakash & John C. Yoo, *The Puzzling Persistence of Process-Based Federalism Theories*, 79 TEX. L. REV. 1459 (2001).

¹¹ Examples of this burgeoning scholarship include Barbara Sinclair, *Can Congress Be Trusted with the Constitution? The Effects of Incentives and Procedures*, in CONGRESS AND THE CONSTITUTION 293 (Neal Devins & Keith E. Whittington eds., 2005) [hereinafter Sinclair, *Can Congress Be Trusted?*]; Mark Tushnet, *Interpretation in Legislatures and Courts: Incentives and Institutional Design*, in THE LEAST EXAMINED BRANCH: THE ROLE OF LEGISLATURES IN THE CONSTITUTIONAL STATE 355 (Richard W. Bauman & Tsvi Kahana eds., 2006) [hereinafter Tushnet, *Interpretation in Legislatures*]. For a recent overview of this debate, see generally Michael J. Gerhardt, *Judging Congress*, 89 B.U. L. REV. 525 (2009). Assumptions about congressional capacity are also important in arguments against judicial intervention in other areas of congressional activity. See, e.g., Josh Chafetz, *Executive Branch Contempt of Congress*, 76 U. CHI. L. REV. 1083, 1086, 1152-53 (2009) (arguing that legislative-executive disputes over the contempt power should be nonjusticiable, in part because Congress has sufficient tools to enforce compliance with its contempt findings); Josh Chafetz, *Politician, Police Thyself*, N.Y. TIMES, Dec. 2, 2006, at A15 (making a similar argument in favor of congressional, rather than legal, enforcement in the context of ethics rules).

¹² With the caveat that political safeguards and legislators' motivations may operate somewhat differently in different areas of congressional activity. See *infra* Part IV.A.

areas of congressional activity that are “outside the [s]hadow [c]ast by the [c]ourts.”¹³

Third, this Article’s examination is fundamental for the burgeoning new scholarship about legislative rules. After many years of largely neglecting the rules that govern the legislative process, legal scholars are increasingly realizing that these rules “are at least as important a determinant of policy outcomes and of the quality of legislative deliberation as are electoral rules, substantive legislative powers, and other subjects studied exhaustively by constitutional lawyers.”¹⁴ Indeed, a flurry of recent scholarship lauds such rules as a solution to a wide array of pathologies in the legislative process and as a means to achieve procedural ideals as well as better substantive outcomes.¹⁵ Given the lack of external enforcement, however, it is essential to evaluate Congress’s capacity and incentives to enforce these rules on its own in order to assess the viability of these solutions.

¹³ Mark Tushnet, *Evaluating Congressional Constitutional Interpretation: Some Criteria and Two Informal Case Studies*, in CONGRESS AND THE CONSTITUTION, *supra* note , at 269, 271-73.

¹⁴ Adrian Vermeule, *The Constitutional Law of Congressional Procedure*, 71 U. CHI. L. REV. 361, 362 (2004).

¹⁵ See, e.g., Aaron-Andrew P. Bruhl, *If the Judicial Confirmation Process Is Broken, Can a Statute Fix It?*, 85 NEB. L. REV. 960, 992 (2007) [hereinafter Bruhl, *Judicial Confirmation Process*]; Brannon P. Denning & Brooks R. Smith, *Uneasy Riders: The Case for a Truth-in-Legislation Amendment*, 1999 UTAH L. REV. 957, 962; Chad W. Dunn, *Playing by the Rules: The Need for Constitutions To Define the Boundaries of the Legislative Game with a One-Subject Rule*, 35 UWLA L. REV. 129, 131 (2003); Elizabeth Garrett, *Legal Scholarship in the Age of Legislation*, 34 TULSA L.J. 679, 687-88 (1999); Jacob E. Gersen & Eric A. Posner, *Timing Rules and Legal Institutions*, 121 HARV. L. REV. 543, 570-72 (2007); Anita S. Krishnakumar, *Representation Reinforcement: A Legislative Solution to a Legislative Process Problem*, 46 HARV. J. ON LEGIS. 1, 3, 15 (2009).

Part I provides a brief overview of the rules that regulate the legislative process. It then establishes the practical and normative importance of these rules, integrating the insights of political scientists, democratic theorists, legal philosophers, and social psychologists. Part II reveals the fallibility of congressional enforcement of these rules by examining Congress's enforcement mechanisms and the circumstances under which they can fail.

Part III explores political safeguards and their projected impact on congressional compliance with the law of congressional lawmaking, arguing that these safeguards' overall impact is in fact a motivation to violate the rules. Although the Article refutes several assumptions that are widely held by judges and scholars alike, it does not go so far as to argue that Congress will never follow the rules. Instead, Part IV offers some observations about the types of rules that are more susceptible to violations and the circumstances in which violations are more likely.

I. THE LAW OF CONGRESSIONAL LAWMAKING

A. *The Rules Governing Lawmaking*

The congressional legislative process is governed by a variety of normative sources. The Constitution sets relatively sparse procedural requirements for

lawmaking,¹⁶ while authorizing each house to “determine the Rules of its Proceedings.”¹⁷ The majority of the rules that govern the congressional legislative process are therefore enacted under this authority, either as statutory rules¹⁸ or as standing rules by each chamber independently.¹⁹ These enacted rules are complemented by the chambers’ formal precedents, which “may be viewed as the [chambers’] ‘common law’ ... with much the same force and binding effect,”²⁰ and by established conventional practices.²¹

Although Congress may not alter the constitutional rules,²² both chambers have procedures that allow for amendment of the nonconstitutional rules, as well as procedures to waive or suspend virtually any statutory or internal

¹⁶ For an overview of the constitutional rules that govern the legislative process, see Matthew D. Adler & Michael C. Dorf, *Constitutional Existence Conditions and Judicial Review*, 89 VA. L. REV. 1105, 1145-50, 1172-81 (2003); Vermeule, *supra* note , at 386-427.

¹⁷ U.S. CONST. art. I, § 5, cl. 2.

¹⁸ See generally Aaron-Andrew P. Bruhl, *Using Statutes To Set Legislative Rules: Entrenchment, Separation of Powers, and the Rules of Proceedings Clause*, 19 J.L. & POL. 345 (2003) [hereinafter Bruhl, *Statutes To Set Legislative Rules*]; Elizabeth Garrett, *The Purposes of Framework Legislation*, 14 J. CONTEMP. LEGAL ISSUES 717 (2005) [hereinafter Garrett, *Purposes of Framework Legislation*].

¹⁹ See, e.g., Kysar, *supra* note , at 524-26.

²⁰ Max Reynolds, Note, *The Impact of Congressional Rules on Appropriations Law*, 12 J.L. & POL. 481, 487 (1996) (quoting H.R. DOC. NO. 94-661, at vii (1977)).

²¹ See Bach, *supra* note , at 732-36.

²² *Clinton v. City of New York*, 524 U.S. 417, 446 (1998) (“Congress cannot alter the procedures set out in Article I, § 7, without amending the Constitution.”).

rule.²³ Nevertheless, the subconstitutional rules are also widely accepted as binding and enforceable law, in the sense that they have “come to be recognized as binding on the assembly and its members, except as it may be varied by the adoption by the membership of special rules or through some other authorized procedural device.”²⁴

This large body of constitutional, statutory, and internal rules regulating the congressional lawmaking process can be described as “the law of congressional lawmaking.” This Article focuses on a particular part of this law: the constitutional and various subconstitutional rules that set procedural *restrictions* on the legislative process.²⁵

This includes rules that stipulate the procedural requirements that must be satisfied for a bill to become law, such as the constitutional bicameralism and presentment requirements,²⁶ the constitutional quorum requirement,²⁷ and the subconstitutional requirement that every bill receive three readings prior to

²³ See Bach, *supra* note , at 737-39; Bruhl, *Statutes To Set Legislative Rules*, *supra* note , at 363-65.

²⁴ WILLIAM HOLMES BROWN & CHARLES W. JOHNSON, *HOUSE PRACTICE: A GUIDE TO THE RULES, PRECEDENTS, AND PROCEDURES OF THE HOUSE* 825 (2003); see also Reynolds, *supra* note , at 487.

²⁵ Hence, excluded from the present inquiry are rules that do not directly regulate the process of enacting legislation, budgetary rules, and rules that facilitate and accelerate the passage of legislation, such as “fast track” rules.

²⁶ U.S. CONST. art. I, § 7, cl. 2 (stipulating that for proposed legislation to become law, the same bill must be passed by both houses of Congress and be signed by the President, or repassed by a supermajority over the President’s veto); see also *Clinton*, 524 U.S. at 448.

²⁷ U.S. CONST. art. I, § 5, cl. 1; see also *United States v. Ballin*, 144 U.S. 1, 5-6 (1892).

passage.²⁸ It additionally includes rules that limit the pace of the legislative process, for example the House rule prohibiting floor consideration of a bill reported by a committee until the third calendar day after the committee report on that bill becomes available to House members.²⁹ Also included are rules that set more specific limitations, such as the constitutional rule that bills for raising revenue originate in the House³⁰ and the chamber rules that prohibit the enactment of substantive law through appropriation bills.³¹

All these rules impose restraints or create hurdles in the legislative process, thereby constraining Congress's ability to pass legislation.³² Nevertheless, neither courts nor any other external body enforce any of these rules—whether

²⁸ RULES OF THE HOUSE OF REPRESENTATIVES, 111th CONG., R. XVI(8) (2009), *available at* <http://clerk.house.gov/legislative/rules111/111th.pdf> [hereinafter HOUSE RULES]; STANDING RULES OF THE SENATE, S. DOC. NO. 106-15, at R. XIV, cl. 2 (2000), *available at* <http://rules.senate.gov/public/index.cfm?p=RuleXIV> [hereinafter SENATE RULES].

²⁹ HOUSE RULES, *supra* note , R. XIII(4)(a)(1). For other examples of rules that impose delay in the legislative process, see Gersen & Posner, *supra* note , at 553-55.

³⁰ U.S. CONST. art. I, § 7, cl. 1; *United States v. Munoz-Flores*, 495 U.S. 385, 394-95 (1990).

³¹ HOUSE RULES, *supra* note , R. XXI(2)(b); SENATE RULES, *supra* note , R. XVI.

³² For somewhat different overviews on procedural rules that make passage of legislation more difficult, see, for example, Jon Elster, *Don't Burn Your Bridge Before You Come to It: Some Ambiguities and Complexities of Precommitment*, 81 TEX. L. REV. 1751, 1765 (2003) (discussing “delay procedures that are intended to give passions time to cool down”); Garrett, *Purposes of Framework Legislation*, *supra* note , at 748-49 (discussing statutory procedural rules that are intentionally designed to make the passage of certain policies more difficult); Gersen & Posner, *supra* note , at 548-55 (discussing, inter alia, “delay rules” that forestall action in the legislative process).

constitutional, statutory, or internal.³³ These rules present, therefore, a particularly fascinating test case for Congress's ability to police itself.

B. The Value of Lawmaking Rules

Legal scholarship has traditionally overlooked the rules that govern the legislative process.³⁴ In recent years, however, legal scholars who heed the insights of political scientists are increasingly realizing that these rules have “immense practical importance.”³⁵ As political scientist Gary Cox explains, “[r]ules can change the set of bills that ... the legislature consider[s]; they can change the menu of amendments to any given bill considered[;] ... they can affect how members vote; and—putting the first three effects together—they can affect which bills pass.”³⁶ Indeed, a growing body of theoretical, experimental, and empirical research by political scientists demonstrates that

³³ To be sure, *Munoz-Flores* signaled the Court's willingness to enforce at least one of these rules—the Origination Clause—but later district and appellate court cases indicate that federal courts will refuse to enforce even the constitutional rules. See Bar-Siman-Tov, *supra* note , at 352 (citing cases); see also *supra* notes 2-3 and accompanying text.

³⁴ See Vermeule, *supra* note , at 363.

³⁵ Bruhl, *Statutes To Set Legislative Rules*, *supra* note , at 393; see also Vermeule, *supra* note , at 362.

³⁶ Gary W. Cox, *On the Effects of Legislative Rules*, 25 LEGIS. STUD. Q. 169, 170 (2000).

legislative rules can significantly impact the policy outcomes of the legislative process.³⁷

In addition to their crucial impact on legislative outcomes, legislative procedures are also instrumental in ensuring the legitimacy of Congress and of the laws it produces. As proceduralist democratic theorists point out, legislative procedures are an especially important means to establish the legitimacy of law, because, in the current reality of a “great deal of substantive moral and ethical dissensus,” no normative substantive standard can appropriately be used in justifying collective political choices.³⁸ If, however, “justification for the force of law can be found in the generally accepted ...

³⁷ See BRYAN W. MARSHALL, *RULES FOR WAR: PROCEDURAL CHOICE IN THE US HOUSE OF REPRESENTATIVES* 87-103, 120-23 (2005); Cox, *supra* note , at 169, 174-88; Karl-Martin Ehrhart et al., *Budget Processes: Theory and Experimental Evidence*, 59 *GAMES & ECON. BEHAV.* 279, 293 (2007); Keith E. Hamm et al., *Structuring Committee Decision-Making: Rules and Procedures in US State Legislatures*, 7 *J. LEGIS. STUD.* 13, 13 (2001) (“The rediscovery of rules and procedures as an important element for understanding legislative decision-making has become very apparent in recent summaries of research on Congress and European Parliaments.”); Nathan W. Monroe & Gregory Robinson, *Do Restrictive Rules Produce Nonmedian Outcomes? A Theory with Evidence from the 101st–108th Congresses*, 70 *J. POL.* 217, 228-29 (2008); Bjørn Erik Rasch, *Parliamentary Floor Voting Procedures and Agenda Setting in Europe*, 25 *LEGIS. STUD. Q.* 3, 4 (2000) (“Theoretical arguments as well as experimental results support the view that decision-making procedures and the details of legislative agendas to a large extent determine outcomes.”); Tim Westmoreland, *Standard Errors: How Budget Rules Distort Lawmaking*, 95 *GEO. L.J.* 1555, 1557 (2007) (“To a large extent, many legislative decisions are pre-ordained by their mode of congressional consideration.... [T]he process is the policy.”).

³⁸ Frank I. Michelman, *The Not So Puzzling Persistence of the Futile Search: Tribe on Proceduralism in Constitutional Theory*, 42 *TULSA L. REV.* 891, 892 (2007); see also David Estlund, *Democratic Theory*, in *THE OXFORD HANDBOOK FOR CONTEMPORARY PHILOSOPHY* 208, 210-13 (Frank Jackson & Michael Smith eds., 2005); David Estlund, *Introduction to DEMOCRACY* 1, 6-7 (David Estlund ed., 2002).

processes whence contested laws issue, then no number of intractable disagreements over the substantive merits of particular laws can threaten it.”³⁹

Experimental and survey-based research by social psychologists and political scientists confirms that public perceptions about congressional procedure—particularly the belief that Congress employs fair decision-making procedures in the legislative process—significantly impact Congress’s legitimacy, as well as individual’s willingness to obey the law.⁴⁰ These studies show, moreover, that although there are widespread differences in evaluations of the favorability or fairness of outcomes, “to a striking degree” there is common agreement across ethnic, gender, education, income, age, and ideological boundaries on the criteria that define fair decision-making procedures, as well as widespread agreement that such procedures are key to legitimacy.⁴¹

³⁹ Michelman, *supra* note , at 892; *see also* José Luis Martí Mármol, *The Sources of Legitimacy of Political Decisions: Between Procedure and Substance*, in *THE THEORY AND PRACTICE OF LEGISLATION: ESSAYS IN LEGISPRUDENCE* 259, 270-71 (Luc J. Wintgens ed., 2005).

⁴⁰ *See, e.g.*, John R. Hibbing & Elizabeth Theiss-Morse, *The Means Is the End*, in *WHAT IS IT ABOUT GOVERNMENT THAT AMERICANS DISLIKE?* 243, 243-45 (John R. Hibbing & Elizabeth Theiss-Morse eds., 2001); Amy Gangl, *Procedural Justice Theory and Evaluations of the Lawmaking Process*, 25 *POL. BEHAV.* 119, 135 (2003); Tom R. Tyler, *Governing Amid Diversity: The Effect of Fair Decisionmaking Procedures on the Legitimacy of Government*, 28 *L. & SOC’Y REV.* 809, 827 (1994); Stacy G. Ulbig, *Policies, Procedures, and People: Sources of Support for Government?*, 83 *SOC. SCI. Q.* 789, 793-96 (2002).

⁴¹ Tyler, *supra* note , at 826, 829; *see also* Tom R. Tyler, *What is Procedural Justice?: Criteria Used by Citizens To Assess the Fairness of Legal Procedures*, 22 *LAW & SOC’Y REV.* 103, 132 (1988).

In addition to their practical and instrumental significance, the importance of the rules that regulate the legislative process also stems from their underlying democratic values and principles.⁴² These rules embody, and are designed to ensure, essential democratic principles, such as majority rule, transparency and publicity, deliberation, procedural fairness, and participation.⁴³

Furthermore, the rules that regulate the legislative process are an essential component of the rule of law. As Joseph Raz noted in one of the most influential formulations of the “rule of law,” “[i]t is one of the important principles of the doctrine that the making of particular laws should be guided by open and relatively stable general rules.”⁴⁴ The procedural rules that instruct lawmakers how to exercise their lawmaking power play a vital role in ensuring that “the slogan of the rule of law and not of men can be read as a meaningful political ideal.”⁴⁵

⁴² See Jeremy Waldron, *Legislating with Integrity*, 72 *FORDHAM L. REV.* 373, 376, 379-85 (2003).

⁴³ *Id.*; see also Jeremy Waldron, *Principles of Legislation*, in *THE LEAST EXAMINED BRANCH*, *supra* note , at 15, 28-29, 31; cf. AMY GUTMANN & DENNIS THOMPSON, *WHY DELIBERATIVE DEMOCRACY?* 21-23 (2004) (arguing that a deliberative lawmaking process also has value in itself, because it respects the moral agency and individual autonomy of the participants and expresses “mutual respect between decision-makers and their fellow citizens”); Dennis F. Thompson, *Deliberative Democratic Theory and Empirical Political Science*, 11 *ANN. REV. POL. SCI.* 497, 498 (2008) (noting that proceduralist theorists also stress the values and benefits that are “inherent in the process, not a consequence of it”).

⁴⁴ JOSEPH RAZ, *The Rule of Law and its Virtue*, in *THE AUTHORITY OF LAW* 213, 215-16 (1979) (emphasis omitted).

⁴⁵ *Id.*; see also Frederick Schauer, *Legislatures as Rule-Followers*, in *THE LEAST EXAMINED BRANCH*, *supra* note , at 468, 468-69; Jeremy Waldron, *Legislation and the Rule of Law*, 1 *LEGISPRUDENCE* 91, 107-08 (2007).

To be sure, the rules that constrain the legislative process are not without cost: they hinder, and sometimes frustrate, the majority party's ability to govern effectively and to translate its policy agenda into legislative action. Moreover, by creating multiple "vetogates" in the legislative process, these rules make defeating legislation easier than passing it,⁴⁶ thereby "systematically favor[ing] the legal status quo."⁴⁷

It appears, however, that the Framers were well aware of this cost. Alexander Hamilton, for example, acknowledged that bicameralism and presentment will sometimes frustrate the enactment of good legislation, but believed that "[t]he injury that may possibly be done by defeating a few good laws will be amply compensated by the advantage of preventing a few bad

⁴⁶ WILLIAM N. ESKRIDGE, JR. ET AL., *CASES AND MATERIALS ON LEGISLATION: STATUTES AND THE CREATION OF PUBLIC POLICY* 66-67 (3d ed. 2001).

⁴⁷ Posting of Michael C. Dorf to Dorf on Law, <http://www.dorfonlaw.org/2009/11/cloture-constitution-and-democracy.html> (Nov. 23, 2009, 01:27 EST). Whether this impact of lawmaking rules in fact constitutes a cost or a benefit depends on one's view on the extent that the legislative process should facilitate or hinder the ability of changing majorities in the legislature to change the state of the law. For example, a Burkean view that "would be wary of any major change in our legal arrangements absent truly overwhelming popular support" would see such an impact as a virtue. *Id.* Contrary to a common misconception, however, this view is not contingent upon a particular view on the proper extent of federal government regulation of private autonomy, economic markets, or the states. Although the lawmaking rules do hinder the passage of federal legislation, these rules do not necessarily serve a libertarian view that eschews government regulation, nor do they necessarily operate to safeguard federalism. Rather, these rules equally restrict Democrats' attempts to pass regulation-increasing bills as they constrain Republicans' efforts to enact legislation rolling back government regulations when they are in the majority. Hence, the rules do not systematically favor conservatives or progressives; they systematically favor the status quo. *Id.*; see also Elizabeth Garrett, *Framework Legislation and Federalism*, 83 NOTRE DAME L. REV. 1495, 1496 n.7 (2008); Carlos Manuel Vazquez, *The Separation of Powers as a Safeguard of Nationalism*, 83 NOTRE DAME L. REV. 1601, 1604-07 (2008).

ones.”⁴⁸ Moreover, as the Court concluded in *INS v. Chadha*, “it is crystal clear from the records of the Convention, contemporaneous writings and debates, that the Framers ranked other values higher than efficiency.... There is unmistakable expression of a determination that legislation by the national Congress be a step-by-step, deliberate and deliberative process.”⁴⁹

At the end of the day, “[m]ost participants and outside experts agree ... that, to function well, a legislative process needs to strike a balance between deliberation and inclusiveness, on the one hand, and expeditiousness and decisiveness, on the other, even if there is no consensus about what the optimal balance is.”⁵⁰ Normative evaluations of the current body of rules that make up the law of congressional lawmaking, as well as evaluations of the optimal level of enforcement of these rules, may vary depending on one’s view about the appropriate balance between these competing values. What is clear, however, is that these rules are not mere formalities; they have crucial practical and

⁴⁸ THE FEDERALIST NO. 73 (Alexander Hamilton).

⁴⁹ 462 U.S. 919, 958-59 (1983).

⁵⁰ Barbara Sinclair, *Spoiling the Sausages? How a Polarized Congress Deliberates and Legislates*, in 2 RED AND BLUE NATION?: CONSEQUENCES AND CORRECTION OF AMERICA’S POLARIZED POLITICS 55, 83 (Pietro S. Nivola & David W. Brady eds., 2008) [hereinafter Sinclair, *Congress Deliberates and Legislates*]; see also Andrei Marmor, *Should We Value Legislative Integrity?*, in THE LEAST EXAMINED BRANCH, *supra* note , at 125, 137 (“[A] delicate balance ... needs to be maintained between too much and too little partisan political power. If the [majority party] is very flimsy and the government needs to compromise on every step it wants to take, governing itself might be seriously compromised. But ... [i]t does not follow that a good government is one which does not have to compromise with minority parties.... [I]n a pluralistic society compromise is not a regrettable necessity, but an important virtue of democratic decision procedures.”).

normative significance, which merits a detailed evaluation of Congress's ability to enforce them on itself.

II. THE FALLIBILITY OF CONGRESSIONAL ENFORCEMENT

Opponents of judicial enforcement of the rules that govern the legislative process emphasize Congress's "numerous, effective techniques" to enforce these rules.⁵¹ This Part, however, reveals the fallibility of congressional enforcement.

A. Congress's Enforcement Mechanisms

The rules that govern the enactment process are not self-enforcing.⁵² They must be actively invoked in order to be enforced, and consequently, in practice, "the House and Senate are free to evade their rules simply by ignoring them."⁵³ The presiding officer of each chamber may take the initiative and rule that

⁵¹ See, e.g., Choper, *supra* note , at 1505-07.

⁵² RICHARD S. BETH & MEGAN SUZANNE LYNCH, CONG. RESEARCH SERV., PARLIAMENTARY REFERENCE SOURCES: HOUSE OF REPRESENTATIVES 4 (2008), available at http://www.rules.house.gov/lpp/resources/parl_ref_source.pdf.

⁵³ Bach, *supra* note , at 740.

amendments, motions, or other actions are out of order.⁵⁴ Usually, however, the presiding officers do not take the initiative to prevent rule violations.⁵⁵

Instead, it is up to individual members to identify actions that violate the rules and raise a timely “point of order.”⁵⁶ In the House, the Speaker or the Chair rule on all points of order, while in the Senate certain questions of order are voted on by the Senators themselves.⁵⁷ In both chambers, almost all “[r]ulings of the [presiding officers] may be appealed by any member and usually reversed by a majority vote of the membership.”⁵⁸ In practice, however, such appeals are relatively rare, and very seldom successful, especially in the House, in which “the chair never loses.”⁵⁹

⁵⁴ *Id.* at 739-40.

⁵⁵ VALERIE HEITSHUSEN, CONG. RESEARCH SERV., POINTS OF ORDER, RULINGS, AND APPEALS IN THE HOUSE OF REPRESENTATIVES 1 (2006), available at <http://www.rules.house.gov/Archives/98-307.pdf>; Bach, *supra* note , at 739-40.

⁵⁶ HEITSHUSEN, *supra* note , at 1. A “point of order” is “a claim, stated by a Member from the floor, that the [chamber] is violating or about to violate some ... Rule, precedent, or other procedural authority.” BETH & LYNCH, *supra* note , at 4.

⁵⁷ Bach, *supra* note , at 740.

⁵⁸ *Id.*

⁵⁹ Chris Den Hartog & Nathan W. Monroe, *Partisan Support for Chairs’ Rulings in the House and Senate* 10-11 (Oct. 23, 2009) (unpublished paper prepared for presentation at the Bicameralism Conference, Vanderbilt University), available at <http://faculty.ucmerced.edu/nmonroe2/Den%20Hartog%20and%20Monroe%20-%20Chairs’%20Rulings.pdf>.

With some exceptions, there are limitations in both chambers concerning when points of order may be raised.⁶⁰ When a point of order is not timely raised, it is “effectively waived,” and the violation of the rule can no longer be challenged.⁶¹ In the Senate, unanimous consent may also preclude points of order.⁶² In the House, points of order may be waived by unanimous consent, via suspension of the rules, or by a special rule reported from the Rules Committee.⁶³ In practice, many bills in the House are considered under special rules that expressly waive “one or more—or indeed all—points of order” against the entire bill or parts of it.⁶⁴ Hence, while points of order are Congress’s main mechanism for enforcing the rules that regulate lawmaking, at least in the House, this mechanism is severely limited.⁶⁵

A less formal enforcement mechanism is legislators’ power to refuse to vote in favor of a bill that is enacted in violation of the rules.⁶⁶ For example, if a bill

⁶⁰ BROWN & JOHNSON, *supra* note , at 666-67; FLOYD M. RIDDICK & ALAN S. FRUMIN, RIDDICK’S SENATE PROCEDURE 993-96 (rev. ed. 1992), *available at* <http://www.gpoaccess.gov/riddick/browse.html>.

⁶¹ BROWN & JOHNSON, *supra* note , at 670.

⁶² RIDDICK & FRUMIN, *supra* note , at 987.

⁶³ BROWN & JOHNSON, *supra* note , at 670.

⁶⁴ *Id.* at 670, 827.

⁶⁵ ESKRIDGE ET AL., *supra* note , at 442 (noting that in the House “points of order are often waived automatically in the special rule structuring the debate ... thus, House members cannot easily object to violations of congressional rules”).

⁶⁶ Bach, *supra* note , at 746.

for raising revenue originates in the Senate—thus violating the Origination Clause—the House always has the power to refuse to pass such a bill.⁶⁷ This power may be exercised by the majority in each chamber during the final vote on the bill, or by individual “gatekeepers” who have the power to block the passage of bills through their control over “vetogates” in the legislative process.⁶⁸

Finally, the “enrollment process” provides the Speaker of the House and the President of the Senate—the legislative officers— with another opportunity to block procedural violations. After a bill passes both chambers in identical form, the final version of the bill, or the “enrolled bill,” is prepared for presentment to the President. The legislative clerks examine the accuracy of the enrolled bill and send it to the legislative officers for signature. The enrolled bill is then signed by the legislative officers in attestation that the bill has been duly approved by their respective houses, and presented to the President.⁶⁹ As “[t]here is no authority in the presiding officers ... to attest by their signatures ... any bill not [duly] passed by Congress,”⁷⁰ the presiding officers have the duty, and the opportunity, to refuse to sign such bills.

⁶⁷ *United States v. Munoz-Flores*, 495 U.S. 385, 403-04 (1990) (Stevens, J., concurring).

⁶⁸ For more on “gatekeepers” and “vetogates” in the legislative process, see ESKRIDGE ET AL., *supra* note , at 66-67.

⁶⁹ For more on the enrollment process, see Bar-Siman-Tov, *supra* note , at 328, 336-38.

⁷⁰ *Field v. Clark*, 143 U.S. 649, 669 (1892).

Once the presiding officers sign the enrolled bill, courts treat these signatures as “complete and unimpeachable” evidence that a bill has been properly enacted.⁷¹ Consequently, a distinctive feature of the enforcement of lawmaking rules is that the enforcement takes place before the fact: all these congressional enforcement mechanisms are designed to prevent rules from being violated before the bill becomes a law.⁷² Given the absence of judicial enforcement of these rules,⁷³ once the President signs the bill into law, or Congress passes the bill over his veto, no other enforcement mechanism exists.

Hence, the enforcement of rules that regulate lawmaking relies entirely on Congress’s capacity and willingness to enforce these rules. In particular, in order for these rules to be enforced, two conditions must be met: (1) some participant in the legislative process, either individual legislators or legislative officers, must identify the rule violation in time; and (2) those participants who have the power to enforce the rule—the legislative officers, the majorities in each chamber, or other gatekeepers—must be willing to exercise their enforcement power. As the following cases demonstrate, when one of these conditions fails, congressional enforcement fails.

⁷¹ *Id.* at 672.

⁷² *See also* Bach, *supra* note , at 726 n.2.

⁷³ *See supra* notes - and accompanying text.

B. Congressional Capacity To Enforce: The Farm Bill

*“We haven’t found a precedent for a congressional blunder of this magnitude.”*⁷⁴

*“What’s happened here raises serious constitutional questions—very serious.”*⁷⁵

The enactment of the original \$300 billion Food, Conservation, and Energy Act of 2008 (better known as the Farm Bill) has prompted divergent reactions. The version of the bill presented to the President omitted a significant part from the version of the bill that was actually passed by both chambers of Congress. In fact, the bill that was presented to the President was missing an entire 34-page section—all of Title III of the bill.⁷⁶ And yet, this massive omission was discovered only after President Bush vetoed the bill and Congress passed it over his veto.⁷⁷

This case is not the first in which provisions that passed both houses of Congress were omitted from the bill presented to the President; nor is it the first time in which breaches of constitutional requirements were discovered

⁷⁴ Mary Clare Jalonick, *Congressional Error Snarls Effort To Override Bush’s Farm Bill Veto*, STAR-LEDGER, May 22, 2008 (quoting Scott Stanzel, a White House spokesperson).

⁷⁵ *Problems with Congress Override of Farm Bill*, CNN, May 22, 2008, <http://www.cnn.com/2008/POLITICS/05/22/farm.bill/index.html> (quoting Minority Leader John Boehner).

⁷⁶ See *Validity of the Food, Conservation, and Energy Act of 2008*, 32 Op. Off. Legal Counsel (May 23, 2008), available at <http://www.justice.gov/olc/2008/validity-farm-bill-energy-act-2008.pdf>; Jalonick, *supra* note .

⁷⁷ Consequently, Congress eventually had to enact the entire bill all over again, including another supermajority passage over a second presidential veto. See *Congress Passes Farm Bill Over Bush Veto*, CNN, June 18, 2008, <http://www.cnn.com/2008/POLITICS/06/18/farm.bill/index.html>.

only after the faulty bill was approved and published as law.⁷⁸ It is also not the first case to illustrate that the length, scope, and complexity of omnibus bills (and the highly accelerated pace of their enactment) often make it impossible for legislators, or even legislative leaders, to be aware of all the provisions in the bill;⁷⁹ nor is it the first case to demonstrate that this reality often creates errors,⁸⁰ as well as enables individual members “to perpetuate a good deal of statutory mischief.”⁸¹

The Farm Bill is particularly interesting, however, because of the magnitude of the discrepancy in this case between the bill passed by Congress and the bill presented to the President. Indeed, the fact that no one in Congress—or the White House—was able to notice such a conspicuous discrepancy suggests that less noticeable procedural violations may often go undetected. Hence, this case clearly illustrates that massive omnibus bills increase the risk of violations

⁷⁸ See Bar-Siman-Tov, *supra* note , at 338; J.A.C. Grant, *Judicial Control of the Legislative Process: The Federal Rule*, 3 W. POL. Q. 364, 368 (1950). For other examples of such cases, see Validity of the Food, Conservation, and Energy Act of 2008, *supra* note 76.

⁷⁹ See, e.g., Dunn, *supra* note , at 137 (“[W]hen all the provisions are rolled into one bill, it is impossible for any member to know the contents of the bills voted on.... Indeed, many votes are for legislation in which the individual member has no idea what is contained therein.”); see also Denning & Smith, *supra* note , at 958-60, 971-76.

⁸⁰ For example, in the case of a giant 2004 appropriations bill, only after the bill had passed was it discovered that a provision that would allow appropriations staff to access individual tax returns, and exempt the staff from criminal penalties for revealing the contents of those returns, was somehow inserted into the bill. The chair of the subcommittee in charge of the bill later admitted that even he had no idea that language was in the bill. THOMAS E. MANN & NORMAN J. ORNSTEIN, *THE BROKEN BRANCH: HOW CONGRESS IS FAILING AMERICA AND HOW TO GET IT BACK ON TRACK* 173-74 (2008).

⁸¹ Ronald A. Cass & Peter L. Strauss, *The Presidential Signing Statements Controversy*, 16 WM. & MARY BILL RTS. J. 11, 22 (2007); see also Bar-Siman-Tov, *supra* note , at 338-40.

of lawmaking rules, deliberate or inadvertent, and significantly undermine the ability of Congress to detect these violations.

More generally, this case suggests that a will to enforce lawmaking rules is a necessary but insufficient condition: even if Congress is genuinely motivated to enforce these rules, due to legislative practices such as omnibus legislation, its capacity to do so is limited.⁸²

C. Congressional Will To Enforce: The Deficit Reduction Act of 2005

*“It’s grade school stuff: To become law, a bill must pass both houses of Congress in identical form and be signed by the president or approved over his veto.... Unless, that is ... complying with the Constitution would be really, really inconvenient to President Bush and Republican congressional leaders.”*⁸³

The enactment of the Deficit Reduction Act of 2005 (DRA) has been described by some as “‘a conspiracy’ to violate the Constitution,”⁸⁴ or as a “legally improper arrangement among certain representatives of the House,

⁸² See Bar-Siman-Tov, *supra* note , at 339-40.

⁸³ Editorial, *Not a Law: A Bill Passed by Only One House of Congress Just Doesn’t Count*, WASH. POST, Apr. 1, 2006, at A16.

⁸⁴ See Posting of Marty Lederman to Balkinization, <http://balkin.blogspot.com/2006/02/q-when-is-bill-signed-by-president-not.html> (Feb. 10, 2006, 10:33 EST) (“[The DRA case was] in fact, a ‘conspiracy’ to violate the Constitution. That is to say, [House Speaker] Dennis Hastert has violated his constitutional oath by attesting to the accuracy of the bill, knowing that the House version was different (and having intentionally avoided fixing the discrepancy when it came to his attention before the House vote). And [President pro tempore of the Senate] Stevens and the President are coconspirators, assuming they, too, knew about the problem before they attested to and signed the bill, respectively.”).

Senate, and Executive Branch to have the President sign legislation that had not been enacted pursuant to the Constitution.”⁸⁵

In this case, the House passed a bill that was identical to the bill passed by the Senate in all but one provision.⁸⁶ In budgetary terms, this seemingly minor difference had significant fiscal consequences, amounting to an estimated \$2 billion.⁸⁷ More importantly, this discrepancy constituted a violation of Article I, Section 7’s bicameral requirement.

The Speaker of the House and the President pro tempore of the Senate were apparently well aware of this discrepancy.⁸⁸ Nevertheless, they allegedly chose to sign the enrolled bill in attestation that the bill was duly enacted by Congress, and to knowingly present to the President a bill that was never passed in identical form by both houses.⁸⁹ President Bush was also allegedly aware of this constitutional violation, but signed the bill into law nonetheless.⁹⁰

⁸⁵ *OneSimpleLoan v. U.S. Sec’y of Educ.*, 496 F.3d 197, 200-01 (2d Cir. 2007) (internal quotation marks omitted).

⁸⁶ *See Bar-Siman-Tov, supra note* , at 331-32.

⁸⁷ *Pub. Citizen v. Clerk*, U.S. Dist. Court for D.C., 451 F. Supp. 2d 109, 111 n.7 (D.D.C. 2006).

⁸⁸ *See Bar-Siman-Tov, supra note* , at 332.

⁸⁹ *See JOHN W. DEAN, BROKEN GOVERNMENT: HOW REPUBLICAN RULE DESTROYED THE LEGISLATIVE, EXECUTIVE, AND JUDICIAL BRANCHES* 51-54 (2007); *Bar-Siman-Tov, supra note* , at 332 & n.44; *Lederman, supra note* .

⁹⁰ *See Bar-Siman-Tov, supra note* , at 332.

The DRA is a clear example of a case in which Congress identified the rule violation in time, but those in the position to enforce the constitutional rule intentionally chose to ignore their obligation. It demonstrates that mechanisms and opportunities to enforce the rules may not suffice if the will to employ these enforcement mechanisms is lacking.

D. When the Enforcers Are the Violators: The 2003 Medicare Bill

*“Never have I seen such a grotesque, arbitrary, and gross abuse of power.... It was an outrage. It was profoundly ugly and beneath the dignity of Congress.”*⁹¹

Under House rules, electronic voting is the preferred method to conduct record votes.⁹² Generally, members may cast their votes through voting machines or manually, and may change their vote any number of times until the vote is closed.⁹³ The vote is directed and controlled by the Chair, who must exercise her power according to the applicable rules, precedents, and practices of the House and in a nonpartisan and impartial manner.⁹⁴

⁹¹ MANN & ORNSTEIN, *supra* note , at 3.

⁹² HOUSE RULES, *supra* note , R. XX(2)(a).

⁹³ For a much more detailed explanation, see SELECT COMMITTEE TO INVESTIGATE THE VOTING IRREGULARITIES OF AUGUST 2, 2007, FINAL REPORT AND SUMMARY OF ACTIVITIES, H.R. REP. NO. 110-885, at 3-5 (2008), *available at* http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=110_cong_reports&docid=f:hr885.110.pdf [hereinafter REPORT ON VOTING IRREGULARITIES].

⁹⁴ *Id.* at 8-10.

One of the important powers of the Chair is the authority to close the vote and announce the vote's result.⁹⁵ The House rules state that there is a fifteen-minute minimum for most electronic votes;⁹⁶ and according to established House practice, once the minimum time for a vote has expired, the Chair should close the vote as soon as possible.⁹⁷ The Chair may hold the vote open for an additional minute or two to allow latecomers to cast a vote; however, since electronic voting began in 1973, it has been an established and clear norm that the Chair may not keep the vote open beyond fifteen minutes in order to change the outcome of the vote.⁹⁸ For over two decades, this norm was apparently breached only once.⁹⁹

All this changed, however, in the enactment of the Medicare Prescription Drug, Improvement, and Modernization Act of 2003 (the Medicare Bill). When the time for debate on the Medicare Bill had ended, at 3 a.m., the Chair announced that "Members will have fifteen minutes to record their votes."¹⁰⁰ When the official time expired, at 3:15 a.m., it was clear that a majority of the

⁹⁵ *Id.* at 8.

⁹⁶ HOUSE RULES, *supra* note , R. XX(2)(a).

⁹⁷ MANN & ORNSTEIN, *supra* note , at 5.

⁹⁸ *Id.*

⁹⁹ *Id.*

¹⁰⁰ *Id.* at 1.

House had voted against the bill.¹⁰¹ Although the majority of the House clearly expressed its will, the Chair held the vote open for nearly three hours until the majority party's leadership was able to convince enough members to switch their votes.¹⁰² At 5:53 a.m., after almost three hours in which the official tally of the votes had consistently shown a majority against the bill, the majority party was finally able to secure a majority in favor of the bill. At this point, "[t]he gavel came down quickly,"¹⁰³ and the Chair declared that the bill had passed.¹⁰⁴

This case illustrates that even seemingly technical rules can serve important objectives, such as ensuring that the will of the chamber rather than the will of its legislative officer is enacted into law, and that violations of such rules can significantly impact the outcome of the legislative process. Indeed, although other process abuses occurred in the enactment process of the Medicare Bill,¹⁰⁵ it was this act that particularly outraged House members who opposed the bill. One member complained, "They grossly abused the rules of the House by

¹⁰¹ *Id.* at 1-2.

¹⁰² *Id.*

¹⁰³ *Id.* at 2.

¹⁰⁴ 149 CONG. REC. 30855 (2003) (statement of Speaker pro tempore).

¹⁰⁵ Other abuses included, inter alia, exclusion of minority party members from the House-Senate conference committee, insertion of major provisions that were rejected during earlier floor debates into the conference report, and even allegations that the majority party tried to secure the necessary votes for passing the bill through threats and bribes. See MANN & ORNSTEIN, *supra* note , at 1-4, 6, 137-38; Oliver A. Houck, *Things Fall Apart: A Constitutional Analysis of Legislative Exclusion*, 55 EMORY L.J. 1, 11-12 (2006).

holding the vote open. The majority of the House expressed its will, 216 to 218. It means it's a dictatorship. It means you hold the vote open until you have the votes.”¹⁰⁶

After this incident, stretching out the vote until the majority party “could twist enough arms to prevail” became a recurring problem.¹⁰⁷ To solve this problem, in January 2007 the new House majority amended the House rules, adding the following explicit rule: “[a] record vote by electronic device shall not be held open for the sole purpose of reversing the outcome of such vote.”¹⁰⁸

Nevertheless, violations of this rule continued.¹⁰⁹ Furthermore, any real possibility of congressional enforcement was soon undermined. When minority party members tried to raise a point of order, the Chair held that this rule does not establish a point of order and does not have an immediate procedural

¹⁰⁶ MANN & ORNSTEIN, *supra* note , at 3. Some majority party members argued, however, that holding votes open was not, “technically speaking,” a violation of the rules, because House rules do not state a formal maximum time for votes. *Id.* at 4.

¹⁰⁷ *Id.* at 6-7.

¹⁰⁸ RULES OF THE HOUSE OF REPRESENTATIVES, 110th CONG., R. XX(2)(a) (2008), *available at* <http://www.rules.house.gov/ruleprec/110th.pdf>.

¹⁰⁹ *See, e.g.*, MANN & ORNSTEIN, *supra* note , at 216; Committee on Rules-Republicans, *Democrats Break Their Own Rules, Refuse To Own Up*, Mar. 12, 2008, <http://rules-republicans.house.gov/ShortTopics/Read.aspx?ID=170>; Jackie Kucinich, *Rep. Gohmert Accuses Dems of Holding Vote Open*, HILL, May 24, 2007, <http://thehill.com/homenews/news/12029-rep-gohmert-accuses-dems-of-holding-vote-open>; Jim Mills, *Pelosi Admits To Breaking House Rules—Sorta*, HILL, Mar. 13, 2008, <http://thehill.com/blogs/pundits-blog/lawmaker-news/32935-pelosi-admits-to-breaking-house-rules-sorta>.

remedy.¹¹⁰ The rule was also interpreted as focusing entirely on the Chair's intent and as prohibiting only cases in which the Chair's *exclusive* motivation for holding the vote open was to change the outcome.¹¹¹ It was further stated that it would be inappropriate to require the Chair to declare her reasons for delaying a vote.¹¹² The practical result was that it became "impossible for the House to determine whether the Chair had the requisite intent necessary to find a violation of the rule."¹¹³

Eventually, following a case in which the Chair closed a vote before the required minimum time expired, allegedly to preclude the minority party from winning the vote,¹¹⁴ a select committee, which investigated voting irregularities in the House, concluded that although the new rule "was enacted with a noble intent," it was "at best, difficult to enforce."¹¹⁵ Consequently, in January 2009, the new House majority deleted this rule from the House

¹¹⁰ See REPORT ON VOTING IRREGULARITIES, *supra* note , at 23 (citing 76 CONG. REC. H3193 (daily ed. May 8, 2008)).

¹¹¹ *Id.*

¹¹² *Id.*

¹¹³ *Id.*

¹¹⁴ Jonathan Weisman & Elizabeth Williamson, *House Forms Special Panel Over Alleged Stolen Vote*, WASH. POST, Aug. 4, 2007, <http://www.washingtonpost.com/wp-dyn/content/article/2007/08/03/AR2007080300878.html>.

¹¹⁵ REPORT ON VOTING IRREGULARITIES, *supra* note , at 22 (quoting *Investigative Hearing Regarding Roll Call 814, Day 1: Hearing Before the Select Comm. to Investigate the Voting Irregularities of August 2, 2007*, 111th Cong. 4 (2008) (opening statement of Rep. William Delahunt, Chairman of the Select Committee)). The Select Committee also found that the rule was a "catalyst" for other voting irregularities, such as prematurely closing the vote. *Id.* at 17-22.

rules.¹¹⁶ The select committee emphasized that “striking the sentence in question” from the rules should not reduce the Chair’s obligation to refrain from holding the vote open in order to change the outcome of the vote,¹¹⁷ but seemed to conclude that ultimately “[t]he dignity and integrity of the proceedings of the House are dependent upon the dignity and integrity of its Speaker and those she appoints to serve in the Chair.”¹¹⁸

The failure to enforce this rule, which was supposed to curb abuses by the Chair during votes, reveals the fallibility of Congress’s enforcement mechanisms, especially with regard to rules that are supposed to control the behavior of the presiding officers. Legislative officers are the primary and final enforcers of lawmaking rules.¹¹⁹ This case illustrates that the legislative officers can also be the primary violators of these rules. When the legislative officers—or other chamber and committee leaders that are essential in enforcing lawmaking rules—are the ones perpetrating the rule violations, the congressional enforcement mechanisms are particularly likely to fail.¹²⁰

¹¹⁶ See H.R. Res. 5, 111th Cong. § 2(h) (2009), available at http://www.rules.house.gov/111/LegText/111_hres_ruleschng.pdf.

¹¹⁷ REPORT ON VOTING IRREGULARITIES, *supra* note , at 23.

¹¹⁸ *Id.*

¹¹⁹ See *supra* Part II.A.

¹²⁰ Cf. Kysar, *supra* note , at 549 (making a similar argument in the “earmark rules” context that the “largest threat to the faithful adherence” to these rules is intentional violations by their enforcers).

In sum, enforcement of lawmaking rules is entirely contingent upon legislators' and legislative leaders' motivation to enforce these rules. Furthermore, because Congress's capacity to detect violations is limited, congressional compliance with these rules also largely depends on legislators' incentives to follow the rules in the first place. The crucial question, therefore, is: what are the political safeguards that may motivate legislators to engage in self-policing and rule-following behavior?¹²¹

III. THE MYTH OF POLITICAL SAFEGUARDS

One of the dominant arguments against judicial review of the legislative process is that Congress has sufficient incentives to enforce the law of congressional lawmaking on its own.¹²² Arguments that "legislators have greater incentives [to act as responsible constitutional decision makers] than scholars typically assert" are also prominent among critics of judicial review and judicial supremacy in other areas.¹²³ Their common argument is that legal

¹²¹ Cf. Richard D. McKelvey & Peter C. Ordeshook, *An Experimental Study of the Effects of Procedural Rules on Committee Behavior*, 46 J. POL. 182, 201 (1984) ("[T]heoretical investigations that seek to uncover the effects of procedural rules and institutional constraints must take cognizance of incentives and opportunities for people to disregard those rules and constraints.").

¹²² See, e.g., Choper, *supra* note , at 1505-07.

¹²³ Tushnet, *Interpretation in Legislatures*, *supra* note , at 356; see also, e.g., MARK TUSHNET, *TAKING THE CONSTITUTION AWAY FROM THE COURTS* 65-66 (1999); Philip P. Frickey & Steven S. Smith, *Judicial Review, the Congressional Process, and the Federalism Cases: An Interdisciplinary Critique*, 111 YALE L.J. 1707, 1708-09 (2002); Elizabeth Garrett & Adrian Vermeule, *Institutional Design of a Thayerian Congress*, 50 DUKE L.J. 1277, 1286-90 (2001); Sinclair, *Can Congress Be Trusted?*, *supra* note , at 294-97.

scholarship tends to rely on the public choice theory's over-simplified and overly cynical assumption that legislators are self-interested, single-minded reelection seekers.¹²⁴

This Article's inquiry begins, therefore, with the assumption that legislators are motivated by a combination of self-interest and public-regarding motivations,¹²⁵ and that they simultaneously pursue multiple goals, such as reelection, power and prestige in Washington, and ideology and desire to make good public policy.¹²⁶

Based on this premise, and drawing on a combination of sources from a wide array of theoretical perspectives, including legal, political science, political economy, and social psychology scholarship, I have identified seven major political safeguards that are supposed to induce congressional self policing and rule following: (1) reelection motivations and electoral controls;

¹²⁴ See sources cited *supra* note ; see also Krishnakumar, *supra* note , at 39 (arguing that "ideology and a desire to make good policy play a far more significant role in determining legislators' voting behavior than public choice theory gives them credit for").

¹²⁵ See Colin Jennings & Iain McLean, *Political Economics and Normative Analysis*, 13 *NEW POL. ECON.* 61, 66, 69-71 (2008) (noting that even political economists are increasingly acknowledging that politicians are not purely self-interested, and demonstrating greater willingness to include public-regarding motivations in political economics models).

¹²⁶ See RICHARD F. FENNO, JR., *CONGRESSMEN IN COMMITTEES* 1 (1973); John W. Kingdon, *Models of Legislative Voting*, 39 *J. POL.* 563, 569-70 (1977); see also DANIEL A. FARBER & PHILIP P. FRICKEY, *LAW AND PUBLIC CHOICE: A CRITICAL INTRODUCTION* 21 & n.39 (1991) (arguing that Fenno's multiple-goal suggestion is "[s]urely closer to reality" than Mayhew's reelection model, and citing empirical studies that support Fenno's suggestion); Garrett & Vermeule, *supra* note , at 1287-88 (arguing that Fenno's multiple-goal view became "[t]he mainstream view in political science"). For a different view, emphasizing reelection above all other goals, see DAVID R. MAYHEW, *CONGRESS: THE ELECTORAL CONNECTION* 5-6, 13-17 (2d ed. 2004).

(2) interest groups; (3) policy motivations; (4) political parties and party leaders; (5) institutional rivalry and institutional interests; (6) the threat of a presidential veto; and (7) ethical and noninstrumental motivations.¹²⁷

Part III systematically evaluates each of these safeguards' projected impact on Congress's compliance with the rules that set procedural restrictions on the legislative process,¹²⁸ in light of theoretical, empirical, and descriptive studies about Congress and its legislative process.

Close consideration of these safeguards is crucial for rebutting a number of misconceptions about legislative rule following. The following examination refutes the widely held assumption that political safeguards can obviate the need for judicial enforcement of lawmaking rules. It argues that some of these political safeguards actually induce lawbreaking rather than law-following behavior, whereas others are too weak to outweigh this impact.

¹²⁷ This list of safeguards is drawn from a combination of a wide array of sources, most notably GLENN R. PARKER, *SELF-POLICING IN POLITICS: THE POLITICAL ECONOMY OF REPUTATIONAL CONTROLS ON POLITICIANS* 26-27 (2004); ERIC SCHICKLER, *DISJOINTED PLURALISM: INSTITUTIONAL INNOVATION AND THE DEVELOPMENT OF THE U.S. CONGRESS* 5-12 (2001); TOM R. TYLER, *WHY PEOPLE OBEY THE LAW* 117-23 (2d ed. 2006); Aaron-Andrew P. Bruhl, *Return of the Line Item Veto? Legalities, Practicalities, and Some Puzzles*, 10 U. PA. J. CONST. L. 447, 472-75 (2008) [hereinafter Bruhl, *Return of the Line-Item Veto*]; Bruhl, *Judicial Confirmation Process*, *supra* note , at 1011-13; Cox, *supra* note , at 170; C. Lawrence Evans, *Politics of Congressional Reform*, in *THE LEGISLATIVE BRANCH* 490, 493-94 (Paul J. Quirk & Sarah A. Binder eds., 2006) [hereinafter Evans, *Politics of Congressional Reform*]; Garrett & Vermeule, *supra* note , at 1286-90; Schauer, *supra* note , at 473-75; Sinclair, *Can Congress Be Trusted?*, *supra* note , at 294-97; Tushnet, *Interpretation in Legislatures*, *supra* note .

¹²⁸ For more on the type of rules covered by this inquiry, see *supra* Part I.A.

A. *Reelection Motivations and Electoral Controls*

There is widespread agreement in the congressional decision-making literature, even among scholars who hold the multiple-goal view, that reelection is an important goal for legislators.¹²⁹ The connection between legislators' reelection motivation and rule following is straightforward: legislators will refrain from violating rules if such violations increase the likelihood of electoral defeat.¹³⁰ Of course, the reelection motivation is an ineffective control mechanism over legislators who are seeking retirement and are not interested in reelection.¹³¹ However, Part III.A argues that even for reelection-seeking legislators there are significant obstacles in harnessing their strong reelection motivation into an effective control mechanism over their behavior in the legislative process.

1. Voters' Inattention and (Rational) Ignorance

In order for violations of lawmaking rules to increase the likelihood of electoral defeat, voters must be aware of these violations. However, most rule violations in the legislative process are likely to escape voters' attention.

¹²⁹ See Susan Block-Lieb, *Congress' Temptation To Defect: A Political and Economic Theory of Legislative Resolutions to Financial Common Pool Problems*, 39 ARIZ. L. REV. 801, 831 (1997).

¹³⁰ See Schauer, *supra* note , at 474-75; Tushnet, *Interpretations in Legislatures*, *supra* note , at 361.

¹³¹ PARKER, *supra* note , at 27.

Due to the high cost of obtaining the relevant information, voters' negligible incentive to obtain it, and free-rider problems, it is rational for voters to remain largely ignorant of legislators' behavior in the legislative process.¹³² Political economists term this phenomenon voters' "rational ignorance."¹³³ Notwithstanding other disagreements over political economists' assumptions about voters,¹³⁴ political scientists seem to agree that there is indeed "widespread voter inattention" to the legislative process:¹³⁵ "The vast majority of voters do not pay much attention to most of the roll calls that occur on Capitol Hill; much less the more insulated activities that occur in committee. As a result, House members and Senators have significant discretion about how to conduct their legislative work."¹³⁶

Surveys consistently confirm that the vast majority of the public does not regularly "follow what's going on in government and public affairs,"¹³⁷ and

¹³² See Block-Lieb, *supra* note , at 820 & n.93, 821 & nn.94-95; Peter T. Leeson, *How Much Benevolence is Benevolent Enough?*, 126 PUB. CHOICE 357, 360, 363 (2006).

¹³³ Leeson, *supra* note , at 360.

¹³⁴ For criticism of economic theories' assumptions about voters, see, for example, FARBER & FRICKEY, *supra* note , at 24-33; Daniel Shaviro, *Beyond Public Choice and Public Interest: A Study of the Legislative Process as Illustrated by Tax Legislation in the 1980s*, 139 U. PA. L. REV. 1, 77-80 (1990).

¹³⁵ C. Lawrence Evans, *The One Thing You Need To Know about Congress: The Middle Doesn't Rule 20* (Nov. 3, 2007) (unpublished manuscript), *available at* <http://www.wmpeople.wm.edu/asset/index/clevan/niemi> [hereinafter Evans, *Middle Doesn't Rule*].

¹³⁶ *Id.* at 7-8.

¹³⁷ AM. NAT'L ELECTION STUDIES, *THE ANES GUIDE TO PUBLIC OPINION AND ELECTORAL BEHAVIOR* tbl.6D.5 (2008), http://www.electionstudies.org/nesguide/toptable/tab6d_5.htm [hereinafter ANES GUIDE]; *see also id.* tbl.5B.1, <http://www.electionstudies.org/nesguide/>

that people are largely unaware of congressional actions.¹³⁸ In fact, one study found that people were rarely aware of even a single policy position taken by their district representatives,¹³⁹ and there is reason to believe that voters' knowledge of their representatives' performance in procedural matters is even lower.¹⁴⁰

Surveys have consistently shown, moreover, that voters' ignorance is not limited to specific congressional actions.¹⁴¹ For example, 45 percent of American adults cannot name either of their state's U.S. senators;¹⁴² and, "at any given time, approximately 40 to 65 percent do not know which party is in control of the House of Representatives,"¹⁴³ which is particularly remarkable, given that "50 percent should be able to get this answer correct merely by

toptable/tab5b_1.htm (finding that roughly 60 to 70 percent of respondents consistently agree that "[s]ometimes politics and government seem so complicated that a person like me can't really understand what's going on").

¹³⁸ John R. Hibbing, *Images of Congress, in THE LEGISLATIVE BRANCH*, *supra* note , at 461, 482.

¹³⁹ *Id.* at 474.

¹⁴⁰ Evans, *Middle Doesn't Rule*, *supra* note , at 12 (arguing that "few people outside the Capitol Beltway pay attention to procedural votes"); *see also* Amber Wichowsky, *Throw the Bums Out: Competition and Accountability in Congressional Elections 2* (Feb. 16, 2009) (unpublished manuscript), *available at* http://users.polisci.wisc.edu/apw/archives/APW_wichowsky.pdf (citing several studies that confirm that "citizens know little to nothing about their legislator's roll-call votes and about the policy process more generally").

¹⁴¹ Hibbing, *supra* note , at 471.

¹⁴² *Id.* Furthermore, 75 percent do not know the length of a senator's term, 45 percent do not know that each state has two senators, and 56 percent cannot name even a single branch of government. *Id.*

¹⁴³ *Id.*

guessing.”¹⁴⁴ Ignorance about the rules that govern the legislative process is even greater.¹⁴⁵ A recent survey found, for example, that 74 percent of the public do not know that it takes sixty votes to break a filibuster in the Senate, perhaps the most well-known and hotly-debated of all legislative rules.¹⁴⁶ These findings significantly undermine the assumption that the public can hold lawmakers accountable for violating lawmaking rules.

2. Voters’ Electoral Choices

Even if some rule violations do receive public attention, legislators would not be deterred from rule violations unless such violations significantly influence their constituency’s voting decision.¹⁴⁷ It is highly unlikely, however, that a significant percentage of voters use conformity with lawmaking rules as a key criterion in their electoral choice.¹⁴⁸

¹⁴⁴ *Id.* at 471-72. Furthermore, these findings probably overestimate people’s knowledge, because politically unknowledgeable people are more likely to refuse to participate in political surveys. *Id.* at 472.

¹⁴⁵ PEW RESEARCH CTR. FOR THE PEOPLE & THE PRESS, SENATE LEGISLATIVE PROCESS A MYSTERY TO MANY 1, 3 (Jan. 28, 2010), <http://people-press.org/report/586/>; *see also* Posting of Jennifer Agiesta to The Washington Post: Behind the Numbers, http://voices.washingtonpost.com/behind-the-numbers/2010/03/the_public_on_procedure.html (Mar. 17, 2010, 12:28 EST).

¹⁴⁶ PEW RESEARCH CTR. FOR THE PEOPLE & THE PRESS, *supra* note , at 3.

¹⁴⁷ Sinclair, *Can Congress Be Trusted?*, *supra* note , at 294.

¹⁴⁸ *Cf.* Schauer, *supra* note , at 474 n.21 (arguing that “there may be little reason to believe that the electorate will punish legislators for violating legislature-constraining rules” in the passage of policies that voters perceive as “wise and popular”); Frederick Schauer, *The Questions of Authority*, 81 GEO. L.J. 95, 104-10, 114 (1992) (presenting anecdotal evidence that citizens do

To be sure, studies by social psychologists and political scientists suggest that people do care about process and procedural fairness in the legislative process;¹⁴⁹ and yet, this does not mean that legislators' procedural performance will significantly determine voters' decisions. As two of the leading scholars in the field explain:

[I]t would be erroneous to expect process perceptions to help people decide whether they are Democrat or Republican or whether to support candidate A or candidate B.... [P]rocess factors are of little use in such tasks as voting decisions.... Assessments of individual officeholders also are not likely to be affected by process concerns We expect process concerns to play a much larger part in such broad variables as whether people approve of government and whether they view it as legitimate and therefore are willing to comply with the laws it produces.¹⁵⁰

That voters do care about the integrity of the legislative process but are nevertheless unlikely to base their voting decisions on this preference

not always expect officials to blindly follow the law); Sinclair, *Can Congress Be Trusted?*, *supra* note , at 294 (arguing that it is “certainly a heroic assumption” to think that “constituents use conformity with the Constitution as a key criterion of electoral choice,” and suggesting that it is unlikely that there are enough such voters to make a difference); Emily Badger, *It's Not About Process, Stupid*, MILLER-MCCUNE, Mar. 25, 2010, <http://www.miller-mccune.com/politics/its-not-about-process-stupid-11524/> (suggesting that voters care little about the legislative process surrounding health care reform).

¹⁴⁹ See *supra* Part I.B. But see Agiesta, *supra* note (noting that recent polls suggest the public's take on parliamentary procedure is based more on the result and partisan affiliation than the process).

¹⁵⁰ John R. Hibbing & Elizabeth Theiss-Morse, *Process Preferences and American Politics: What the People Want Government To Be*, 95 AM. POL. SCI. REV. 145, 150 (2001); see also Tyler, *supra* note , at 818, 820-21 (finding that the use of fair decision-making procedures significantly enhances the legitimacy of Congress; but on the question of whether people will be more willing to vote for members of Congress who support a procedurally fair policy decision that the voters disagree with, conceding that the primary direct influence on willingness to vote is agreement with the outcome).

underscores the weakness of elections as an enforcement mechanism. In making their voting decisions, voters must make up their mind based on a complex combination of potentially competing considerations, such as the candidates' records, party affiliations, personalities, and other qualities, as well as their policy positions on a variety of different issues.¹⁵¹ At the same time, however, “[e]ach voter has just one vote per election.... There is simply no way for a voter to vote for Smith on the economy and health reform while voting for Jones on [his rule-following performance].”¹⁵² Consequently, voting “is simply too blunt an instrument to be an effective means for” punishing legislators for rule violations in the legislative process.¹⁵³

3. Uncompetitive Elections and Incumbents' Electoral Security

Even if voters were fully informed about legislators' rule violations and had strong rule-following preferences that influenced their voting decisions, other

¹⁵¹ Richard Briffault, Campaign Finance Disclosure 2.0, at 37 (Jan. 20, 2010) (unpublished manuscript), available at http://www.law.columbia.edu/null/download?&exclusive=filemgr.download&file_id=163372 [hereinafter Briffault, Campaign Finance]; see also PARKER, *supra* note , at 106-11 (discussing the factors that influence electoral choice in congressional voting).

¹⁵² Briffault, Campaign Finance, *supra* note , at 36-38 (making this argument in the campaign finance context: “the idea that the voter can use the election to hold candidates accountable for accepting donations the voter finds troublesome fails to recognize how voting works”).

¹⁵³ *Id.* at 37; see also James D. Fearon, *Electoral Accountability and the Control of Politicians: Selecting Good Types Versus Sanctioning Poor Performance*, in DEMOCRACY, ACCOUNTABILITY, AND REPRESENTATION 55, 56-60 (Adam Przeworski et al. eds., 1999) (arguing that voting is more about selecting “good types” of politicians, in terms of their perceived character and policy positions, than about disciplining incumbents' past behavior).

factors in the contemporary political system significantly hinder “voters’ ability to strip incumbents of their power.”¹⁵⁴

Over the past several decades, a combination of factors has dramatically increased incumbents’ electoral advantages in congressional elections, and created progressively rising barriers to electoral competition.¹⁵⁵ Some scholars have noted, for example, that the dramatic growth in the costs of running for Congress and the increasing financial advantages of incumbents have undermined the financial competitiveness of challengers.¹⁵⁶ Other scholars highlight advantages that derive from holding office, such as increasing governmentally funded resources for constituency-service and constituency-contact activities¹⁵⁷ or the introduction of television cameras in the legislature, which affords incumbents television exposure that would be expensive for political challengers to replicate.¹⁵⁸ Others argue that computer-driven

¹⁵⁴ PATRICK BASHAM & DENNIS POLHILL, CATO INST., UNCOMPETITIVE ELECTIONS AND THE AMERICAN POLITICAL SYSTEM (2005), available at <http://www.cato.org/pubs/pas/pa547.pdf>.

¹⁵⁵ Glenn R. Parker & Jun Young Choi, *Barriers to Competition and the Effect on Political Shirking: 1953-1992*, 126 PUB. CHOICE 297, 297-99 (2006).

¹⁵⁶ Alan I. Abramowitz et al., *Incumbency, Redistricting, and the Decline of Competition in U.S. House Elections*, 68 J. POL. 75, 82-84, 87 (2006) [hereinafter Abramowitz et al., *Incumbency*].

¹⁵⁷ Parker & Choi, *supra* note , at 298-99.

¹⁵⁸ Franklin G. Mixon, Jr. & Kamal P. Upadhyaya, *Legislative Television as an Institutional Entry Barrier: The Impact of C-SPAN2 on Turnover in the U.S. Senate, 1946-1998*, 112 PUB. CHOICE 433, 434, 444-45 (2002).

gerrymandering has made the vast majority of districts noncompetitive.¹⁵⁹ Finally, some studies emphasize demographic changes, including growing partisan polarization within the electorate¹⁶⁰ and voters' increasing reliance on incumbency as a voting cue.¹⁶¹

At any rate, there seems to be significant agreement that the result of these factors “is a pattern of reinforcing advantages that leads to extraordinarily uncompetitive elections.”¹⁶² In fact, only 11 percent of the congressional races in 2008 had a sufficiently small victory margin—10 percent or lower—that

¹⁵⁹ Neal Devins, *Presidential Unilateralism and Political Polarization: Why Today's Congress Lacks the Will and the Way To Stop Presidential Initiatives*, 45 WILLAMETTE L. REV. 395, 408 (2009); Samuel Issacharoff, *Gerrymandering and Political Cartels*, 116 HARV. L. REV. 593, 624 (2002). *But see* Richard Briffault, *Defining the Constitutional Question in Partisan Gerrymandering*, 14 CORNELL J.L. & PUB. POL'Y 397, 410-11 (2005) (“The threat gerrymandering poses to competitiveness comes not from districting per se, but from the interplay of gerrymandering with a host of other political factors. The extent to which district-level competition is in decline or that gerrymandering is responsible is debatable.”). For more on this debate, compare, for example, Michael P. McDonald, *Drawing the Line on District Competition*, 39 PS: POL. SCI. & POL. 91 (2006) (contending that redistricting has reduced the number of competitive congressional districts), with Alan Abramowitz et al., *Drawing the Line on District Competition: A Rejoinder*, 39 PS: POL. SCI. & POL. 95 (2006) (concluding that redistricting is not responsible for declining competition in House elections).

¹⁶⁰ Abramowitz et al., *Incumbency*, *supra* note , at 77, 86-87.

¹⁶¹ Parker & Choi, *supra* note , at 298.

¹⁶² Abramowitz et al., *Incumbency*, *supra* note , at 86; *see also* BASHAM & POLHILL, *supra* note , at 2-7; Parker & Choi, *supra* note , at 298. *But see* Nathaniel Persily, *In Defense of Foxes Guarding Henhouses: The Case for Judicial Acquiescence to Incumbent-Protecting Gerrymanders*, 116 HARV. L. REV. 649, 653-65 (2002) (arguing that “[c]oncentrating on district-level competition ... distracts attention from abundant evidence of competition in the political system as a whole,” and that the indisputable high rates of incumbent reelection and large margins of victory, as well as the declining number of marginal districts, tell only part of the story).

could be categorized as competitive.¹⁶³ In 2002, only 8.7 percent of the races were competitive;¹⁶⁴ in 2004, only 5.2 percent of the races were competitive;¹⁶⁵ and even in the 2006 congressional elections, which were the most competitive in a decade, only 13.7 percent were competitive.¹⁶⁶

Empirical studies about “incumbency advantage” show that incumbency significantly raises the probability of electoral success, with some studies finding that congressional incumbents enjoy an 11 percent increase in expected vote share merely for being an incumbent candidate.¹⁶⁷ Reelection data also confirms that members of Congress in both houses enjoy significant electoral safety, with over 90 percent reelection rates for incumbents in recent years,¹⁶⁸

¹⁶³ Center for Voting and Democracy, *Dubious Democracy 2008: Overview and Data*, <http://www.fairvote.org/overview-and-data> (last visited Nov. 12, 2010).

¹⁶⁴ BASHAM & POLHILL, *supra* note , at 3.

¹⁶⁵ Center for Voting and Democracy, *Dubious Democracy 2007: U.S. National Profile*, <http://www.archive.fairvote.org/?page=2113> (last visited Nov. 12, 2010).

¹⁶⁶ *Id.*

¹⁶⁷ BASHAM & POLHILL, *supra* note , at 2-3, 15 nn.12-13, 16 nn.15-16.

¹⁶⁸ Wichowsky, *supra* note , at 1. In each of the 2000, 2002, and 2004 congressional elections, for example, the reelection rate for House incumbents was over 98 percent. BASHAM & POLHILL, *supra* note , at 3. Even in the 2006 congressional election—in which an unusually high number of seats changed hands, and despite polls indicating that only 16 percent of Americans believed most members of Congress deserved reelection—voters reelected 95 percent of the incumbent Representatives who ran in the election. Christopher M. Straw, *The Role of Electoral Accountability in the Madisonian Machine*, 11 N.Y.U. J. LEGIS. & PUB. POL’Y 321, 322-23 & nn.4-5 (2008). For more on senators’ reelection rates, see Persily, *supra* note , at 665. See also Gautam Gowrisankaran et al., *Why Do Incumbent Senators Win? Evidence from a Dynamic Selection Model* 17-21 (Nat’l Bureau of Econ. Research, Working Paper No. 10748, 2004), available at <http://www.nber.org/papers/w10748>.

and with the vast majority of incumbents winning by a landslide.¹⁶⁹ In fact, in each of the recent congressional elections, dozens of incumbents went completely unchallenged.¹⁷⁰ With such levels of electoral safety and lack of electoral competition in Congress, especially in the House, some have argued that “[a]s a general matter, congressional accountability appears to be dead.”¹⁷¹

Some scholars maintain, however, that the indisputably high levels of electoral safety in Congress do not necessarily undermine the “electoral connection” theory of congressional behavior.¹⁷² They claim that “[m]embers of Congress do not behave as if they are invulnerable to electoral defeat ... because they subscribe to the idea that they are ... ‘unsafe at any margin.’”¹⁷³ The argument, in effect, is that congressional behavior is less determined by the objective measures of electoral safety, but rather by legislators’ subjective feelings of electoral insecurity.¹⁷⁴ Consequently, they claim that notwithstanding objective electoral safety, legislators are in fact attentive to

¹⁶⁹ See BASHAM & POLHILL, *supra* note , at 3; sources cited *supra* note .

¹⁷⁰ See sources cited *supra* note .

¹⁷¹ Straw, *supra* note , at 323.

¹⁷² See Persily, *supra* note , at 659-60; David A.M. Peterson et al., *Congressional Response to Mandate Elections*, 47 AM. J. POL. SCI. 411, 412-13 (2003); Wichowsky, *supra* note , at 1-2.

¹⁷³ Persily, *supra* note , at 659-60; Peterson et al., *supra* note , at 412.

¹⁷⁴ See generally Jeffrey E. Cohen, *Perceptions of Electoral Insecurity Among Members Holding Safe Seats in a U.S. State Legislature*, 9 LEGIS. STUD. Q. 365 (1984).

constituent preferences and potential electoral consequences in their policy decisions.¹⁷⁵

However, even if we accept the argument that congressional behavior is mostly influenced by legislators' subjective beliefs about electoral insecurity, it appears that when it comes to lawmaking rules, members of Congress feel relatively secure from electoral retribution. As political scientist Gary Cox suggests, “[i]n a world in which the effects of [lawmaking] rules on final outcomes are obscure to voters, members fear electoral retribution from their constituents less than they would on straightforward votes on substance.”¹⁷⁶

This claim is confirmed by empirical evidence that “members increasingly act very differently when they vote on procedure and when they vote on substance.”¹⁷⁷ Thus, for example, legislators often vote in favor of a procedure that facilitates the passage of a bill—such as restrictive rules that sharply curtail the ability to offer amendments on the floor—and then vote against the

¹⁷⁵ Peterson et al., *supra* note , at 412-13. At least one empirical study challenges this claim, however, by demonstrating that the objective decline in electoral competition in fact correlates with an increase in “shirking,” that is, deviation from constituent preferences, in legislators’ roll-call decisions. *See* Parker & Choi, *supra* note , at 310-11.

¹⁷⁶ Cox, *supra* note , at 187; *see also* Monroe & Robinson, *supra* note , at 218 (noting that “members have less reason to fear being held accountable by their constituents for votes they make on the procedural maneuvers of their party leadership ... than for votes on the substance of policy”).

¹⁷⁷ Sean M. Theriault, Procedural Polarization in the U.S. Congress 16 (Mar. 24, 2006) (unpublished manuscript), *available at* [http://users.polisci.wisc.edu/apw/archives/theriault .pdf](http://users.polisci.wisc.edu/apw/archives/theriault.pdf).

bill itself.¹⁷⁸ The explanation to this seemingly puzzling behavior is that “members increasingly listen to their party on procedure and to their constituents on substance,”¹⁷⁹ based on their widely held belief that “few people outside the Capitol Beltway pay attention to procedural votes.”¹⁸⁰ Indeed, many legislators, political consultants, and candidates share the belief that most voters do not care about procedural issues and that procedural votes are much less visible to voters.¹⁸¹

The bottom line is that from both the perspective of objective electoral safety and legislators’ subjective perceptions of electoral security, violations of lawmaking rules are largely insulated from electoral accountability. Hence, the prospect that voters will effectively police legislators’ rule-following behavior in the legislative process, or induce reelection-minded legislators to police

¹⁷⁸ Cox, *supra* note , at 183-84; Evans, Middle Doesn’t Rule, *supra* note , at 12.

¹⁷⁹ Theriault, *supra* note , at 16.

¹⁸⁰ Evans, Middle Doesn’t Rule, *supra* note , at 12; Theriault, *supra* note , at 11-12, 15-16 (finding support for the “parties care about procedures; constituents care about substance” explanation for this behavior); *see also* Cox, *supra* note , at 183-84; Monroe & Robinson, *supra* note , at 218.

¹⁸¹ DEAN, *supra* note , at 4-5, 8-9. Admittedly, there may be a limited exception to this assumption, namely, when the bill in question receives wide public attention and the impact of the procedural vote on the final outcome is relatively transparent. The best example is probably the House’s final procedural votes in passing President Obama’s health care legislation. Even in this exceptional case of rare public attention to the legislative process, however, it was highly debatable whether the public actually understood or cared about the procedural rules. *See* Agiesta, *supra* note ; Badger, *supra* note ; Amy Goldstein, *House Democrats’ Tactic for Health-Care Bill is Debated*, WASH. POST, Mar. 17, 2010, at A1; Adam Nagourney, *Procedural Maneuvering and Public Opinion*, N.Y. TIMES, Mar. 19, 2010, at WK1. At any rate, for the vast majority of procedural votes, legislators can safely assume that their vote will not have significant electoral consequences.

themselves, seems grim. Furthermore, as Parts III.B-H explain, to the extent that the reelection goal motivates legislators to satisfy special interest groups, to make public policy, or to follow their party leaders' instructions, all of these considerations may in fact induce rule violations.

B. Interest Groups

Although political unawareness and organization problems plague the vast majority of voters, there are subsets of the constituency, such as organized advocacy groups, that are politically aware and relatively well organized.¹⁸² Political scientists James Snyder and Michael Ting argue that some “activist groups,” such as the Sierra Club or NAACP, “have the attention of large numbers of voters in many constituencies,” and therefore may potentially provide “the link between desired punishment strategies and voter actions.”¹⁸³ They argue that “[b]y coordinating voting behavior through publications, advertisements, or endorsements, such groups can tune the responses of voters to incumbent behavior over multiple elections.”¹⁸⁴ Undeniably, activist groups may solve some electoral accountability deficiencies—particularly, voters’

¹⁸² Evans, *Middle Doesn't Rule*, *supra* note , at 5-6.

¹⁸³ James M. Snyder Jr. & Michael M. Ting, *Interest Groups and the Electoral Control of Politicians*, 92 J. PUB. ECON. 482, 483 (2008).

¹⁸⁴ *Id.*

political unawareness, indifference, and coordination problems—in certain areas, and legislators do seem to pay attention to such groups.¹⁸⁵

However, activist groups are unlikely to serve as a significant force in the lawmaking rules context. First, it is unlikely that there are many activist groups whose agendas focus on ensuring compliance with the procedural rules constraining the legislative process. Because organized voter groups are highly susceptible to free-rider problems that can undermine their effectiveness, activist groups tend to be most effective when focused on specific, narrow issues.¹⁸⁶ As examples like the National Education Association, the Sierra Club, and the NAACP illustrate, these narrow issues are more likely to revolve around specific ideological and policy issues.¹⁸⁷ Even activist groups such as Common Cause or the Center for Responsive Politics that are more generally interested in the political process typically focus on areas such as elections,

¹⁸⁵ Evans, *Middle Doesn't Rule*, *supra* note , at 7 (arguing that members of Congress “pay particular attention to the preferences of issue publics,” advocacy groups, “and organized interests because they are an important source of campaign resources,” and because “[a]dvocacy groups engage in grassroots mobilization efforts that potentially can sway the attitudes of less politically aware constituents”).

¹⁸⁶ Block-Lieb, *supra* note , at 822-23.

¹⁸⁷ *Cf.* Evans, *Middle Doesn't Rule*, *supra* note , at 6-7 (suggesting that the organized advocacy groups tend to form around specific policy areas). This conclusion is also corroborated by research about the forces that influence congressional reform, which indicates that “advocacy organizations are activated by reform initiatives that directly affect the ability of individual groups to achieve their political and policy goals.” *See* Evans, *Politics of Congressional Reform*, *supra* note , at 516.

lobbying, and campaign finance, rather than on floor procedures and procedural rule following in the legislative process.¹⁸⁸

Second, as public choice scholars argue—in a different context —“voters’ ignorance of politicians’ behavior is not exclusively a function of their negligible incentive to obtain such information It is also a function of the cost of obtaining the relevant information, which may be prohibitive even for [those] who have a much higher benefit of obtaining this information.”¹⁸⁹ Unlike special interest groups that represent industries, activist groups typically have relatively limited financial resources.¹⁹⁰ Furthermore, due to the prevalence of legislative practices such as omnibus legislation, monitoring procedural rule violations may require particularly high monitoring costs.¹⁹¹

The combination of monitoring costs, limited financial resources, and narrow policy interests inevitably means that activist groups are likely to focus their resources on monitoring legislators’ policy votes, and in only a limited set of policy areas.¹⁹² It is therefore unlikely that activist groups will spend their

¹⁸⁸ See Evans, *Politics of Congressional Reform*, *supra* note , at 494-516; see also Center for Responsive Politics, Mission, <http://www.opensecrets.org/about/index.php> (last visited Nov. 12, 2010); Common Cause, About Common Cause, <http://www.commoncause.org/site/pp.asp?c=dkLNK1MQIwG&b=4764181> (last visited Nov. 12, 2010).

¹⁸⁹ Leeson, *supra* note , at 363.

¹⁹⁰ Snyder & Ting, *supra* note , at 483.

¹⁹¹ See *supra* Part II.B; see also Garrett & Vermeule, *supra* note , at 1300.

¹⁹² Given that good-government groups, such as Common Cause, the Center for Responsive Politics, and Taxpayers for Common Sense, often focus on money in politics, it is possible that

scarce monitoring resources on detecting violations of procedural rules in the legislative process.

Special interest groups representing corporate business interests, for example, Pharmaceutical Research and Manufacturers of America,¹⁹³ tend to have greater resources to monitor legislators' behavior, but are also unlikely to solve the monitoring problems regarding rules governing lawmaking. On the contrary, such special interest groups are more likely to favor less transparency and electoral accountability in the legislative process.¹⁹⁴ Indeed, to the extent that reelection-minded legislators need to cater to the demands of these interest groups,¹⁹⁵ this circumstance creates a powerful incentive to engage in procedural rule violations. In fact, a number of case studies and significant anecdotal evidence suggest that rent-seeking interest groups are often the primary beneficiaries of stealth legislation and irregularities in the legislative process.¹⁹⁶

other types of congressional rules, such as budgetary rules and some ethics rules, attract somewhat higher activist-group monitoring.

¹⁹³ See Snyder & Ting, *supra* note , at 483.

¹⁹⁴ See Block-Lieb, *supra* note , at 825-27 (discussing the aspects of the legislative process, such as omnibus legislation, that serve the interests of special interest groups); Evans, *Politics of Congressional Reform*, *supra* note , at 494, 516 (noting that special interest groups have been major opponents to congressional reforms in areas such as committee jurisdiction).

¹⁹⁵ See Block-Lieb, *supra* note , at 824, 831-32.

¹⁹⁶ See MANN & ORNSTEIN, *supra* note , at 217-18 (arguing that deviation from “regular order in Congress creates greater opportunities for parochial, special interest provisions to be added to legislation out of public view” and providing several examples); *see also* Seth Grossman,

To be sure, the extent to which interest groups dominate the legislative process, and the extent to which activist groups and special interest groups may cancel each other out, are matters of intense debate in the political science and political economy literature.¹⁹⁷ This Article expresses no opinion on this larger question. Rather, it argues that, in the context of the rules regulating lawmaking, interest groups are generally more likely to create an incentive to violate rules than to solve monitoring problems and induce rule following.¹⁹⁸

C. Policy Motivations

Advocates of greater trust in Congress's aptitude to act as a responsible constitutional decision maker often base their claim primarily on legislators' incentive to pursue good public policy.¹⁹⁹ This Article accepts the argument that legislators' policy motivations have an important impact on congressional

Tricameral Legislating: Statutory Interpretation in an Era of Conference Committee Ascendancy, 9 N.Y.U. J. LEGIS. & PUB. POL'Y 251, 272-88 (2006); Andrew J. Schwartzman et al., *Section 202(h) of the Telecommunications Act of 1996: Beware of Intended Consequences*, 58 FED. COMM. L.J. 581, 582-84 (2006); Charles Tiefer, *How To Steal a Trillion: The Uses of Laws About Lawmaking in 2001*, 17 J.L. & POL. 409, 442-47 (2001); Victor Goldfeld, Note, *Legislative Due Process and Simple Interest Group Politics: Ensuring Minimal Deliberation Through Judicial Review of Congressional Processes*, 79 N.Y.U. L. REV. 367, 368-69 (2004); Reynolds, *supra* note , at 508-09, 513-14, 518-19; E. Bolstad, *Earmark Tampering Suggested*, ANCHORAGE DAILY NEWS, Aug. 10, 2007, at B1.

¹⁹⁷ For overviews of these debates, see, for example, FARBER & FRICKEY, *supra* note , at 17-33; Block-Lieb, *supra* note , at 819-27, 830-38; Shaviro, *supra* note , at 42-45, 55-56, 87-92.

¹⁹⁸ Cf. Evans, *Politics of Congressional Reform*, *supra* note , at 516 (concluding that, for the most part, the interest-group community has been an impediment to congressional reforms).

¹⁹⁹ See, e.g., TUSHNET, *supra* note , at 65-66; Garrett & Vermeule, *supra* note , at 1288; Sinclair, *Can Congress Be Trusted?*, *supra* note , at 294-96.

decision making.²⁰⁰ It argues, however, that at least in the lawmaking rules context, this incentive is more likely to produce rule violations than rule following.

Legislators' motivation to create policy is derived from a wide range of personal goals.²⁰¹ In addition to ideology and a desire to make good public policy, the motivation to create policy is also induced by a desire to be an influential policymaker, to exhibit institutional power and increase one's prestige, to claim credit and satisfy constituents, and to attract financial support from interest groups.²⁰² All these interests combine into a powerful incentive to create policy and to pass legislation.²⁰³ The question, therefore, is how this strong incentive interacts with lawmaking rules.

Research by political scientists suggests that lawmaking rules can significantly impact policy outcomes.²⁰⁴ There is evidence, moreover, that members of Congress themselves are well aware of the important impact of

²⁰⁰ See Andrew D. Martin, *Congressional Decision Making and the Separation of Powers*, 95 AM. POL. SCI. REV. 361, 361-62 (2001); Shaviro, *supra* note , at 82, 85-86.

²⁰¹ Martin, *supra* note , at 362.

²⁰² Edward B. Hasecke & Jason D. Mycoff, *Party Loyalty and Legislative Success: Are Loyal Majority Party Members More Successful in the U.S. House of Representatives?*, 60 POL. RES. Q. 607, 607, 609 (2007); Martin, *supra* note , at 362; Shaviro, *supra* note , at 85-86, 93-94; Sinclair, *Can Congress Be Trusted?*, *supra* note , at 294-96.

²⁰³ See sources cited *supra* note .

²⁰⁴ See *supra* Part I.B.

legislative rules on legislative outcomes.²⁰⁵ Representative John Dingell, the longest-serving member of the House, has expressed—albeit in a slightly different context—a cognizance about the impact of procedures perhaps most bluntly: “I’ll let you write the substance ... and you let me write the procedure, and I’ll screw you every time.”²⁰⁶ Indeed, scholarship on congressional design of lawmaking rules suggests that “[w]hen lawmakers make decisions between rule alternatives, they typically consider the implications for policy.”²⁰⁷ Empirical research confirms, moreover, that the majority party indeed uses lawmaking rules, such as rules that restrict adding amendments during floor debate, to achieve more favorable policy outcomes, and that this strategy is often successful.²⁰⁸

The combination of the factors discussed thus far—legislators’ strong incentive to pass policy, the significant impact of lawmaking rules on policy

²⁰⁵ Cox, *supra* note , at 183-84; *see also* Bruhl, *Statutes To Set Legislative Rules*, *supra* note , at 397 (“Legislators realize that voting rules and other procedural details determine outcomes, and that is why they wrangle over such matters so fiercely, much to the befuddlement of outsiders.”); Theriault, *supra* note , at 11 (“Party leaders, who are primarily concerned with the outcome of a substantive vote, establish the best possible set of procedures to arrive at their preferred substantive outcome. The leaders use procedure to hardwire the final outcome.”).

²⁰⁶ *Regulatory Reform Act: Hearing on H.R. 2327 Before the Subcomm. on Admin. Law and Governmental Regulations of the H. Comm. on the Judiciary*, 98th Cong. 312 (1983) (statement of Rep. John Dingell) (discussing the impact of procedures imposed on agencies).

²⁰⁷ SCHICKLER, *supra* note , at 10, 261-63 (finding that policy considerations impact Congress’s decisions about designing and altering formal procedural rules); C. Lawrence Evans, *Legislative Structure: Rules, Precedents, and Jurisdictions*, 24 LEGIS. STUD. Q. 605, 605, 627 (1999) [hereinafter Evans, *Legislative Structure*].

²⁰⁸ *See generally* Monroe & Robinson, *supra* note .

outcomes, and legislators’ knowledge of this impact—leads to the conclusion that policy incentives should have considerable influence on Congress’s enforcement of these rules. When it comes to the lawmaking rules that constrain the legislative process, which by their very nature limit legislators’ ability to translate their policy preferences into legislation, the impact of policy motivations is clear: they create a strong incentive to deviate from the rules.²⁰⁹

Descriptive congressional scholarship suggests that this impact of policy interests on rule following may be particularly strong in the modern Congress.²¹⁰ As some congressional scholars suggest, in a different context, with “the ever-growing ideological polarization in Congress[,] [m]ore than ever before, lawmakers may have hard-and-fast views about the rightness of their policy agenda. The question of whether their policy agenda is constitutional may matter less to today’s lawmakers.”²¹¹

Even more germane for present purposes is congressional scholars Thomas Mann and Norman Ornstein’s observation that “[s]harp partisan differences on policy created an atmosphere [in Congress, and especially in the House,] in

²⁰⁹ Cf. McKelvey & Ordeshook, *supra* note , at 201 (“[I]nstitutions and rules ... are designed to attain some preferred set of outcomes. And, when such outcomes cannot be attained under them and when some set of persons possesses the appropriate means, those institutions and rules will either be modified or bypassed.”).

²¹⁰ MANN & ORNSTEIN, *supra* note , at 7.

²¹¹ Keith E. Whittington et al., *The Constitution and Congressional Committees: 1971-2000*, in THE LEAST EXAMINED BRANCH, *supra* note , at 396, 408 (suggesting that this may be one explanation for the steady decline in the number of constitutional hearings by all congressional committees but the judiciary committees).

which the legislative ends could justify any procedural means,”²¹² and in which procedural values are viewed as “impediments to the larger goal of achieving political and policy success.”²¹³

In short, legislators’ policy goals—even if they originate from purely ideological and public-regarding motivations—produce a strong incentive to violate lawmaking rules when such rules stand in the way of their policy preferences.²¹⁴ Notwithstanding the central impact of policy motivations on rule following, however, Part III.D argues that other powerful forces both exacerbate and complicate the influence of legislators’ policy motivations.

D. Parties and Leaders

Some scholars argue that the most promising enforcers of the rules that govern lawmaking are the majority party and its leaders.²¹⁵ This Article accepts the claim that political parties are a powerful force in Congress,

²¹² MANN & ORNSTEIN, *supra* note , at 7.

²¹³ *Id.* at 170-71.

²¹⁴ McKelvey & Ordeshook, *supra* note , at 201.

²¹⁵ Cox, *supra* note , at 172 (“If party leaders can expel members from legislative caucuses, deny them renomination, or deny them future office opportunities, then the majority party (or coalition) may be able externally to enforce a given set of rules.”); Philip Norton, *Playing by the Rules: The Constraining Hand of Parliamentary Procedure*, 7 J. LEGIS. STUD. 13, 29 (2001) (making a similar argument regarding the British parliament and noting that “[w]hen Labour MPs have appeared to challenge or, worse still, disobey the rules of the House, they have been slapped down by their leaders”).

especially in the House,²¹⁶ and that parties have an impact both on congressional decision making²¹⁷ and on congressional design of procedural rules.²¹⁸ It also agrees that party leaders have significant tools to enforce party discipline and to influence members' behavior,²¹⁹ and that this influence is particularly evident in members' procedural votes.²²⁰ This Article concedes, therefore, that party leaders can potentially induce compliance with lawmaking rules even when rules conflict with individual legislators' policy preferences.²²¹ Furthermore, as explained in Part II, the chambers' presiding officers, who are always members of the majority party, have a crucial role both in the application—or violation—of the rules and in Congress's

²¹⁶ See, e.g., Larry D. Kramer, *Putting the Politics Back into the Political Safeguards of Federalism*, 100 COLUM. L. REV. 215, 281 & n.263 (2000) (arguing that “the consensus today is that parties ... have, in fact, come back strong”).

²¹⁷ For more on the political science scholarship about the effects of parties on congressional decision making, see, for example, Cary R. Covington & Andrew A. Barga, *Comparing Floor-Dominated and Party-Dominated Explanations of Policy Change in the House of Representatives*, 66 J. POL. 1069, 1074, 1084-85 (2004); Cox, *supra* note , at 180-82; Steven S. Smith, *Positive Theories of Congressional Parties*, 25 LEGIS. STUD. Q. 193, 199 (2000).

²¹⁸ See, e.g., Evans, *Legislative Structure*, *supra* note , at 631-32; Evans, *Politics of Legislative Reform*, *supra* note , at 494, 508-11, 516. *But cf.* SCHICKLER, *supra* note , at 25, 259-61, 263 (conceding that, since the 1970s, party interests returned to prominence, but arguing that the importance of partisan interests to institutional design is greater in the House than in the Senate and that “even when majority party interests are important, these interests are rarely alone”); Sarah A. Binder, *Parties and Institutional Choice Revisited*, 31 LEGIS. STUD. Q. 513, 514 (2006) (suggesting that, “while it is premature to reject party-based accounts of procedural change, no single account best explains the politics of institutional change”).

²¹⁹ See Hasecke & Mycoff, *supra* note , at 609-10; William Hixon & Bryan W. Marshall, *Agendas, Side Issues, and Leadership in the US House*, 19 J. THEORETICAL POL. 83, 83-84, 85-88 (2007); Evans, *Middle Doesn't Rule*, *supra* note , at 10-12.

²²⁰ See Cox, *supra* note , at 183-84; Evans, *Middle Doesn't Rule*, *supra* note , at 12; Theriault, *supra* note , at 16.

²²¹ See Evans, *Middle Doesn't Rule*, *supra* note , at 12; Theriault, *supra* note , at 16.

enforcement mechanisms.²²² Thus, the majority party leaders in Congress, especially in the House, are arguably the most influential figures in determining Congress's compliance with lawmaking rules. The question, however, is how parties and their leaders use this power.

Just like individual legislators, congressional parties also pursue multiple goals.²²³ These include passing items on the party's agenda, helping members accomplish individual goals, achieving and maintaining majority status, and enhancing the party's image.²²⁴ All of these goals lead to a powerful motivation to pass legislation. In addition to the obvious collective party goal of passing the party agenda, rank-and-file members often pressure their leaders to enact legislation because it serves their personal policy and reelection goals.²²⁵ The party goals of maintaining majority status and enhancing party image also depend, to a significant extent, upon the party's success in enacting the legislative program on which it was elected and on fostering a distinct "party label" in terms of the policies for which the party stands.²²⁶

²²² Hartog & Monroe, *supra* note , at 2 (noting that "in the modern House and Senate, the Presiding Officer is always a member of the majority party").

²²³ See Hasecke & Mycoff, *supra* note , at 609.

²²⁴ *Id.*

²²⁵ John E. Owens & J. Mark Wrighton, Procedural Control and Majority Party Entrenchment in the U.S. House: An Explanation of Rules Restrictiveness Over Time 11 (Apr. 12, 2007) (unpublished manuscript), available at http://www.wmin.ac.uk/ssh/pdf/csd_owens_MPSA07_19Mar07.pdf.

²²⁶ *Id.*; see also Cox, *supra* note , at 187-88.

The combination of these goals creates strong pressures on majority party leaders to pass legislation and to push through the party's legislative agenda.²²⁷ These pressures result not only from incentives that parties create to induce their leaders to internalize the collective goals of the party,²²⁸ but also from party leaders' personal goals.²²⁹ Although legislative leaders have the same personal goals that motivate other legislators, the desire for power and prestige tend to be particularly pronounced in congressional and party leaders.²³⁰ Much more than in the case of rank-and-file members, legislative leaders' personal prestige often hinges on winning legislative victories.²³¹ These leaders' goal to appear effective and successful in passing the party policy agenda creates a strong incentive to pass legislation, which often overshadows other considerations.²³²

²²⁷ Owens & Wrighton, *supra* note , at 11.

²²⁸ Cf. SCHICKLER, *supra* note , at 10 (noting that parties create "leadership posts that are both attractive and elective, thereby inducing [their] leaders 'to internalize the collective electoral fate of the party'" (quoting GARY W. COX & MATHEW D. MCCUBBINS, *LEGISLATIVE LEVIATHAN: PARTY GOVERNMENT IN THE HOUSE* 132-33 (1993))).

²²⁹ Shaviro, *supra* note , at 83-84.

²³⁰ *Id.* at 102 ("Congressional leaders, including both party leaders and committee chairpersons, face stronger prestige ... incentives than rank and file members.").

²³¹ *Id.* at 83-84.

²³² *Id.* (arguing, for example, that "Wilbur Mills, the Chairman of the Ways and Means Committee from 1958 to 1974, who never lost a tax bill on the House floor, seemingly regarded his 'aura of invincibility' as more important than the content of legislation").

Majority party leaders have several tools to secure the passage of their party's legislative agenda,²³³ but a chief tool, particularly in the House, is the party leaders' control over legislative procedures.²³⁴ As John Owens and Mark Wrighton put it:

[M]ajority parties have well-earned reputations for crafting rules designed to protect their legislative agendas on the floor. Majority leaders can manipulate the consideration of legislation in any way that a majority of votes on the floor will support, and they have become very creative in writing rules that protect elements of their legislative agenda and/or provide cover for caucus members.²³⁵

Indeed, significant literature on congressional parties documents the means by which majority parties and their leaders manipulate procedural rules to facilitate the passage of their party's agenda.²³⁶

Legislative leaders can also advance the majority party's agenda through the enforcement, or lack of enforcement, of legislative rules.²³⁷ Decisions about the enforcement of lawmaking rules in the House appear to be particularly influenced by partisan considerations. Recent empirical research suggests that,

²³³ See Hixon & Marshall, *supra* note , at 85.

²³⁴ *Id.* at 85-86.

²³⁵ Owens & Wrighton, *supra* note , at 9.

²³⁶ Cox, *supra* note , at 180; Hixon & Marshall, *supra* note , at 85-86; Monroe & Robinson, *supra* note , at 217-20; Evans, Middle Doesn't Rule, *supra* note , at 12.

²³⁷ Hartog & Monroe, *supra* note , at 1-2 (arguing that "Presiding Officers' rulings [on points of order] in the House and Senate ... can play an important role in both chambers' legislative processes, sometimes having major impacts on legislative outcomes," and that "in both chambers, chairs' rulings have important implications for parties' agendas").

in the House, “perhaps without exception, the chair rules [on points of order] in a way favored by the majority party,” and that in the relatively few cases in which the Chair’s rulings are appealed, the majority party always prevails.²³⁸ Furthermore, points of order—Congress’s chief enforcement mechanism for lawmaking rules—are often waived in the House by special rules written by the Rules Committee.²³⁹ Since the 1970s, the Rules Committee has increasingly served as an “agent” of the majority party,²⁴⁰ including granting waivers that circumvent House rules in order to serve the majority party’s policy agenda.²⁴¹ These special rules are typically approved on the floor “on a strictly party line vote.”²⁴²

Legislative leaders have strong incentives to enforce the types of rules, such as restrictive rules, that serve the majority party’s policy and political interests,

²³⁸ *Id.* at 12. Partisan influence on the Chair’s enforcement of procedural rules in the Senate is less clear. *Compare, e.g., id.* at 2 (suggesting that “substantial partisanship is also at play in Senate chair’s rulings”), *with* Michael S. Lynch & Tony Madonna, *The Vice President in the U.S. Senate: Examining the Consequences of Institutional Design* 29 (Jan. 25, 2010) (unpublished manuscript), *available at* <http://ajmadonn.myweb.uga.edu/VicePresident.pdf> (finding that “[i]n the post-parliamentarian era, senators [serving in the Chair] were likely to issue favorable rulings to majority party members 73.6 percent of the time.... [T]he predicted probability of the vice president issuing a favorable ruling to the majority party was [roughly 60] percent”), *and* Anthony J. Madonna, *Informational Asymmetries, the Parliamentarian, and Unorthodox Procedural Choice in the United States Senate* 2, 19 (Mar. 4, 2010) (unpublished manuscript), *available at* <http://ajmadonn.myweb.uga.edu/Parliamentarian.pdf> (arguing that the emergence of the Senate’s parliamentarian in the 1920s decreased the impact of partisanship in presiding officers’ rulings).

²³⁹ *See* MARSHALL, *supra* note , at 108-09.

²⁴⁰ *Id.* at 49-59, 77-82, 118-21.

²⁴¹ *Id.* at 108-09, 112-14, 121.

²⁴² Monroe & Robinson, *supra* note , at 218-19.

and they often succeed in doing so.²⁴³ In this regard, scholars who argue that majority party leaders can ensure compliance with lawmaking rules are correct.²⁴⁴ At the same time, however, these scholars seem to overlook the fact that party leaders also have considerable power and incentives to violate rules that impede the passage of the majority party's agenda.²⁴⁵ In fact, the same incentives that make party leaders vigorously enforce rules that serve their party's interests become powerful incentives to violate rules that stand in the way of party interests.

The 2003 Medicare Bill is a clear example. This bill was the major social policy initiative of President Bush,²⁴⁶ and Republican leaders in Congress "hoped that adoption of the measure would reduce or even neutralize the long-term Democratic advantage on health issues with the public."²⁴⁷ Passing this bill was therefore a top priority for the majority party and its leaders.²⁴⁸

²⁴³ See, e.g., Cox, *supra* note , at 187 ("Typically, the effect of rules is most visible in conjunction with a majority party or coalition's efforts to push through its legislative agenda against opposition.").

²⁴⁴ See *id.* at 172.

²⁴⁵ Theoretically, party leaders may have an incentive to enforce procedural rules, even when these rules do not facilitate the passage of the majority party's agenda, if they believe that procedural violations will jeopardize the party image and risk their chances of maintaining majority status. See Norton, *supra* note , at 21-22 (providing anecdotal evidence from England). As Part III.A already established, however, because most procedural violations are relatively insulated from electoral accountability, it is unlikely that fear from voters' punishment can override the powerful motivation to pass the party's agenda.

²⁴⁶ MANN & ORNSTEIN, *supra* note , at 1.

²⁴⁷ Evans, Middle Doesn't Rule, *supra* note , at 11.

²⁴⁸ MANN & ORNSTEIN, *supra* note , at 1.

Consequently, they employed a variety of more or less legitimate strategies to pass the bill, including exclusion of minority party members from the House-Senate conference committee and insertion of major provisions that were rejected during earlier floor debates into the conference report.²⁴⁹ There were even allegations that the majority party leaders tried to secure the necessary votes for passing this bill through threats and bribes.²⁵⁰ Finally, as Part II.D elaborated, when following the established norm that limits votes to fifteen minutes would have meant defeat of the bill, House leaders simply, and blatantly, breached it.²⁵¹

As the DRA example from Part II.C suggests, moreover, party interests may create strong incentives to violate even constitutional rules when compliance would mean defeat of a bill that is important to the majority party.²⁵² The DRA's passage was highly contentious.²⁵³ It passed the Senate through Vice President Cheney's tie-breaking vote²⁵⁴ and the House by a 216-214 vote through heavy pressure by majority party leaders.²⁵⁵ Hence, when it was

²⁴⁹ See *id.* at 1-4, 6, 137-38; Houck, *supra* note , at 11-12.

²⁵⁰ See MANN & ORNSTEIN, *supra* note , at 1-4, 6.

²⁵¹ See *id.* at 1-4; Evans, Middle Doesn't Rule, *supra* note , at 11-12; see also *supra* Part II.D.

²⁵² See *supra* Part II.C.

²⁵³ See Michael Gilfix & Bernard A. Krooks, *Asset Preservation and Long-Term Care: Assault in the Name of Deficit Reduction*, 20 PROB. & PROP. 34, 34 (2006).

²⁵⁴ DEAN, *supra* note , at 51.

²⁵⁵ *Id.* at 52.

discovered that the bill did not pass both chambers in the same form, majority party leaders did not want to take the chance that the bill would not pass another vote in the House.²⁵⁶ Instead, the legislative leaders simply ignored the constitutional bicameralism requirement and signed the enrolled bill in attestation that the bill had duly passed both houses, despite their knowledge that the bill was never passed in identical form by both chambers.²⁵⁷

Admittedly, the instances of both the DRA and the Medicare Bill occurred during Republican control of Congress, but significant evidence confirms that the procedural “maneuvering behind the Medicare ... legislation was neither unique to [this bill] nor to the 108th Congress,”²⁵⁸ and that since the 1980s both parties have been increasingly guilty of deviations from lawmaking rules and process abuses when they controlled Congress.²⁵⁹ Indeed, the recent

²⁵⁶ *Id.* at 52-53.

²⁵⁷ *See id.*; *supra* Part II.C.

²⁵⁸ Houck, *supra* note , at 14.

²⁵⁹ For a detailed account, see MANN & ORNSTEIN, *supra* note , at 7-9, 67-95, 100-07, 169-75, 212-16, 253-62 (detailing process abuses by both parties between the late 1980s and 2008). For more on process abuses by the Democratic majority that controlled Congress in the early 1990s, see Kimberly Coursen et al., *Restoring Faith in Congress*, 11 YALE L. & POL’Y REV. 249, 263-64, 266, 269-70 (1993); Gerald B.H. Solomon & Donald R. Wolfensberger, *The Decline of Deliberative Democracy in the House and Proposals for Reform*, 31 HARV. J. ON LEGIS. 321, 321-22, 349, 351-63 (1994). For more on process abuses by the Republican majority that controlled Congress between 1994 and 2006, see HOUSE RULES COMM. MINORITY OFFICE, 108TH CONG., BROKEN PROMISES: THE DEATH OF DELIBERATIVE DEMOCRACY: A CONGRESSIONAL REPORT ON THE UNPRECEDENTED EROSION OF THE DEMOCRATIC PROCESS IN THE 108TH CONGRESS 1-2 (2005), *available at* <http://web.archive.org/web/20050511221002/http://www.democrats.house.gov/docs/brokenpromises.pdf>; Sinclair, *Congress Deliberates and Legislates*, *supra* note , at 55-56, 59-67, 72, 75-76. Finally, for more on process abuses by the Democratic majority that controlled Congress from 2007 to 2010, see Committee on Rules-

history of Congress suggests that “the inclination to pass bills important to the majority party quickly trumps previous assurances of openness and fairness made by the incoming majority.”²⁶⁰

E. Institutional Rivalry and Institutional Interests

The assumption about institutional competition and institutional interests is illustrated by the government’s argument in *United States v. Munoz-Flores*. In that case, the government argued that courts should not review Origination Clause²⁶¹ challenges because “the House has the power to protect its institutional interests by refusing to pass a bill if it believes that the Origination Clause has been violated.”²⁶² Although the full Court did not embrace this position,²⁶³ this argument was essentially accepted by Justice Stevens in his concurring opinion. Justice Stevens opined that “the House is in an excellent position to defend its origination power,”²⁶⁴ and that “there is every reason to

Republicans, <http://rules-republicans.house.gov/ShortTopics/Default.aspx?id=1> (last visited Nov. 12, 2010) (website of the minority members of the House Rules Committee that details the majority’s procedural abuses).

²⁶⁰ Owens & Wrighton, *supra* note , at 11.

²⁶¹ U.S. CONST. art. I, § 7, cl. 1 (“All Bills for raising Revenue shall originate in the House of Representatives.”).

²⁶² *United States v. Munoz-Flores*, 495 U.S. 385, 392 (1990).

²⁶³ *Id.* at 401.

²⁶⁴ *Id.* at 403 (Stevens, J., concurring).

anticipate that Representatives ... will jealously guard [this] power.”²⁶⁵ While acknowledging that “the House has an interest in upholding the entire Constitution, not just those provisions that protect its institutional prerogatives,” Justice Stevens added that “even if the House should mistake its constitutional interest generally, it is unlikely to mistake its more particular interest in being powerful.”²⁶⁶

Justice Stevens’s concurrence was carefully limited to only the Origination Clause and did not address other lawmaking requirements.²⁶⁷ However, some opponents of judicial review of the legislative process argue that the assumption that institutional rivalry provides Congress sufficient incentives to police itself applies to most other constitutional and nonconstitutional lawmaking rules as well.²⁶⁸ Jesse Choper, for example, argues that lawmaking rules “ordinarily concern protections for one house of Congress,” and that the

²⁶⁵ *Id.* at 404.

²⁶⁶ *Id.* at 404 n.2 (internal quotations omitted). Justice Stevens agreed with the Court that “the possibility of legislative enforcement does not supply a prudential, nonconstitutional justification for abstaining from constitutional interpretation,” but argued that “this possibility is relevant to the substantive task of interpreting § 7 itself.” *Id.*

²⁶⁷ *Id.* at 404, 406. Interestingly, in many of his other decisions Justice Stevens has been “the most ardent proponent of a ‘due process of lawmaking’ philosophy” in the Court. Dan T. Coenen, *The Rehnquist Court, Structural Due Process, and Semisubstantive Constitutional Review*, 75 S. CAL. L. REV. 1281, 1286, 1385 (2002); *see, e.g.*, *Bowsher v. Synar*, 478 U.S. 714, 757 n.23 (1986) (Stevens, J., concurring); *Fullilove v. Klutznick*, 448 U.S. 448, 548-554 & nn.24 & 26-28 (1980) (Stevens, J., dissenting); *Ill. Bd. of Elections v. Socialist Workers Party*, 440 U.S. 173, 189-90 (1979) (Stevens, J., concurring); *Del. Tribal Bus. Comm. v. Weeks*, 430 U.S. 73, 97-98 (1977) (Stevens, J., dissenting); Goldfeld, *supra* note , at 405-08.

²⁶⁸ Choper, *supra* note , at 1505-07.

Senate and House have sufficient incentives to protect their interests against each other.²⁶⁹

Part III.E argues, however, that institutional interests and institutional rivalry are not an effective mechanism to ensure rule following in the legislative process. First, while the Origination Clause and bicameralism requirement indeed implicate the House's prerogatives vis-à-vis the Senate, many other rules have no bearing on the division of powers between the two chambers. The violation of rules such as voting and quorum and the three-reading requirement in one chamber does not impact the prerogatives and institutional interests of the other chamber. Hence institutional rivalry cannot ensure compliance with these rules.

The major problem with the institutional rivalry argument, however, is that it too often treats legislative chambers as an "it" rather than a "they."²⁷⁰ The argument assumes that the Senate and the House each act as a "personified rational actor," rather than a large multi-member body, whose members' interests "often, and perhaps systematically," diverge from their chamber's institutional interests.²⁷¹

²⁶⁹ *Id.*

²⁷⁰ See generally Kenneth A. Shepsle, *Congress is a "They," Not an "It": Legislative Intent as Oxymoron*, 12 INT'L REV. L. ECON. 239 (1992).

²⁷¹ Eric A. Posner & Adrian Vermeule, *Constitutional Showdowns*, 156 U. PA. L. REV. 991, 1034-35 (2008) (making this claim in a slightly different context and noting that "this is a

To be sure, institutional concerns sometimes do converge with individual legislators' interests.²⁷² A motivation that may potentially reinforce legislators' interest in protecting their chamber's institutional prerogatives is their interest in personal power and prestige. This Article does not dispute that personal power is an important goal for legislators;²⁷³ nor does it deny that legislators' interest in greater personal influence and prestige may theoretically translate into an interest in belonging to a stronger, more influential legislative chamber.

The problem, however, is that although all of the 435 Representatives and 100 Senators have some stake in their chamber's institutional standing, they also have more direct and powerful personal interests that are often in conflict with their institutional interests.²⁷⁴ Motivations, such as pursuing

standard assumption in constitutional theory"). To be fair, Justice Stevens did relate his argument to legislators' personal interests, noting that taxes "rarely go unnoticed at the ballot box," and therefore assuming that "Representatives subject to reelection every two years will jealously guard their power over revenue-raising measures." *Munoz-Flores*, 495 U.S. at 404. However, this Section argues that reelection motivations—and other legislators' motivations—are more likely to conflict with institutional interests than reinforce them. Moreover, even if Justice Stevens is correct that taxes are the exception to voters' general ignorance and indifference, his argument applies only to the Origination Clause.

²⁷² See Devins, *supra* note , at 398, 404, 413-14 (arguing that the Watergate era was a rare exception in which "members of Congress gained personal advantage by standing up for legislative prerogatives," because "[v]oters wanted Congress to check a too powerful President—to prevent future Watergates and Viet Nams," but that today "members of Congress see little personal gain" in defending Congress's institutional turf).

²⁷³ See, e.g., Shaviro, *supra* note , at 82.

²⁷⁴ Devins, *supra* note , at 400; Daryl J. Levinson, *Empire-Building Government in Constitutional Law*, 118 HARV. L. REV. 915, 926-32 (2005); cf. Donald L. Davison et al., *The Behavioural Consequences of Institutional Rules: Republicans in the US House*, 11 J. LEGIS. STUD. 38, 43-44 (2005) (asking legislators about their goals and finding that the vast majority of legislators favor other goals, such as solving national policy problems or servicing their constituents, over "restoring public confidence in Congress").

policy and reelection, often conflict with institutional interests.²⁷⁵ Because it is unlikely that voters reward legislators for aggressively protecting their chamber's power vis-à-vis the other chamber,²⁷⁶ legislators are unlikely to block the passage of a law that advances their, or their constituents', interests in order to defend their chamber's prerogatives.²⁷⁷

Furthermore, legislators have powerful incentives to prefer party loyalty over institutional loyalty because parties significantly impact legislators' ability to pursue their personal goals. Due to party leaders' control over the legislative agenda, parties are particularly instrumental to lawmakers' ability to pursue their policy goals, and there is evidence that party leaders do in fact schedule members' bills to reward party loyalty.²⁷⁸ By providing campaign funds and other essential campaign resources, parties are also important for legislators' reelection, and party leaders use their influence over these resources as well to ensure party loyalty.²⁷⁹ Furthermore, "in the highly

²⁷⁵ Davison et al., *supra* note , at 43-44.

²⁷⁶ If voters today are unlikely to reward lawmakers for defending Congress's prerogatives vis-à-vis the President, Devins, *supra* note , at 414, it is even less likely that voters care about the separation of powers between the two chambers.

²⁷⁷ *Cf. id.* at 400 (noting that "members of Congress regularly tradeoff their interest in Congress as an institution for their personal interests—most notably, reelection and advancing their (and their constituents') policy agenda").

²⁷⁸ See Hasecke & Mycoff, *supra* note , at 610, 615; Evans, Middle Doesn't Rule, *supra* note , at 11-12.

²⁷⁹ See Kramer, *supra* note , at 281-82; Evans, Middle Doesn't Rule, *supra* note , at 11-12. *But cf.* Richard Briffault, *The Political Parties and Campaign Finance Reform*, 100 COLUM. L. REV. 620, 627-33, 644-47 (2000) (discussing parties' growing role in funding campaigns and

polarized two-party system currently dominating national politics, a member's political success depends more on the fortunes of her particular party than on the stature of Congress."²⁸⁰

Even from the perspective of their personal power and prestige goals, lawmakers have a strong motivation to prefer party loyalty over institutional loyalty. Legislators' personal power goals are more directly, and more often, translated into a personal interest in committee assignments and leadership positions in their chamber than into concerns about their chamber's power.²⁸¹ In the modern Congress, assignments to committees and to committee leadership positions are very much controlled by party leaders, who use party loyalty as a major assignment criterion.²⁸² Finally, as Part III.D established and as the DRA case illustrates, even chamber leaders have strong incentives to

noting that parties could seek to leverage their funds to induce a legislator to take certain positions on pending legislative issues, but arguing that "in practice, those who argue that party money does not present a serious danger of undue party influence over candidates may be right").

²⁸⁰ William P. Marshall, *Eleven Reasons Why Presidential Power Inevitably Expands and Why It Matters*, 88 B.U. L. REV. 505, 518 (2008).

²⁸¹ Levinson, *supra* note , at 927-29. On legislators' strong interest in committee assignments, see Davison et al., *supra* note , at 42 (presenting results of a survey finding that members from both parties see their specific committee and subcommittee assignments as important instruments that enable them to achieve their personal goals, and wish to be either the chair or ranking member on a committee in order to advance their goals); Elizabeth Garrett, *Preferences, Laws, and Default Rules*, 122 HARV. L. REV. 2104, 2118-19 (2009) (book review) ("Members of Congress vie for assignments to committees with jurisdiction over policy in which they take a strong interest, either because of personal preferences, constituent interests, the potential for influence within the legislature, or some combination.").

²⁸² Cox, *supra* note , at 181; Hasecke & Mycoff, *supra* note , at 610; Evans, *Middle Doesn't Rule*, *supra* note , at 11-12.

prefer party loyalty over protecting their chamber's prerogatives. All this leads to the conclusion that "party loyalty [often] trumps institutional concerns."²⁸³

Indeed, in addition to individual legislators' interests, parties and partisan interests also complicate and undermine the institutional rivalry argument. As Daryl Levinson and Richard Pildes argue—in a slightly different context, "[i]ntraparty cooperation ... smoothes over branch boundaries."²⁸⁴ This, in turn, suppresses "the political dynamics that were supposed to provide each branch with a 'will of its own,'" and undermines the Madisonian assumption that departmental "[a]mbition [will] counteract ambition."²⁸⁵ The exceptionally strong, cohesive, and polarized parties of the modern Congress make the likelihood of cross-chamber, intra-party cooperation that undermines chamber rivalry even more likely, at least when both chambers are controlled by the same party.²⁸⁶ Furthermore, even under a divided government, the sharp partisan polarization in Congress makes intra-chamber bipartisan cooperation,

²⁸³ Marshall, *supra* note 280, at 518.

²⁸⁴ Daryl J. Levinson & Richard H. Pildes, *Separation of Parties, Not Powers*, 119 HARV. L. REV. 2311, 2329 (2006).

²⁸⁵ *Id.* at 2313 (internal quotation marks omitted); *see also* Kramer, *supra* note , at 268-87 (similarly arguing that party cooperation transcends federal-state institutional boundaries, and that this undermines the traditional "political safeguards of federalism" assumption); Fabrice E. Lehoucq, *Can Parties Police Themselves? Electoral Governance and Democratization*, 23 INT'L POL. SCI. REV. 29, 29 (2002) (similarly arguing, in the electoral governance context, "that the classical theory" about separating powers between the executive and the legislature "breaks down when the same party controls the executive and the legislature").

²⁸⁶ Levinson & Pildes, *supra* note , at 2315-16, 2332-38.

which is often necessary to assert the chamber's prerogatives vis-à-vis other government branches, much less likely.²⁸⁷

Admittedly, not everyone agrees with Levinson and Pildes's strong claim that the current American system of separation of powers is more properly characterized as "separation of parties, not powers,"²⁸⁸ or with Neal Devins's even bolder conclusion that "[f]or those who embrace a constitutional design in which ... 'ambition must be made to counteract ambition,' today's system of checks and balances is an abject failure."²⁸⁹ However, there is strong support in the congressional scholarship at least to the more modest claim that legislators' willingness to protect their institutional prerogatives is relatively weak in the modern Congress,²⁹⁰ and that institutional interests "usually play second fiddle

²⁸⁷ Devins, *supra* note , at 406-15.

²⁸⁸ Levinson & Pildes, *supra* note , at 2311, 2315-16, 2329.

²⁸⁹ Devins, *supra* note , at 415; *see* Posner & Vermeule, *supra* note , at 1035-36 (agreeing that "the separation of powers system functions differently in times of unified or divided government," but arguing that "it goes too far to claim that the American constitutional system displays 'separation of parties, not powers'; rather, it displays both separation of powers and parties in a complicated interaction"); Richard A. Epstein, *Why Parties and Powers Both Matter: A Separationist Response to Levinson and Pildes*, 119 HARV. L. REV. F. 210, 210, 213 (2006), <http://www.harvardlawreview.org/media/pdf/epstein.pdf> (conceding that "[i]t is futile to argue that political parties do not influence relations between the legislative and executive branches" and that "[t]he greater the political cohesion, the less critical separation of powers becomes," but arguing that "Professors Levinson and Pildes have too much faith that party unity renders structural obstacles unimportant").

²⁹⁰ *See* MANN & ORNSTEIN, *supra* note , at xi-xii, 146-49, 215; Devins, *supra* note , at 408-15; Louis Fisher, *Congressional Abdication: War and Spending Powers*, 43 ST. LOUIS U. L.J. 931, 931-32 (1999); Levinson, *supra* note , at 926-32, 951-59; Marshall, *supra* note , at 518-19, 521; Patricia Wald & Neil Kinkopf, *Putting Separation of Powers into Practice: Reflections on Senator Schumer's Essay*, 1 HARV. L. & POL'Y REV. 41, 43-52 (2007).

to more parochial goals, that is, to partisanship or the narrow interests of particular members and constituencies.”²⁹¹

In short, whenever the passage of a bill serves legislators’ individual or party interests, it is unlikely that institutional interests and institutional rivalry are sufficiently strong to ensure rule following in the congressional legislative process. Furthermore, as Part III.F argues, some institutional rivalry—namely, of Congress vis-à-vis the President—may in fact create an incentive to violate lawmaking rules.

F. Presidential Veto Power

While this Article focuses on Congress, the President also has the potential power to enforce the law of congressional lawmaking. At least as far as the constitutional rules are concerned, the President arguably has a duty to refuse to sign bills that were enacted in violation of these rules.²⁹² Hence, Part III.F examines whether fear of a presidential veto might serve as a potential motivation for legislators to avoid procedural rule violations. It argues that the

²⁹¹ Evans, *Politics of Congressional Reform*, *supra* note , at 494, 511, 516.

²⁹² *See* Field v. Clark, 143 U.S. 649, 669 (1892). *But cf.* Cass & Strauss, *supra* note , at 21-25 (arguing, in a different context, that the President is not obliged to veto legislation that has one or two provisions he believes to be unconstitutional, and that the President falls short of his obligation to the Constitution only when he “signs a law that he believes, in its core provisions, so fundamentally violates the Constitution that he cannot with a straight face declare its constitutional merits outweigh its flaws”).

presidential veto power is unlikely to induce congressional rule following, and may in fact have the opposite effect in certain circumstances.

Presidential enforcement of lawmaking rules rests on a single, crude enforcement mechanism: the President's power to veto the bill. This enforcement mechanism is contingent upon the President's ability to detect the rule violation before signing the bill and on the President's willingness to veto an entire bill merely for procedural violations in its enactment process. Both of these conditions for presidential enforcement can be easily manipulated by Congress.

First, by enacting massive omnibus bills through expedited procedures, legislators can significantly reduce the President's capacity to detect violations in the legislative process. This possibility is clearly illustrated by the Farm Bill example in which the President failed to notice that the bill presented to him was missing an entire 34-page section.²⁹³

Second, as the DRA example illustrates, even when the President is well aware of the procedural rule violation, the President may lack the will to use her veto power to ensure compliance with lawmaking rules.²⁹⁴ As long as the bill's content serves the President's policy and political interests, it is unlikely

²⁹³ See *supra* Part II.B.

²⁹⁴ See *supra* Part II.C.

that the President will choose to veto a bill merely for procedural violations.²⁹⁵ Scholarship about presidential vetoes suggests that while a variety of factors influence Presidents' veto decisions, one of the most important is the extent to which the President finds the legislation's content objectionable.²⁹⁶ As one empirical study found, "[t]o a substantial degree, presidential vetoes are a direct and predictable consequence of congressional behavior and of the kind of legislation Congress passes."²⁹⁷ Thus, by making the content of legislation more attractive to the President, legislators can undercut the President's will to enforce procedural lawmaking rules.²⁹⁸

Furthermore, even if legislators fail to undermine the President's capacity or will to enforce lawmaking rules, the impact of presidential enforcement is also limited by the congressional power to override the President's veto by a supermajority vote.²⁹⁹

It appears, therefore, that the presidential veto power is not likely to create a significant incentive for legislators to avoid procedural rule violations. Instead,

²⁹⁵ Gersen & Posner, *supra* note , at 579.

²⁹⁶ John B. Gilmour, *Institutional and Individual Influences on the President's Veto*, 64 J. POL. 198, 202, 212, 216 (2002).

²⁹⁷ *Id.* at 212.

²⁹⁸ Gersen & Posner, *supra* note , at 579 (“[E]ven if the President were (somehow) fifty percent more likely to veto legislation that failed to satisfy relevant [lawmaking] rules, Congress could simply adjust the content of legislation to make it more attractive to the President.”).

²⁹⁹ *Id.*

the existence of the presidential veto power may motivate legislators to create legislative practices that undermine the President's ability to veto their preferred legislation, whether on content or procedural grounds. These practices, in turn, often entail deviating from the rules governing the legislative process.³⁰⁰ A prime example is lawmakers' "propensity" for inserting nongermane, substantive riders into omnibus appropriations bills,³⁰¹ despite the long-standing rules that prohibit attaching such provisions to appropriations bills.³⁰² Because a presidential veto of omnibus appropriation bills poses "the specter of government shutdown," and is therefore much less likely, legislators have long been using nongermane riders as a means to circumvent the President's power to veto objectionable legislation.³⁰³ Hence, the desire to avoid a presidential veto may actually create an incentive to violate lawmaking rules.

³⁰⁰ Cf. Cass & Strauss, *supra* note , at 22 ("The practical political reality is that Congress, ignoring common precepts like 'single subject' rules, frequently deploys statutory complexity as a weapon against the veto.").

³⁰¹ Diane-Michele Krasnow, *The Imbalance of Power and the Presidential Veto: A Case for the Item Veto*, 14 HARV. J.L. & PUB. POL'Y 583, 584 (1991).

³⁰² Sandra Beth Zellmer, *Sacrificing Legislative Integrity at the Altar of Appropriations Riders: A Constitutional Crisis*, 21 HARV. ENVTL. L. REV. 457, 505-06 (1997).

³⁰³ Krasnow, *supra* note , at 584, 597, 606, 612; Zellmer, *supra* note , at 527; see also J. Gregory Sidak & Thomas A. Smith, *Four Faces of the Item Veto: A Reply to Tribe and Kurland*, 84 NW. U. L. REV. 437, 449 (1990) ("Legislators often incorporate nongermane bills into larger legislative proposals, knowing that the impracticality of vetoing the entire bill may ensure that nongermane provisions become law.").

G. Ethical and Noninstrumental Motivations

Parts III.A-F focused mainly on instrumental or goal-seeking motivations; however, some scholars argue that legislators’ “willingness to play by the rules also has an ethical underpinning” because legislators “are constrained by a belief system as well as by a purely rational assessment of political cost.”³⁰⁴ Others have suggested that internalization is an additional noninstrumental force that may potentially influence legislators’ compliance with rules.³⁰⁵ The argument is that, over the course of time, some legal constraints become so internalized that “the necessity of enforcement may, except to guard against outliers, disappear.”³⁰⁶ A related noninstrumental force mentioned in the scholarship is canonization. A certain text becomes canonical when the relevant community—in this case, the legislature—has “a certain positive and reverential attitude toward that text such that it is largely unthinkable to imagine its modification or violation.”³⁰⁷

This Article does not deny that ethical and noninstrumental motivations also influence legislators, and that such considerations may induce rule following in the legislative process. In fact, this view finds support in social psychology research on rule following that argues that people’s compliance with rules is

³⁰⁴ Norton, *supra* note , at 29.

³⁰⁵ Schauer, *supra* note , at 475.

³⁰⁶ *Id.* at 475 & n.22.

³⁰⁷ *Id.* at 473.

not merely a function of sanctions and incentives.³⁰⁸ This research suggests that noninstrumental factors, rooted in social relationships and ethical judgments, may also induce people to become self-regulatory and to take responsibility for rule following onto themselves.³⁰⁹ The question, however, is whether these ethical and noninstrumental forces are powerful enough to override legislators' competing motivations to violate lawmaking rules.

One problem with noninstrumental forces such as canonization and internalization is that it is unlikely that most lawmaking rules reach a degree of internalization and reverence that secures them from violation temptations. As for canonization, the only lawmaking rules that may arguably achieve such a sacred status are the constitutional bicameralism and presentment requirements.³¹⁰ Internalization also probably occurs only with the most time-honored rules, such as the constitutional procedural rules or the filibuster in the Senate.³¹¹

In England, for example, arguments about legislators internalizing the parliamentary rules are based on the fact that parliamentary procedures have

³⁰⁸ For a good overview of this scholarship, see TYLER, *supra* note , at 269-94.

³⁰⁹ *Id.* at 270-71.

³¹⁰ *Cf.* Schauer, *supra* note , at 473 (suggesting that in the United States, the Constitution, or at least the First Amendment, might have such a canonized status).

³¹¹ *Cf.* Bach, *supra* note , at 755 (“Senators may be willing to ignore, waive, or violate most of their rules, but they give up their cherished right to unlimited debate only in return for certain knowledge of what they are gaining in return. Some rules are more important than others, and the debate rules are most important of all.”).

been a well-entrenched feature of the British political system for many centuries.³¹² For example, England's three-reading rule has been considered "an old-established practice" since the sixteenth century.³¹³ Furthermore, a distinct feature of the British parliamentary system is that legislators "are socialised into existing procedures. New entrants to a legislature, as various studies have shown, undertake a period of apprenticeship and learning, a process inculcating support for institutional rules."³¹⁴ And yet, there is evidence that even in the "mother of parliaments" the rules are not so internalized as to make them invulnerable to partisan, ideological, or personal temptations.³¹⁵

If this is the case in the British Parliament, it is hard to believe that the situation is much better in the younger, sharply polarized, and partisan U.S.

³¹² Norton, *supra* note , at 18-21.

³¹³ *Id.* at 19.

³¹⁴ *Id.* at 21, 27.

³¹⁵ See Donald D. Searing, *Rules of the Game in Britain: Can the Politicians Be Trusted?*, 76 AM. POL. SCI. REV. 239, 240, 255 (1982) (examining the views of more than six hundred members of Parliament and candidates toward the most fundamental democratic "rules of the game," and finding that "politicians' attitudes towards the rules of the game ... are based on political values and partisan advantage.... In sum, rules of the game are pushed and pulled by political forces that shape politicians' responses to the rules while having the potential to undermine the politicians' commitments"). For recent examples of grave violations of parliamentary rules in the British Parliament, see, for example, *Lords Vote To Suspend Two Peers*, BBC NEWS, May 21, 2009, http://news.bbc.co.uk/2/hi/uk_news/politics/8060003.stm (reporting a case in which House of Lords members were found to be willing to change laws in exchange for cash); cf. John F. Burns, *Beneath a Scandal, Deeper Furies*, N.Y. TIMES, May 24, 2009, at WK1 (arguing that the recent expense abuses in the House of Commons are only the tip of the iceberg in the contemporary British Parliament and describing other problems, including in the legislative process).

Congress. The House, in particular, is currently characterized, as we have seen, by “an atmosphere in which the legislative ends could justify any procedural means.”³¹⁶ In the Senate as well, when Senators have to decide whether a lawmaking rule has been violated, “most Senators appear to base their votes more on policy and political considerations than on a concern for procedural consistency and regularity.”³¹⁷

Even the filibuster procedure, which is perhaps the most venerated and internalized of all Senate rules,³¹⁸ is far from immune to instrumental considerations.³¹⁹ One study has found, for example, that “the votes of Senators on proposals to alter Senate Rule XXII [the provision specifying cloture requirements for ending filibusters] are driven by short-term policy considerations, rather than by broader principles about the deliberative benefits of extended debate.”³²⁰

Moreover, as the DRA example from Part II suggests, even the constitutional bicameralism requirement is vulnerable when the motivation for

³¹⁶ MANN & ORNSTEIN, *supra* note , at 7.

³¹⁷ Bach, *supra* note , at 741.

³¹⁸ *Id.* at 755.

³¹⁹ See Evans, *Politics of Congressional Reform*, *supra* note , at 510 (arguing that Senators’ views toward changing the cloture rule to end filibusters are mostly driven by partisan imperatives and, to a lesser extent, by individual members’ power goals).

³²⁰ Evans, *Legislative Structure*, *supra* note , at 627.

violation is sufficiently strong.³²¹ Congress’s repeated efforts to create lawmaking procedures that circumvent the constitutional bicameralism and presentment requirements, such as the legislative veto and the line-item veto, also cast doubt as to the extent that these rules are internalized and canonized in Congress.³²² Undeniably, there is a difference between a direct, flagrant violation of the rules, such as in the DRA example, and a formal statutory attempt to modify the constitutional structure of the legislative process, such as in the legislative veto and the line-item veto cases.³²³ However, both types of cases illustrate that even the constitutional lawmaking rules have not achieved a canonized status in Congress “such that it is largely unthinkable to imagine [their] modification or violation.”³²⁴

Admittedly, adherents to a “functional approach” to separation of powers may disagree with the Court’s conclusion that the legislative veto and the line-item veto violated the Constitution.³²⁵ This Section’s argument, however, does

³²¹ See *supra* Parts II.C, III.D.

³²² For an overview of these and other cases in which Congress tried to circumvent the constitutional requirements for lawmaking, see Bradford R. Clark, *Separation of Powers as a Safeguard of Federalism*, 79 TEX. L. REV. 1321, 1379-91 (2001).

³²³ I thank Richard Briffault for this point.

³²⁴ Schauer, *supra* note , at 473, 470 & n.9.

³²⁵ See, e.g., William N. Eskridge, Jr. & John Ferejohn, *Making the Deal Stick: Enforcing the Original Constitutional Structure of Lawmaking in the Modern Regulatory State*, 8 J.L. ECON. & ORG. 165 (1992); Peter L. Strauss, *Was There a Baby in the Bathwater? A Comment on the Supreme Court’s Legislative Veto Decision*, 1983 DUKE L.J. 789; see also Peter L. Strauss, *Formal and Functional Approaches to Separation-of-Powers Questions—A Foolish Inconsistency?*, 72 CORNELL L. REV. 488 (1987).

not depend on one's position on whether *Chadha* and *Clinton v. City of New York* were correctly decided,³²⁶ or on whether Congress may adopt different constitutional interpretations of Article I, Section 7 than the Court.³²⁷ As case studies about the legislative process of the Line Item Veto Act of 1996 and the enactment process of a pre-*Chadha* legislative veto provision suggest, the real problem in these cases was not that Congress asserted its right to form an independent, informed constitutional judgment.³²⁸ On the contrary, scholars' main criticism in both cases was that Congress failed to do so.³²⁹

More importantly for present purposes, the case studies of the legislative processes in both cases reveal that although Congress was well aware that the legislative proposal may violate Article I, Section 7, constitutional concerns

³²⁶ *Clinton v. City of New York*, 524 U.S. 417 (1998); *INS v. Chadha*, 462 U.S. 919 (1983).

³²⁷ See Tushnet, *Interpretations in Legislatures*, *supra* note , at 356-60 (advocating a non-court-based evaluative standard to examine Congress's constitutional performance). For recent reviews of the different academic views on whether Congress may or even must adopt its own interpretation of the Constitution, see generally Michael C. Dorf, *Fallback Law*, 107 COLUM. L. REV. 303, 342-52 (2007); Trevor W. Morrison, *Suspension and the Extrajudicial Constitution*, 107 COLUM. L. REV. 1533, 1579 & n.227, 1580-82 (2007).

³²⁸ See Elizabeth Garrett, *The Story of Clinton v. City of New York: Congress Can Take Care of Itself*, in ADMINISTRATIVE LAW STORIES 47, 57-83 (Peter L. Strauss ed., 2006) [hereinafter Garrett, *Story*] (discussing the legislative process of the Line Item Veto Act of 1996); Abner J. Mikva, *How Well Does Congress Support and Defend the Constitution?*, 61 N.C. L. REV. 587, 593-600 (1983) (discussing the enactment process of a legislative veto provision in the period between the lower court's *Chadha* decision and the Supreme Court's *Chadha* decision).

³²⁹ Garrett, *Story*, *supra* note , at 48-49, 91-98; Mikva, *supra* note , at 597-600; see also Neal Devins & Michael A. Fitts, *The Triumph of Timing: Raines v. Byrd and the Modern Supreme Court's Attempt to Control Constitutional Confrontations*, 86 GEO. L.J. 351, 355-61 (1997); Neal Devins, *Congress as Culprit: How Lawmakers Spurred on the Court's Anti-Congress Crusade*, 51 DUKE L.J. 435, 441-45 (2001).

were apparently not a decisive factor in Congress's decision making.³³⁰ Hence, regardless of one's view about the legislative veto and the line-item veto, the legislative process in these cases suggests, at the very least, that constitutional considerations do not necessarily trump policy and partisan considerations in Congress.³³¹

Although not focusing on procedural rules, Mitchell Pickerill's study is also illustrative.³³² Based on case studies and on interviews with legislators, congressional staff, and others involved in the legislative process, Pickerill concludes that "[p]olitics and policy dominate congressional decision making, and members of Congress do not systematically consider the constitutional authority for their actions."³³³ As one Senator ranked the considerations in the congressional legislative process, "[p]olicy issues first, how [to] get a consensus to pass the bill, six other things, then constitutionality."³³⁴

³³⁰ Garrett, *Story*, *supra* note , at 98 ("[T]he debate [on the Line Item Veto Act] does not demonstrate that constitutional concerns are the deciding factor in any lawmaker's vote, nor do constitutional arguments appear to change the decision that members would [make] on policy or partisan grounds."); Mikva, *supra* note , at 600 ("[T]he constitutionality of the provision was only one factor that was considered in the Senate's vote on the amendment and ... it may not have been the most important.").

³³¹ *Supra* note ; cf. Sinclair, *Can Congress Be Trusted?*, *supra* note , at 296 (defending the legislative veto as a congressional attempt "to come up with a politically and substantively sensible policy solution to a complex problem," but seeming to concede that this example illustrates that constitutionality is only one consideration for members of Congress and that other competing considerations sometimes prevail).

³³² J. MITCHELL PICKERILL, *CONSTITUTIONAL DELIBERATION IN CONGRESS* 8-9, 133-45 (2004).

³³³ *Id.* at 144.

³³⁴ *Id.* at 134.

In sum, ethical and noninstrumental motivations to follow rules surely play some part in the legislative process, especially with regard to constitutional rules. However, it is unlikely that such motivations will prevail whenever strong incentives to violate rules exist.

H. Summary

The following table briefly summarizes the insights gained from analysis in Part III of the political safeguards that potentially impact congressional compliance with the rules that constrain the legislative process.

Safeguards	Projected Impact on Procedural Rule Following
A. Electoral Controls	Very weak impact.
B. Interest Groups	Good-government groups are unlikely to have an impact; rent-seeking interest groups create incentive to violate rules in order to insert special-interest provisions into legislation.
C. Policy Motivations	Very strong impact. Creates strong incentive to violate rules that hinder passage of legislators' policy.
D. Party and Leaders	Very strong impact. Creates strong incentive to violate rules that impede the majority party's policy and political interests (as well as strong incentive to enforce rules that serve majority party policy and political interests).
E. Institutional Interests	Weak impact on procedural rule following (may be slightly stronger when divided government). Applies only to rules that implicate institutional rivalry.
F. Presidential Veto	Unlikely to induce procedural rule following. Creates incentive to violate rules in order to circumvent the President's veto power.
G. Ethical and Noninstrumental Motivations	Weak to medium impact. Creates some incentive to follow rules, particularly constitutional rules (and perhaps other internalized, time-honored rules, such as filibuster).

As the table illustrates, the most influential forces on Congress's compliance with the rules that regulate lawmaking are legislators' policy motivations and the majority party and its leaders. Although these forces' effects do not completely overlap, the combination of the two creates a very strong incentive

to violate lawmaking rules that impede the majority party's ability to pass its policy agenda. Electoral controls and good-government groups are expected to have little to no impact on procedural rule following, while special interest groups create an incentive to violate the rules. Institutional interests and institutional rivalry are also expected to have relatively little influence on procedural rule following. Furthermore, institutional interests influence only those rules that implicate institutional rivalry, such as bicameralism and the Origination Clause. The threat of a presidential veto is also expected to have a limited impact and may in fact motivate rule violations. The only real safeguard that may induce rule following is legislators' ethical and noninstrumental motivations. Such motivations are expected to have some positive impact on rule following, particularly on constitutional rules, but it is doubtful that they can counterbalance strong policy and partisan interests.

Hence, the overall impact of the "political safeguards" is in fact to induce violations of the procedural rules that constrain lawmaking. Nevertheless, this Article does not argue that lawmaking rules will never be followed in Congress. Rather, as Part IV briefly explains, Congress's enforcement of these rules depends both on the rule in question and on the circumstances.

IV. WHEN WILL LAWMAKERS BE LAWBREAKERS?

Part IV draws on the insights from the previous Parts to offer some brief tentative observations about the types of lawmaking rules that are more

susceptible to violations, the circumstances in which violations are more likely, and the incidence of violations.

A. Which Rules Are More Susceptible to Violation?

The likelihood of rule violations depends, to a large extent, on the rule in question. This Article focuses on rules that impose procedural restrictions on the legislative process.³³⁵ Accordingly, its analysis of the political safeguards that impact congressional rule following is tailored to this category of lawmaking rules. It is important to recognize, however, that the same safeguards may operate differently with regard to other types of congressional rules.

For example, legislators' policy motivations and the majority party's interests are chief forces that induce lawmakers to be lawbreakers of the lawmaking rules discussed by this Article.³³⁶ However, these same powers are likely to lead to relatively strong enforcement of other types of rules, such as "fast track" rules, which are statutory rules that are intentionally designed to expedite the legislative process and to curtail the minority party's ability to obstruct the passage of legislation.³³⁷ The same is true for special rules that are

³³⁵ See *supra* Part I.A.

³³⁶ See *supra* Parts II, III.C, III.D, III.H.

³³⁷ On fast track rules, see Bruhl, *Statutes To Set Legislative Rules*, *supra* note , at 345-48, 358-60; Garrett, *Purposes of Framework Legislation*, *supra* note , at 727-28, 748.

intentionally written by the House Rules Committee to facilitate the majority party's ability to pass legislation and to protect party interests.³³⁸

Even within the subgroup of lawmaking rules discussed in this Article, some rules are probably more vulnerable to violation than others. To be sure, all the rules in this group hinder the majority party's ability to pass its policy agenda and therefore are susceptible to violation, but the extent to which they hamper the majority party's agenda varies from rule to rule. The above analysis suggests that this difference should have an important impact on the likelihood of violation, since the dominant forces that motivate violations of these rules are legislators' policy motivations and the majority party's interests.³³⁹

The degree to which the rule obstructs the majority party's ability to pursue its agenda is not the sole determinant of the likelihood of violations, however. For example, as the discussion about noninstrumental, rule-following motivations suggests, some rules, such as constitutional rules and the Senate rules for ending debate, are more internalized and revered than others and may therefore be less vulnerable.³⁴⁰ The discussion of institutional interests also suggests that rules that implicate one chamber's prerogatives vis-à-vis the other chamber, bicameralism and the Origination Clause, may be slightly less

³³⁸ Perhaps the most important example is restrictive rules that shield the bill from floor amendments. On restrictive rules, see, for example, Owens & Wrighton, *supra* note , at 1-5.

³³⁹ See *supra* Parts II, III.C, III.D, III.H.

³⁴⁰ See *supra* Part III.G.

susceptible to violation than rules that do not involve inter-chamber rivalry—including three-reading, quorum and voting, and amendment rules.³⁴¹ In short, the vulnerability of a certain rule to violation depends on the specific way in which each of the safeguards relates to that rule, and on the overall combined effect of these safeguards with regard to that particular rule.³⁴²

This conclusion fits nicely with a larger point in recent political science research about institutional change in Congress: congressional behavior is not determined by a single motivating force, such as reelection motivations or party interests, but rather, by a combination of potentially conflicting forces, whose overall impact varies across areas of congressional activity.³⁴³ This point does not undercut this Article's general claim that the overall impact of the political safeguards is a motivation to violate rules that set procedural restrictions on the legislative process. Rather, it suggests that although much of this Article's analysis and many of its claims can contribute to discussions about other types of rules and other areas of congressional activity, each area

³⁴¹ See *supra* Part III.E.

³⁴² It is possible, for example, that the filibuster procedure is relatively resilient despite its clear negative impact on the majority party's ability to pursue its policy agenda due to a rare combination of other safeguards, such as the fact that it is relatively internalized and revered; that it is the most important rule for the minority party, which has more power in the Senate than in the House; and—perhaps most importantly—that more than any other rule it serves each Senator's individual goal of personal power and influence.

³⁴³ SCHICKLER, *supra* note , at 4-5; Evans, *Politics*, *supra* note , at 493-94, 515.

requires individualized analysis that will examine how the safeguards discussed in this Article operate in that specific context.

B. When Are Violations More Likely?

Some of the circumstances that impact the likelihood of violations are case-specific, but this Article's analysis does provide some insights as to the type of bills that are more likely to produce rule violations, the type of violations that are more likely, and more general circumstances that impact the likelihood of violations.

Perhaps the most influential circumstances are the extent to which the bill's passage is a priority for the majority party and its leaders, and the strength of the opposition that the majority party faces in passing the bill. As the discussion of the DRA and Medicare Bill examples illustrated, when the bill is particularly important for the majority party, and its passage would be particularly difficult or impossible without breaking the rules, the probability of violations is, of course, much higher.³⁴⁴

Furthermore, the likelihood of violations also depends on the means or types of violation. Some violations can be easily carried out by an individual legislator, committee chair, or chamber leader without the need for other

³⁴⁴ See *supra* Part III.D.

legislators' collaboration;³⁴⁵ whereas other violations may require the cooperation, or at least acquiescence, of a large group of legislators and are therefore harder to accomplish.³⁴⁶ Similarly, violations that occur in the final stages of the legislative process, and especially in the enrollment stage, are likely to be more successful simply because they occur after the stage that most enforcement—points of order or refusal to pass the bill—can take place.

Some features of the legislative process can also influence the likelihood of violations. For example, as the Farm Bill illustrated, omnibus legislation makes violations, deliberate or unintentional, more likely.³⁴⁷ Generally, as Congress's use of unorthodox legislative practices such as omnibus legislation increases, its capacity to avoid procedural violations diminishes.³⁴⁸ While the normative debate about the advantages and disadvantages of omnibus legislation is beyond the scope of this Article,³⁴⁹ this conclusion contributes to the debate by revealing an additional cost of this legislative device.

³⁴⁵ An individual legislator slipping a substantive rider into an omnibus appropriation bill at the last minute is a good example. *See, e.g.,* Goldfeld, *supra* note , at 368 & n.4, 369; Bolstad, *supra* note .

³⁴⁶ *See* Bach, *supra* note , at 756; Kenneth A. Shepsle & Barry R. Weingast, *When Do Rules of Procedure Matter?*, 46 J. POL. 206, 208-20 (1984) (arguing that “procedures will prove more binding and less susceptible to evasion when the costs of negotiating, policing, and enforcing agreements to circumvent procedural restrictions are high”).

³⁴⁷ *See supra* Part II.B.

³⁴⁸ *Id.*

³⁴⁹ *See generally* GLEN S. KRUTZ, *HITCHING A RIDE: OMNIBUS LEGISLATING IN THE U.S. CONGRESS* 135-42 (2001); MANN & ORNSTEIN, *supra* note , at 170-75.

Finally, the likelihood of violations depends on the degree of partisan and ideological polarization.³⁵⁰ As long as the intense partisanship and ideological polarization in Congress, and especially in the House, persist, rule violations and procedural abuses are likely to be prevalent.

C. *The Incidence of Violations*

In the absence of systematic and current empirical data,³⁵¹ it is admittedly difficult to assess how often Congress violates the rules in practice. Nevertheless, several rough observations in descriptive congressional scholarship suggest that there were indeed *numerous* cases in which Congress, especially the House, flagrantly ignored lawmaking rules in recent years.³⁵²

³⁵⁰ See *supra* Parts III.C, III.D.

³⁵¹ There is at least one earlier study about Senate compliance with its legislative rules, but that study examined a much earlier era (1965-1986) and rested on debatable proxies—the frequency with which the Senate decided questions of order, and the frequency with which it upheld points of order and sustained rulings of the Chair—as indications of compliance with the rules. See Stanley Bach, *The Senate's Compliance with Its Legislative Rules: The Appeal of Order*, 18 CONGRESS & PRESIDENCY 77-78 (1991) [hereinafter Bach, *Senate's Compliance*].

³⁵² See, e.g., DEAN, *supra* note , at 25 (claiming that the Republican-controlled Congress between 1994 and 2006 “has demonstrated a conspicuous inability, unwillingness, or incompetence to operate according to ‘regular order’—which means by long-established traditions, norms, rules, and laws—not to mention the Constitution itself”); MANN & ORNSTEIN, *supra* note , at 7 (arguing that procedures guaranteeing adequate time for discussion, debate, and votes are “routinely ignored to advance the majority agenda”); Edward R. Becker, *Of Laws and Sausages: There is a Crying Need for a Better Process in the Way Congress Makes Laws*, 87 JUDICATURE 7-9 (2003) (arguing that “[t]he bottom line is that the formal Rules of the House of Representatives are extensive and detailed, but the key rules are all too frequently ignored in practice,” and providing several examples of rule violations); Bruhl, *Return of the Line-Item Veto*, *supra* note , at 473-74 (arguing that “Congress has on numerous occasions decided not to follow statutized rules” and sometimes simply flouted these rules); see also Grossman, *supra* note , at 262-70 (describing violations of rules that govern conference committees); Zellmer, *supra* note , at 486-99 (describing deviations from rules that

This descriptive scholarship indicates, moreover, that the two houses “do not enforce all their rules with the same rigor [or] abide by them with the same consistency”:³⁵³ some rules are apparently routinely ignored, while other rules, such as “fast track” rules, seem to exhibit “a strong record of compliance.”³⁵⁴

A review of this scholarship may also suggest that nonconstitutional rules are violated much more frequently than constitutional rules. Although “Congress’s disregard of [*INS v. Chadha*’s] teachings has been notorious,”³⁵⁵ this descriptive scholarship provides very few examples of direct and intentional violations of constitutional procedural rules.³⁵⁶ That is, if one excludes the hundreds of legislative veto provisions that Congress continued to

prohibit substantive legislation through appropriations bills); David Heath & Christine Willmsen, *Congress Hides \$3.5B in Earmarks*, SEATTLE TIMES, Oct. 14, 2008, http://seattletimes.nwsourc.com/html/localnews/2008265781_apwaearmarkreform.html (arguing that “time after time, Congress exploited loopholes or violated [earmark disclosure] rules,” finding over 110 violations in a single bill). *But cf.* Barbara Sinclair, *Question: What’s Wrong with Congress? Answer: It’s a Democratic Legislature*, 89 B.U. L. REV. 387, 387-88, 396-97 (2009) (conceding that there is “some truth” to Mann and Ornstein’s claim that “the majority flagrantly manipulates the rules for a partisan advantage,” while arguing that “[a]ctually, the House in the 110th Congress was fairly good about abiding by rules designed to give members some time to examine legislation before they were required to vote, but the rules and abidance by the rules could be even stricter”).

³⁵³ Bach, *supra* note , at 747; *see also* Bruhl, *Return of the Line-Item Veto*, *supra* note , at 473-74 (arguing that Congress’s record of compliance with statutory procedural rules “presents a distinctly mixed bag”).

³⁵⁴ Bruhl, *Return of the Line-Item Veto*, *supra* note , at 473-74.

³⁵⁵ Cass & Strauss, *supra* note , at 15.

³⁵⁶ *Cf.* DEAN, *supra* note , at 51 (claiming that the behavior of the Republican majority in Congress between 1994 and 2006 was “far worse than merely breaking the rules of the House (or Senate), for they also [had] no hesitation about cavalierly ignoring the Constitution,” but providing few examples to support this claim).

enact after the Court ruled such provisions unconstitutional in *Chadha*,³⁵⁷ and unintentional violations such as in the Farm Bill example,³⁵⁸ examples of flagrant constitutional violations such as in the DRA case seem to be harder to find.

The above may suggest that this Article has slightly underestimated the degree to which the constitutional procedural rules are internalized and canonized in Congress. An alternative explanation, however, is that direct violations of constitutional rules are harder to find both because the Constitution places such sparse lawmaking requirements on Congress and because even these few limitations have been interpreted and implemented by Congress in creative ways that provide much latitude—including, for example, an artificial presumption that the constitutionally required quorum is always present “unless and until the presumption is proven incorrect.”³⁵⁹ It is possible, therefore, that constitutional violations are less common because the majority

³⁵⁷ See Cass & Strauss, *supra* note , at 23 (noting that Congress has included legislative veto provisions in its legislation “numerous times” since *Chadha*); Neal Devins, *Congressional-Executive Information Access Disputes: A Modest Proposal—Do Nothing*, 48 ADMIN. L. REV. 109, 115 (1996) (“In the decade after *Chadha*, 1983-1993, well over 200 legislative vetoes have been enacted into law.”); Louis Fisher, *The Legislative Veto: Invalidated, It Survives*, 56 LAW & CONTEMP. PROBS. 273, 288 (1993) (“Notwithstanding the mandate in *Chadha*, Congress continued to add legislative vetoes to bills and Presidents Reagan and Bush continued to sign them into law. From the date of the Court’s decision in *Chadha* to the end of the 102nd Congress on October 8, 1992, Congress enacted more than two hundred new legislative vetoes.”).

³⁵⁸ See *supra* Part II.B.

³⁵⁹ Bach, *supra* note , at 727-30.

party can almost always get its way by violating only nonconstitutional rules.³⁶⁰

This explanation seems to find support in the experiences of the states, whose constitutions place much more procedural limits on lawmaking,³⁶¹ therefore resulting in many more examples of constitutional violations. Indeed, several scholars have observed that state “legislators often do not follow the legislative procedure requirements of the state constitution, particularly where the legislative proposal is controversial and the courts do not enforce the constitutional restriction.”³⁶² Some state courts have similarly observed that the state legislature has shown “remarkably poor self-discipline in policing itself,”³⁶³ and that violations of some constitutional lawmaking requirements have “become a procedural regularity.”³⁶⁴ The Supreme Court of Illinois has

³⁶⁰ Cf. Bach, *Senate’s Compliance*, *supra* note , at 88 (suggesting that the reason for the relative paucity of contested questions of order in the Senate is that “Senate procedures have not been a serious obstacle to individualism. Its rules normally are not confining and when they do pinch, it is not for very long.... Rarely do senators contend that existing procedures do not give them enough latitude.”).

³⁶¹ Robert F. Williams, *State Constitutional Limits on Legislative Procedure: Legislative Compliance and Judicial Enforcement*, 48 U. PITT. L. REV. 797, 798 (1987).

³⁶² *Id.* at 800; *see also* Denning & Smith, *supra* note , at 1000 (arguing that “many state legislatures have often seen fit to skirt the edges of their constitutional [lawmaking] requirements, or to ignore them entirely” and that “[i]n the experience of the states,” the presumption that legislatures will comply with procedural constitutional limitations “seems to have been unwarranted”).

³⁶³ *Geja’s Cafe v. Metro. Pier & Exposition Auth.*, 606 N.E.2d 1212, 1221 (Ill. 1992).

³⁶⁴ *Id.*; *see also* *Friends of the Parks v. Chi. Park Dist.*, 786 N.E.2d 161, 171 (Ill. 2003); *Cutinello v. Whitley*, 641 N.E.2d 360, 367 (Ill. 1994); *McGinley v. Madigan*, 851 N.E.2d 709, 724 (Ill. App. Ct. 2006).

perhaps been the most explicit in its conclusion that “the assumption that the General Assembly would police itself and judicial review would not be needed because violations of the constitutionally required procedures would be rare” has been repeatedly refuted in practice.³⁶⁵ Although the applicability of state experiences to Congress is not clear, these experiences at least suggest that the alternative explanation—that direct violations of constitutional rules are harder to find because the Constitution places few lawmaking requirements on Congress—may be plausible.

In sum, to the extent that the above far-from-scientific observations provide any indication, this Article’s analysis seems to have promising explanatory power, at least with regard to nonconstitutional rules. Undeniably, there is a great need for much more vigorous and systematic empirical research about congressional compliance with the rules that govern lawmaking. Hopefully, this Article may contribute to such future research by providing several testable predictions for general empirical studies, as well as for case studies.

CONCLUSION

Hans Linde was correct in his observation that “[o]ther participants than courts have the opportunity, and the obligation, to insist on legality in

³⁶⁵ *Geja’s Cafe*, 606 N.E.2d at 1221.

lawmaking.”³⁶⁶ Duty and opportunity, however, are not enough. Congress’s capacity and incentives to enforce the law of congressional lawmaking upon itself are lacking.

This Article’s conclusions refute the widely held assumption that political safeguards can obviate the need for judicial review, at least in the procedural lawmaking rules context. This does not mean that judicial enforcement of these rules is necessarily the proper solution. The impact of judicial review on legislative rule-following behavior, and the other costs and benefits of judicial oversight, remain to be examined. The starting point for any such examination, however, is the recognition that Congress cannot police itself.

³⁶⁶ Hans A. Linde, *Due Process of Lawmaking*, 55 NEB. L. REV. 197, 243-44 (1976).

THIRD ARTICLE:
THE PUZZLING RESISTANCE TO JUDICIAL REVIEW OF THE
LEGISLATIVE PROCESS

INTRODUCTION

“The irony of today’s great American debate” in constitutional law and theory, Guido Calabresi once observed, “is that both sides share the same approach to judicial review”¹—an approach that “emphasizes a decisive judicial role and requires that . . . judges ultimately be responsible for enforcing [rights] against government action.”² This Article argues for a different model of judicial review, “judicial review of the legislative process.” Under this model, the judicial role is neither decisive nor focused on defending constitutional rights from legislative action. In fact, this model is not even concerned with the content of legislation. Instead, the model requires courts to examine the *procedure* leading to a statute’s enactment and to enforce the procedural requirements for lawmaking.³

The Supreme Court has been persistently reluctant to exercise judicial review of the legislative process.⁴ For more than a century, federal courts have

¹ Guido Calabresi, *Antidiscrimination and Constitutional Accountability (What the Bork-Brennan Debate Ignores)*, 105 HARV. L. REV. 80, 109-10 (1991).

² *Id.* at 82, 109-10.

³ For a more detailed definition of “judicial review of the legislative process” see Part I.A. *infra*.

⁴ *Field v. Clark* 143 U.S. 649 (1892) (setting forth the “enrolled bill” doctrine, which effectively insulates the legislative process from judicial review); Marci A. Hamilton, *Discussion and Decisions: A Proposal to Replace the Myth of Self-rule with an Attorneyship*

consistently refused to entertain challenges to legislation based on procedural defects in the enactment process,⁵ even when the alleged defects were violations of the Constitution’s lawmaking requirements.⁶ Indeed, the courts refused to recognize an exception to the long-established rule that courts may not inquire into the process of enactment, even in “cases involving allegations that the presiding officers of Congress and the President . . . conspired to violate the Constitution by enacting legislation that had not passed both the House and Senate.”⁷

To be sure, at times the Court has employed what I term “semiprocedural judicial review,” which entails some form of examination of the enactment process as part of the Court’s substantive constitutional review of legislation.⁸ However, even this semiprocedural review provoked vigorous objections within the Court,⁹ and “a flood of scholarly criticism.”¹⁰ Indeed, the

Model of Representation, 69 N.Y.U. L. REV. 477, 493, 545 (1994) (noting “the Court’s persistent refusal to embrace judicial review of the legislature’s deliberative process”).

⁵ Ittai Bar-Siman-Tov, *Legislative Supremacy in the United States?: Rethinking the Enrolled Bill Doctrine*, 97 GEO. L. J. 323, 325 (2009).

⁶ *Id.* at 333; *id.* at 352 (noting that although *United States v. Munoz-Flores*, 495 U.S. 385 (1990) seemed to signal the Court’s willingness to enforce constitutional lawmaking requirements, later district and appellate cases interpreted this decision very narrowly).

⁷ *OneSimpleLoan v. U.S. Sec’y of Educ.*, 496 F.3d 197, 208 (2d Cir. 2007), *cert. denied sub nom.*, *OneSimpleLoan v. Spellings*, 128 S. Ct. 1220 (2008).

⁸ *See* part I.C. *infra*.

⁹ *See, e.g.*, *United States v. Lopez*, 514 U.S. 549, 613-14 (1995) (Souter, J., dissenting) (judicial “review for deliberateness [in the legislative process] would be as patently unconstitutional as an Act of Congress mandating long opinions from this Court.”); *Bd. of Trs. of Univ. of Ala. v. Garrett*, 531 U.S. 356, 376 (2001) (Breyer, J., dissenting) (criticizing the

idea that courts will determine the validity of legislation based on the adequacy of lawmaking procedures is highly controversial in the academic literature as well.¹¹

A striking feature of this resistance to judicial review of the legislative process is that it appears that most judges and scholars “find it improper to question legislative adherence to lawful procedures,” while “tak[ing] substantive judicial review for granted.”¹² The prevalent view is that judicial review of the legislative process is somehow less legitimate than the classic model of judicial review, which grants courts power to scrutinize the content of legislation and to strike down laws that violate fundamental rights.

This Article challenges this prevalent view, and establishes the theoretical case for judicial review of the legislative process. In the process, the Article reveals another great irony in constitutional theory. It argues that some

majority for “[r]eviewing the Congressional record as if it were an administrative agency record”); *Thompson v. Oklahoma*, 487 U.S. 815, 876-77 (1988) (Scalia, J., dissenting) (“We have in the past studiously avoided... interference in the States’ legislative processes, the heart of their sovereignty. Placing restraints upon the manner in which the States make their laws... is not... ours to impose.”).

¹⁰ Glen Staszewski, *Rejecting the Myth of Popular Sovereignty and Applying an Agency Model to Direct Democracy*, 56 VAND. L. REV. 395, 465-66 (2003). See also A. Christopher Bryant & Timothy J. Simeone, *Remanding to Congress: The Supreme Court’s New “On the Record” Constitutional Review of Federal Statutes*, 86 CORNELL L. REV. 328 (2001); William W. Buzbee & Robert A. Schapiro, *Legislative Record Review*, 54 STAN. L. REV. 87 (2001); Ruth Colker & James J. Brudney, *Dissing Congress*, 100 MICH L. REV. 80 (2001); Philip P. Frickey & Steven S. Smith, *Judicial Review, the Congressional Process, and the Federalism Cases: An Interdisciplinary Critique*, 111 YALE L.J. 1707 (2002).

¹¹ Staszewski, *supra* note 10, at 465-66.

¹² Hans A. Linde, *Due Process of Lawmaking*, 55 NEB. L. REV. 197, 242-43 (1976).

of the major arguments of leading constitutional theorists in favor of substantive judicial review, and even the arguments in *Marbury v. Madison* itself, are in fact equally—and perhaps more—persuasive when applied to judicial review of the legislative process. It further demonstrates that even some of the arguments raised by leading critics of (substantive) judicial review can actually be employed as arguments for justifying judicial review of the lawmaking process.

Making the theoretical case for judicial review of the legislative process has important practical significance. The lower federal courts were confronted with this issue in multiple cases in the past few years.¹³ While all these cases reiterated the judicial refusal to hear claims that statutes were not validly enacted, some of the lower courts conceded that this issue does merit

¹³ See, e.g., *Public Citizen v. Clerk*, U.S. Dist. Court for D.C., 451 F. Supp. 2d 109 (D.D.C. 2006), *aff'd sub nom.*, 486 F.3d 1342 (D.C. Cir. 2007), *cert. denied*, 128 S. Ct. 823 (2007); *OneSimpleLoan v. U.S. Sec'y of Educ.*, No. 06 Civ. 2979 (RMB), 2006 WL 1596768 (S.D.N.Y. June 9, 2006), *aff'd*, 496 F.3d 197 (2d Cir. 2007); *Conyers v. Bush*, No. 06-11972, 2006 WL 3834224 (E.D. Mich. Nov. 6, 2006); *Cal., Dep't of Soc. Servs. v. Leavitt*, 444 F. Supp. 2d 1088 (E.D. Cal. 2006); *Cookeville Reg'l Med. Ctr. v. Leavitt*, No. 04-1053 (JR), 2006 WL 2787831 (D.D.C. Sept. 26, 2006); *Zeigler v. Gonzales*, No. 06-0080-CG-M, 2007 WL 1875945 (S.D. Ala. June 28, 2007); *Metzenbaum v. FERC*, 675 F.2d 1282, 1287 (D.C. Cir. 1982); *United States v. Miles*, No. 06-2899, 2007 WL 1958623, at *1 (7th Cir. July 3, 2007); *United States v. Campbell*, No. 06-3418, 2007 WL 1028785, at *1 (7th Cir. Apr. 3, 2007); *United States v. Chillemi*, No. CR-03-0917-PHX-PGR, 2007 WL 2995726, at *7 (D. Ariz. Oct. 12, 2007); *United States v. Harbin*, No. C-01-221(3), 2007 WL 2777777, at *4-6 (S.D. Tex. Sept. 21, 2007); *United States v. McCuiston*, No. C-04-676, 2007 WL 2688502, at *7-8 (S.D. Tex. Sept. 12, 2007); *United States v. Farmer*, 583 F.3d 131, 151-52 (2d Cir.2009); *United States v. Davis*, 375 Fed.Appx. 611, 612 (7th Cir. 2010); *United States v. Collins*, 510 F.3d 697, 698 (7th Cir. 2007); *Salomone v. U.S.*, No. 1:08-CV-1574-JEC., 2009 WL 2957279 (N.D.Ga. Sept. 15, 2009); see also *United States v. Wolford*, NO. CRIM.A. 08-29, 2009 WL 1346034, at *1-3 (W.D.Pa. May 13, 2009) (citing several additional decisions by circuit and district courts, and nothing that “numerous district courts” were confronted with this question).

reconsideration.¹⁴ Many state courts have also confronted this question, and several have decided to depart from the traditional nonjusticiability view that still prevails in the federal courts.¹⁵ In fact, even in some of the states that still follow the traditional nonintervention view, lower courts have recently suggested that this view “is due for re-examination.”¹⁶ Courts in other countries are also increasingly tackling this question, and as one scholar observed, this “dilemma . . . is one of the more difficult questions under discussion today in foreign doctrine.”¹⁷

Most recently, this question came to the foreground once more in the dramatic final stages of the enactment of President Obama’s healthcare reform. As the House majority was seeking ways to secure the passage of this historic albeit controversial legislation,¹⁸ it considered procedural maneuvers that raised significant debate on the constitutionally required procedures for enactment and the role of courts in enforcing them.¹⁹ This case was eventually

¹⁴ *Public Citizen*, 451 F. Supp. 2d at 115–16.

¹⁵ See, generally, Robert F. Williams, *State Constitutional Limits on Legislative Procedure: Legislative Compliance and Judicial Enforcement*, 48 U. PITT. L. REV. 797 (1987).

¹⁶ *California Taxpayers Ass’n V. California Franchise Tax Bd.*, No. 34-2009-80000168, at 9-11 (Super. Ct. Cal. May 20, 2009), available at http://www.ftb.ca.gov/businesses/Official_Court_Ruling_34-2009-80000168.pdf.

¹⁷ Suzie Navot, *Judicial Review of the Legislative Process*, 39 ISR. L. REV. 182, 193 (2006).

¹⁸ David M. Herszenhorn & Robert Pear, *Democrats Consider New Moves for Health Bill*, N.Y. TIMES, March 16, 2010, available at <http://www.nytimes.com/2010/03/17/health/policy/17health.html>.

¹⁹ See, e.g., Michael C. Dorf, *Deeming Again*, DORF ON LAW (March 24, 2010),

mooted,²⁰ but with the ever-growing partisanship and ideological polarization in Congress, the courts are bound to confront such cases again sooner than later.²¹

A theoretical examination of judicial review of the legislative process may also contribute to broader debates about judicial review and other issues in constitutional theory. As recent scholarship suggests, since the traditional debates within constitutional theory have been significantly influenced by their focus on a single concept of judicial review, drawing attention to other models of judicial review can be particularly helpful for shedding new light on these debates.²²

Part I defines “judicial review of the legislative process” and distinguishes it from “substantive judicial review” and “semiprocedural judicial review.” Part II discusses the arguments underlying the opposition to

<http://www.dorfonlaw.org/2010/03/deeming-again.html>; Josh Gerstein, *Is 'Deem & Pass' Unconstitutional? It Doesn't Matter*, POLITICO (March 17, 2010), http://www.politico.com/blogs/joshgerstein/0310/Is_deem_pass_unconstitutional_It_doesnt_matter.html; Amy Goldstein, *House Democrats' Tactic for Health-Care Bill is Debated*, WASH. POST, March 17, 2010, available at <http://www.washingtonpost.com/wp-dyn/content/story/2010/03/16/ST2010031603033.html>; Michael W. McConnell, *The House Health-Care Vote and the Constitution*, WALL ST. J., March 15, 2010, available at <http://online.wsj.com/article/SB10001424052748704416904575121532877077328.html>.

²⁰ Lori Montgomery, *House Leaders Plan Separate Health Vote, Rejecting “Deem and Pass,”* WASH. POST, March 20, 2010, available at <http://www.washingtonpost.com/wp-dyn/content/article/2010/03/20/AR2010032001651.html>.

²¹ Ittai Bar-Siman-Tov, *Lawmakers as Lawbreakers*, 52 WM. & MARY L. REV. 805, 867 (2010) (“As long as the intense partisanship and ideological polarization in Congress... persist, rule violations and procedural abuses [in the legislative process] are likely to be prevalent”).

²² Mark Tushnet, *Alternative Forms of Judicial Review*, 101 MICH. L. REV. 2781, 2781 (2003).

judicial review of the legislative process. Part III challenges the view that only substantive judicial review is justified, by establishing the crucial practical and normative importance of reviewing the legislative process as well. Part IV turns to leading constitutional theories' justifications for judicial review, as well as theoretical arguments against judicial review. It argues that when applied to judicial review of the legislative process, the justifications are even more persuasive, while the objections to substantive judicial review are mitigated or can sometimes even serve as justifications. Finally, Part V incorporates the arguments from the previous two parts to establish the theoretical case for judicial review of the legislative process.

Before turning to this discussion, a clarification is in order. Although many of this Article's arguments juxtapose judicial review of the legislative process with substantive judicial review, this Article does not advocate the former as an alternative to the latter. It supports the view that judicial review of the legislative process should supplement, rather than supplant, substantive judicial review. The purpose of juxtaposing these two models of judicial review is not to challenge substantive judicial review itself, but rather, the dominant position that only substantive judicial review is legitimate and that judicial inquiry into the legislative process is fundamentally objectionable.

I. DEFINING JUDICIAL REVIEW OF THE LEGISLATIVE PROCESS

Current scholarship employs a wide array of terms to describe judicial review models that entail some form of scrutiny of the legislative process. Sometimes, different terms are used to describe essentially the same model of judicial review.²³ At other times, the same term—most commonly “due process of lawmaking”—is used by different scholars to describe a variety of dissimilar approaches.²⁴ It is therefore essential to begin by elucidating the term “judicial review of the legislative process,” and distinguishing it from “substantive judicial review” and “semiprocedural judicial review.”²⁵

²³ For example, scholars have used a variety of terms to describe the Rehnquist Court’s federalism cases that examined the legislative record for sufficient congressional findings as part of their determination of the constitutionality of legislation. Examples include “on the record constitutional review,” “legislative record review,” “the model of due deliberation,” and “semi-substantive judicial review.” See Dan T. Coenen, *The Rehnquist Court, Structural Due Process, and Semisubstantive Constitutional Review*, 75 S. CAL. L. REV. 1281, 1281-83 & nn. 3, 11 (2002).

²⁴ The term “due process of lawmaking,” was coined in Linde, *supra* note 9, at 235-55 to refer to judicial enforcement of lawmaking procedures required by the constitution, statutes and legislative rules. Philip P. Frickey, *Honoring Hans: On Linde, Lawmaking, And Legacies*, 43 WILLAMETTE L. REV. 157, 170 (2007). However, today the term “encompasses a variety of approaches to the legislative process,” well beyond the meaning intended by Linde. WILLIAM N. ESKRIDGE, JR. ET AL., *CASES AND MATERIALS ON LEGISLATION: STATUTES AND THE CREATION OF PUBLIC POLICY* 175–8 (3d ed. 2001).

²⁵ While this Article focuses on juxtaposing JRLP with substantive and semiprocedural judicial review, it is also worth distinguishing it from a fourth category of judicial review that is often confused with JRLP. “*Structural judicial review*”—or the “model of institutional legitimacy,” as Frickey and Smith term it—constitutes a separate form of judicial review, because it does not focus on the enactment procedure, but rather on the identity of the appropriate governmental institution for a given decision. Judicial enforcement of federalism, separation-of-powers, and the nondelegation doctrine can all be seen as falling under this category. See Frickey & Smith, *supra* note 10, at 1713-16.

A. *Judicial Review of the Legislative Process*

“*Judicial review of the legislative process*” (“JRLP”) is a form of judicial review in which courts determine the validity of statutes based on an examination of the procedure leading to their enactment.²⁶ The idea is that there is a certain minimal threshold of requirements a bill must meet in its enactment process in order to become law, and that courts should be given the power to determine whether these requirements have been met.

This broad definition encompasses a variety of specific models of JRLP. These models differ, *inter alia*, in their answer to the question of which procedural requirements courts should enforce or, in other words, which procedural defects in the legislative process will justify judicial review and invalidation of statutes.²⁷ Most common is the model that allows courts to enforce only the lawmaking requirements mandated by the constitution—such as the bicameral passage and presentment requirements set forth in Article I, Section 7 of the U.S. Constitution or the three-reading requirement which appears in many state constitutions. To be sure, federal courts and some state courts refuse to examine the legislative process even in order to determine compliance with such constitutional requirements.²⁸ However, among the state

²⁶ See Navot, *supra* note 17, at 182.

²⁷ *Cf. id.* at 102-12.

²⁸ See 1 NORMAN J. SINGER, SUTHERLAND STATUTES AND STATUTORY CONSTRUCTION §15:3 (2009).

courts that do exercise JRLP, most restrict themselves to enforcement of constitutional rules.²⁹

In other countries, courts enforce both constitutional and statutory rules that specify the steps required in the legislative process;³⁰ and in some countries courts enforce internal parliamentary rules as well.³¹ Finally, there are models which allow courts to also enforce unwritten procedural principles, with some versions emphasizing procedural requirements such as due deliberation,³² while others focus on requirements such as formal equality and fair participation.³³ Some of the arguments developed in this Article lend support to JRLP in all its variations. However, this Article focuses on the models that enforce the formal rules that govern the enactment process,

²⁹ *Baines v. New Hampshire Senate President*, 152 N.H. 124-132 (N.H., 2005) (holding that lawmaking procedures required by state Constitution would be enforced by the courts, while statutory procedures and internal rules governing the passage of legislation are not justiciable. Arguing that this is the case in most state courts); SINGER, *supra* note 28, at §7:4 ("The decisions are nearly unanimous in holding that an act cannot be declared invalid for failure of a house to observe its own rules. Courts will not inquire whether such rules have been observed in the passage of the act.").

³⁰ See PETER W. HOGG, *CONSTITUTIONAL LAW OF CANADA* 309–14 (3d ed. 1992); Navot, *supra* note 17, at 202, 207 (discussing Germany).

³¹ HCJ 5131/03 *Litzman v. The Knesset Speaker* [2004] IsrSC 59 (1) 577, 588 (English translation available at [2004] IsrLR 363) (stating that the Israeli Court will enforce even internal parliamentary rules and describing the different approaches to this question in several countries).

³² Victor Goldfeld, Note, *Legislative Due Process and Simple Interest Group Politics: Ensuring Minimal Deliberation through Judicial Review of Congressional Processes*, 79 N.Y.U. L. REV. 367 (2004).

³³ HCJ 4885/03 *Isr. Poultry Farmers Ass'n v. Gov't of Isr.* [2004] IsrSC 59(2) 14 (English translation available at [2004] IsrLR 388)

whether constitutional or subconstitutional,³⁴ but not unwritten procedural principles such as due deliberation.³⁵

The primary feature of JRLP (in all its variations) is that courts scrutinize the process of enactment rather than the statute's content. JRLP is indifferent to the content of legislation passed by the legislature, focusing exclusively on the enactment process. Furthermore, JRLP grants courts the power to examine the legislative process regardless of the constitutionality of the statute's content, and to invalidate an otherwise constitutional statute based solely on defects in the enactment process. Another feature of JRLP is that it does not preclude legislative reenactment: it simply remands the invalidated statute to the legislature, which is free to reenact the exact same legislation (in terms of its content), provided that a proper legislative process is followed.³⁶

B. Substantive Judicial Review

The features of JRLP discussed thus far relate to the questions of what is reviewed by the Court (the enactment process rather than content), when is the review employed (uniformly on all legislation that was improperly enacted

³⁴ For an overview of the constitutional and subconstitutional rules that govern the congressional legislative process, see Bar-Siman-Tov, *Lawmakers*, *supra* note 21, at 811-13.

³⁵ In other words, from the various models of "due process of lawmaking" discussed in Frickey and Smith, only their "model of procedural regularity" would satisfy my definition of JRLP. See Frickey & Smith, *supra* note 10, at 1711-13.

³⁶ Bar-Siman-Tov, *EBD*, *supra* note 5, at 384.

rather than only when constitutional rights or other substantive values are at stake), and what is the consequence of judicial invalidation of a statute (provisional rather than conclusive). In all these features JRLP is distinctively different from the current American model of substantive judicial review.

“*Substantive judicial review*” examines whether the content of legislation is in accordance with the Constitution. Typically, it asks whether the content of a certain statute infringes upon individual liberties or rights guaranteed in the Bill of Rights. In its “pure form,” substantive judicial review is not interested in the way in which the legislature enacted its law; it is interested merely in the result or outcome of the enactment process.³⁷ Moreover, under the American model of substantive judicial review, the Court’s constitutional judgments are considered final and unreviewable.³⁸

To be sure, in many other areas of law there is significant discussion about the elusive distinction between substance and procedure.³⁹ It should be clarified, therefore, that nothing in this Article’s arguments rests on the claim that there is a sharp and clear distinction between process and substance as a general conceptual matter. In fact, several of the arguments in the subsequent

³⁷ See Dan T. Coenen, *A Constitution of Collaboration: Protecting Fundamental Values with Second-Look Rules of Interbranch Dialogue*, 42 WM. & MARY L. REV. 1575, 1596-97 (2001).

³⁸ See Mark Tushnet, *New Forms of Judicial Review and the Persistence of Rights-and-Democracy-Based Worries*, 38 WAKE FOREST L. REV. 813, 817-18 (2003).

³⁹ On this discussion, see, e.g., Jenny S. Martinez, *Process and Substance in the “War on Terror”*, 108 COLUM. L. REV. 1013, 1018-27 (2008).

parts highlight some of the many ways in which substance and process interact. Moreover, this Article's distinction between JRLP and substantive judicial review is not meant to deny that, in practice, there may be many judicial doctrines that can be characterized as falling between these forms of judicial review.⁴⁰ The next section discusses one such model that merges substantive and procedural judicial review.

C. Semiprocedural Judicial Review

Under “*semiprocedural judicial review*” the court reviews the legislative process as part of its substantive constitutional review of legislation. The court begins by examining the content of legislation, and only if that content infringes upon constitutional rights (or other constitutional values such as federalism), the court examines the legislative record to ensure the satisfaction of some procedural requirements in the legislative process. Under this model, defects in the legislative process, such as inadequate deliberation, may serve as a decisive consideration in the judicial decision to strike down legislation. However, these procedural requirements—and the judicial examination of the

⁴⁰ See Goodwin Liu, *Rethinking Constitutional Welfare Rights*, 61 STANFORD L. REV. 203, 258 (2008) (Noting that there is no “rigid dichotomy between ‘procedural’ and ‘substantive’ judicial review. The terms are best understood as poles on a continuum of judicial intervention.”).

legislative process itself—are only triggered when the content of the legislation is allegedly unconstitutional.⁴¹

The best example of a decision employing the semiprocedural approach is Justice Stevens' dissent in *Fullilove v. Klutznick*:⁴²

Although it is traditional for judges to accord [a] presumption of regularity to the legislative process . . . I see no reason why the character of their procedures may not be considered relevant to the decision whether the legislative product has caused a deprivation of liberty or property without due process of law. Whenever Congress creates a classification that would be subject to strict scrutiny under the Equal Protection Clause . . . it seems to me that judicial review should include a consideration of the procedural character of the decisionmaking process.

While this remains the clearest example of a semiprocedural decision, in a number of more recent cases—including *Turner Broadcasting System, Inc. v. FCC*,⁴³ *Kimel v. Florida Board of Regents*⁴⁴ and *Board of Trustees of the*

⁴¹ This definition builds, of course, on Coenen's definition for "semisubstantive review." See Coenen, *Semisubstantive Constitutional Review*, *supra* note 23, at 1282-83. I eventually decided to use the term "semiprocedural judicial review" rather than "semisubstantive review" in order to avoid confusion, because only a very limited subset of rules that Coenen considers semisubstantive (his findings or study-based "how" rules) satisfy my definition of "semiprocedural judicial review." See *id.* at 1314-28.

⁴² 448 U.S. 448, 550-51 (1980) (Stevens, J., dissenting). For academic semiprocedural approaches, see, e.g., Calabresi, *supra* note 1, at 103-108; Coenen, *Constitution of Collaboration*, *supra* note 37; Terrance Sandalow, *Judicial Protection of Minorities*, 75 MICH. L. REV. 1162, 1183-90 (1977).

⁴³ 512 U.S. 622 (1994).

⁴⁴ 528 U.S. 62 (2000).

*University of Alabama v. Garrett*⁴⁵—the Court appeared to look for evidence in the legislative record that Congress based its decisions on sufficient legislative findings as part of the Court’s substantive review of the legislation.⁴⁶

The key difference between semiprocedural judicial review and JRLP is that under the semiprocedural approach, judicial review of the enactment process is only justified when individual rights (or fundamental substantive values) are at stake.⁴⁷ In contrast, I argue that JRLP is legitimate in and of itself, regardless of the constitutionality of the legislation’s content, and independently of the need to protect individual rights or fundamental substantive values.

⁴⁵ 531 U.S. 356 (2001).

⁴⁶ For a detailed discussion, see e.g., Coenen, *Semisubstantive Constitutional Review*, *supra* note 23, at 1314-28; Frickey & Smith, *supra* note 10, at 1720-27.

⁴⁷ See, e.g., *Gonzales v. Raich*, 125 S.Ct. 2195, 2208 (2005) (“[W]e have never required Congress to make particularized findings in order to legislate, absent a special concern such as the protection of free speech.”); Coenen, *Semisubstantive Constitutional Review*, *supra* note 23, at 1283 (noting that “the Court confines its use of semisubstantive rulings to cases in which the substantive values at stake are (in the Court’s view) distinctively deserving of judicial protection”).

II. THE RESISTANCE TO JRLP OF THE LEGISLATIVE PROCESS

The resistance to JRLP is shared by many judges,⁴⁸ constitutional scholars,⁴⁹ and legislation scholars.⁵⁰ The prevalent view is that courts should exercise substantive judicial review (and perhaps also structural judicial review, in the sense of separation of powers and federalism), but should abstain from engaging in JRLP. Indeed, the rejection of JRLP is often explicitly accompanied by a reaffirmation that courts, should, of course, review the constitutionality of the statute's content.⁵¹ Despite the large variety of arguments employed,⁵² the common position is that JRLP is somehow less legitimate than substantive judicial review. Two major lines of argument seem to underlie this position.

⁴⁸ Indeed, courts often see the enactment process as a primary example of a nonjusticiable political question. *See Baker v. Carr*, 369 U.S. 186, 214 (1962); *Public Citizen*, 486 F.3d at 1348 and decisions cited therein. *See also* cases cited in notes 4, 7, 13 *supra*.

⁴⁹ *See, e.g.*, Jesse H. Choper, *The Political Question Doctrine: Suggested Criteria*, 54 DUKE L.J. 1457, 1505-07 (2005).

⁵⁰ *See, e.g.*, Elizabeth Garrett, *Framework Legislation and Federalism*, 83 NOTRE DAME L. REV. 1495, 1530-39 (2008); Adrian Vermeule, *The Judiciary is a They, Not an It: Interpretive Theory and the Fallacy of Division*, 14 J. CONTEMP. LEGAL ISSUES 549, 573-76 (2005); and sources cited in note 10 *supra*.

⁵¹ *Field*, 143 U.S. at 672 (holding that courts should refrain from examining the process of enactment; "leaving the courts to determine, when the question properly arises, whether the act... is in conformity with the Constitution."); *Thompson*, 487 U.S. at 876-77 (Scalia, J., dissenting) ("I know of no authority whatever for our specifying the precise form that state legislation must take, as opposed to its constitutionally required content.").

⁵² For an overview of the arguments against JRLP see Bar-Siman-Tov, *EBD*, *supra* note 5, at 329-31.

One line of argument is that JRLP is less justified than substantive judicial review because JRLP is not aimed at the protection of individual rights. This claim is based on the view that “the principal justification for the awesome (and antimajoritarian) power [of] judicial review” is “[t]he necessity of vindicating constitutionally secured personal liberties.”⁵³ The view that ties the justification for judicial review to the protection of individual and minority rights resonates with a deep-seeded belief in constitutional law and theory,⁵⁴ and has long dominated debates about judicial review.⁵⁵ Indeed, this view “has become the global conventional wisdom.”⁵⁶

The prevalent view that bases the justification for judicial review on the protection of individual liberties becomes particularly challenging when combined with arguments for limiting the scope of judicial review, such as the argument that courts have very limited resources and legitimacy capital, and

⁵³ Choper, *supra* note 49, at 1468.

⁵⁴ See e.g., Richard Briffault, *Lani Guinier and the Dilemmas of American Democracy*, 95 COLUM. L. REV. 418, 421 (1995) (Book Review) (“[C]oncern with the capacity of a majority to abuse its authority and oppress the minority resonates deeply with longstanding themes in democratic political theory and the American constitutional tradition.”); Daryl J. Levinson, *Empire-Building Government in Constitutional Law*, 118 HARV. L. REV. 915, 971-72 (2005) (“The civil rights movement solidified [the view] exalting the ‘countermajoritarian’ protection of individual and minority rights as the primary purpose of constitutional law”).

⁵⁵ Yuval Eylon & Alon Harel, *The Right to Judicial Review*, 92 VA. L. REV. 991, 995 (2006); Adrienne Stone, *Judicial Review Without Rights: Some Problems for the Democratic Legitimacy of Structural Judicial Review*, 28 OXFORD J. LEGAL STUD. 1, 1-2 (2008).

⁵⁶ Michael C. Dorf, *Legal Indeterminacy and Institutional Design*, 78 N.Y.U. L. REV. 875, 891 (2003).

should therefore “not act in ways which ‘waste’ their institutional capital.”⁵⁷ The argument is that given the high costs of judicial review, and the courts’ limited institutional capital, judges should exercise this power only when most justified—namely, to protect individual and minority rights.⁵⁸ It therefore poses a serious challenge to this Article’s claim that JRLP is justified regardless of the content of legislation and its impact on individual liberties.

The second line of argument is that JRLP is more objectionable than substantive judicial review. The claim is that several of the major concerns about judicial review in general—including “separation of powers concerns . . . [and c]oncerns regarding judicial activism and the countermajoritarian difficulty”—are “at their zenith when courts invalidate the work of the elected branches based on perceived deficiencies in the lawmaking process.”⁵⁹

Among these concerns, the primary and most common objection to JRLP is the argument that such judicial review violates the separation of powers and evinces lack of respect due to a coequal branch.⁶⁰ JRLP is often seen by its critics as an interference with the internal workings of the legislature; and as an intrusion into the most holy-of-holies of the legislature’s

⁵⁷ Ruth Gavison, *The Role of Courts in Rifted Democracies*, 33 *ISR. L. REV.* 216, 233 (1999).

⁵⁸ Choper, *supra* note 49, at 1468.

⁵⁹ Staszewski, *supra* note 10, at 468.

⁶⁰ Bar-Siman-Tov, *EBD*, *supra* note 5, at 329-30 & n. 29.

prerogatives.⁶¹ Justice Scalia expressed this view when he held that “[m]utual regard between the coordinate branches” prohibits courts from inquiring into “such matters of internal process” as Congress’s compliance with the constitutional requirements for lawmaking;⁶² or when he objected in another case to “interference in the States’ legislative processes, the heart of their sovereignty.”⁶³ This argument is also at the core of most academic criticisms of JRLP and of semiprocedural judicial review.⁶⁴ These critics argue, therefore, that any type of judicial inquiry into the enactment process is much more intrusive and disdainful than substantive judicial review.⁶⁵

This Article challenges the conventional wisdom that JRLP is less legitimate than substantive judicial review. The following parts establish the practical and normative importance of reviewing the legislative process, and the theoretical justifications for such review.

⁶¹ *Id.* at 383.

⁶² *Munoz-Flores*, 495 U.S. at 410 (Scalia, J., concurring).

⁶³ *Thompson*, 487 U.S. at 876-77 (Scalia, J., dissenting).

⁶⁴ See Bar-Siman-Tov, *EBD*, *supra* note 5, at 330 & n. 29; Staszewski, *supra* note 10, at 468 & n. 256.

⁶⁵ Dan T. Coenen, *The Pros and Cons of Politically Reversible “Semisubstantive” Constitutional Rules*, 77 *FORDHAM L. REV.* 2835, 2868-72 (2009).

III. WHY PROCESS?⁶⁶

Why should courts not focus exclusively on reviewing the content of statutes and their impact on individual rights? Why divert some of the judicial attention and institutional capital to the enactment process of statutes as well? The answer lies in appreciating the importance of the legislative process and of the rules that govern it.

A. *Process and Outcomes*

“Most participants [in the legislative process] and outside experts agree that a good process will, on average and over the long run, produce better policy,” observed one of the leading congressional scholars in the U.S.⁶⁷ Admittedly, there are significant methodological challenges to systematically proving this truism, primarily due to the lack of widely-accepted criteria for defining good policy.⁶⁸ Notwithstanding this difficulty, several case studies and a wealth of anecdotal evidence support the argument that a flawed

⁶⁶ This Part builds upon, and elaborates, some of the ideas I originally discussed much more briefly in Bar-Siman-Tov, *Lawmakers*, *supra* note 21, at 813-15.

⁶⁷ Barbara Sinclair, *Spoiling the Sausages? How a Polarized Congress Deliberates and Legislates*, in 2 RED AND BLUE NATION?: CONSEQUENCES AND CORRECTION OF AMERICA'S POLARIZED POLITICS 55, 83 (Pietro S. Nivola & David W. Brady eds., 2008) (internal quotation marks omitted).

⁶⁸ *Id.* at 78-83 (arguing that while there is rough agreement about what good process entails, the lack of a broadly agreed upon standard of what constitutes good policy and insufficient systematic data pose a significant challenge to proving that good process leads to good policy).

legislative process results in “poor laws and flawed policy,”⁶⁹ or in laws that serve rent-seeking interest groups rather than the collective public good.⁷⁰

Empirical research demonstrates, moreover, that deviation from the regular rules that govern the legislative process can, and does, distort policy outcomes away from the policy preferences of the chamber’s median and toward the preferences of majority party leaders.⁷¹

⁶⁹ See, e.g., THOMAS E. MANN & NORMAN J. ORNSTEIN, *THE BROKEN BRANCH: HOW CONGRESS IS FAILING AMERICA AND HOW TO GET IT BACK ON TRACK* 1-6, 13, 141-46, 173-74, 216-24 (2008) (claiming that a flawed legislative process “results in the production of poor laws and flawed policy” and discussing several cases that support this claim); GARY MUCCIARONI & PAUL J. QUIRK, *DELIBERATIVE CHOICES: DEBATING PUBLIC POLICY IN CONGRESS* 2-3, 55-91 (2006) (providing several examples that “illustrate the dangers of inadequate or distorted legislative deliberation,” as well as several case studies). Cf. Christopher H. Foreman Jr., *Comment on Chapter Two*, in Nivola & Brady, *supra* note 67, at 88, 92 (“The judgment of recent critics highlights a significant deterioration of quality [of laws] as a consequence of a recent decline in deliberative norms.”).

⁷⁰ See, e.g., MANN & ORNSTEIN, *supra* note 69, at 217-18 (arguing that deviation from “regular order in Congress creates greater opportunities for parochial, special interest provisions to be added to legislation out of public view” and providing several examples); see also Seth Grossman, *Tricameral Legislating: Statutory Interpretation in an Era of Conference Committee Ascendancy*, 9 N.Y.U. J. LEGIS. & PUB. POL’Y 251, 272-88 (2006); Andrew J. Schwartzman et al., *Section 202(h) of the Telecommunications Act of 1996: Beware of Intended Consequences*, 58 FED. COMM. L.J. 581 (2006); Charles Tiefer, *How To Steal a Trillion: The Uses of Laws About Lawmaking in 2001*, 17 J.L. & POL. 409, 442-47 (2001); Goldfeld, *supra* note 32, at 368-69; Max Reynolds, Note, *The Impact of Congressional Rules on Appropriations Law*, 12 J.L. & POL. 481, 508-09, 513-14, 518-19 (1996); E. Bolstad, *Earmark Tampering Suggested*, ANCHORAGE DAILY NEWS, Aug. 10, 2007, at B1; David Heath & Christine Willmsen, *Congress Hides \$3.5B in Earmarks*, SEATTLE TIMES, Oct. 14, 2008, http://seattletimes.nwsourc.com/html/localnews/2008265781_apwaearmarkreform.html.

⁷¹ Nathan W. Monroe & Gregory Robinson, *Do Restrictive Rules Produce Nonmedian Outcomes? A Theory with Evidence from the 101st–108th Congresses*, 70 J. POLITICS 217 (2008). Cf., Cary R. Covington & Andrew A. Barga, *Comparing Floor-Dominated and Party-Dominated Explanations of Policy Change in the House of Representatives*, 66 J. POLITICS 1069, 1085 (2004) (finding that legislative outcomes reflect the preferences of the majority party rather than those of the floor median member. Noting that this study supports the claim that the majority party determines various institutional rules that are motivated by partisan considerations, and that these rules produce legislative outcomes that heavily advantage the majority party).

Indeed, regardless of one's view of what constitutes good process or good policy, one thing that has been repeatedly proven by theoretical, experimental, and empirical studies is that legislative procedures and rules have a crucial impact on policy outcomes.⁷² There is evidence, moreover, that legislators are well aware of this impact,⁷³ which unfortunately, creates a strong incentive to manipulate and violate legislative rules and procedures.⁷⁴ Hence, even from the sole point of view of legislative outcomes, there is good reason to pay greater attention to the process as well.

B. Process and Legitimacy

Legislative procedures play a vital role in both the normative and the sociological legitimacy of the legislature and its laws.⁷⁵

⁷² See BRYAN W. MARSHALL, *RULES FOR WAR: PROCEDURAL CHOICE IN THE US HOUSE OF REPRESENTATIVES* 87-103, 120-23 (2005); Aaron-Andrew P. Bruhl, *Using Statutes To Set Legislative Rules: Entrenchment, Separation of Powers, and the Rules of Proceedings Clause*, 19 J.L. & POL. 345, 393 (2003); Gary W. Cox, *On the Effects of Legislative Rules*, 25 LEGIS. STUD. Q. 169, 174-88 (2000); Karl-Martin Ehrhart et al., *Budget Processes: Theory and Experimental Evidence*, 59 GAMES & ECON. BEHAV. 279, 293 (2007); Monroe & Robinson, *supra* note 71, at 228-29; Keith E. Hamm et al., *Structuring Committee Decision-Making: Rules and Procedures in US State Legislatures*, 7 J. LEGIS. STUD. 13, 13 (2001); Bjørn Erik Rasch, *Parliamentary Floor Voting Procedures and Agenda Setting in Europe*, 25 LEGIS. STUD. Q. 3, 4 (2000); Tim Westmoreland, *Standard Errors: How Budget Rules Distort Lawmaking*, 95 GEO. L.J. 1555, 1557 (2007).

⁷³ Bar-Siman-Tov, *Lawmakers*, *supra* note 21, at 841-42.

⁷⁴ *Id.* at 842-43.

⁷⁵ On the distinction between empirical-sociological legitimacy and normative-moral legitimacy, see Richard H. Fallon, *Legitimacy and the Constitution*, 118 HARV. L. REV. 1787, 1795-1801 (2005); A. Daniel Oliver-Lalana, *Legitimacy through Rationality: Parliamentary*

From a normative perspective, several scholars have observed a significant shift in emphasis in normative democratic theory from substantive legitimacy to legitimate political procedure.⁷⁶ Roughly, substantive legitimation approaches in democratic theory focus on the content of the law and its conformity with some substantive moral standard; whereas procedural legitimation approaches appeal to features of the process by which laws are generated as the only (or main) source of legitimacy.⁷⁷ Proceduralist democratic theorists argue that there is too much reasonable disagreement on the meaning of substantive justice, the common good, and other moral principles, and therefore no normative substantive standard can appropriately be used in justifying the law.⁷⁸ Instead, proceduralist democrats seek to establish the legitimacy of law “in the midst of a great deal of substantive moral and ethical dissensus,”⁷⁹ by arguing that “[i]f justification for the force of law can be found in the generally accepted . . . processes whence contested

Argumentation as Rational Justification of Laws, in *THE THEORY AND PRACTICE OF LEGISLATION: ESSAYS IN LEGISPRUDENCE* 239, 241 (Luc J. Wintgens ed., 2005).

⁷⁶ David Estlund, *Introduction*, in *DEMOCRACY* 1, 2-7 (David Estlund, ed., 2002); Frank I. Michelman, *The Not So Puzzling Persistence Of The Futile Search: Tribe On Proceduralism In Constitutional Theory*, 42 *TULSA L. REV.* 891, 891-92 (2007).

⁷⁷ See Luc J. Wintgens, *Legitimacy and Legitimation from the Legisprudential Perspective*, in *LEGISLATION IN CONTEXT: ESSAYS IN LEGISPRUDENCE* 4, 6-7 (Luc J. Wintgens & Philippe Thion, eds., 2007); Jose Luis Marti Marmol, *The Sources of Legitimacy of Political Decisions: Between Procedure and Substance*, in Wintgens, *supra* note 75, at 259.

⁷⁸ Estlund, *supra* note 76, at 6-7.

⁷⁹ Michelman, *supra* note 76, at 892.

laws issue, then no number of intractable disagreements over the substantive merits of particular laws can threaten it.”⁸⁰

From the sociological or empirical legitimacy perspective, experimental and field studies demonstrate that the perception that the process by which a decision was made is fair increases people’s sense that the outcome is legitimate and leads to greater support for the decision, regardless of whether they agree substantively with the outcome.⁸¹ Some of these studies even suggest that “the process employed in attaining the decisions may be equally, if not more, important” to people than the result.⁸²

Studies that examined this hypothesis specifically on Congress and its lawmaking process confirm that people’s perceptions regarding congressional procedures—particularly the belief that Congress employs fair decision-making procedures in the legislative process—significantly impact the legitimacy of Congress, as well as legitimacy evaluations of the lawmaking process and of its outcomes.⁸³ Many studies found, moreover, that the fairness

⁸⁰ *Id.*

⁸¹ See, e.g., Michael X. Delli Carpini et al., *Public Deliberation, Discursive Participation, and Citizen Engagement: A Review of the Empirical Literature*, 7 ANNU. REV. POLIT. SCI. 315, 327 (2004).

⁸² Joseph L. Arvai, *Using Risk Communication to Disclose the Outcome of a Participatory Decision-Making Process: Effects on the Perceived Acceptability of Risk-Policy Decisions*, 23 RISK ANALYSIS 281, 287-88 (2003).

⁸³ Amy Gangl, *Procedural Justice Theory and Evaluations of the Lawmaking Process*, 25 POL. BEHAV. 119, 135 (2003); Tom R. Tyler, *Governing Amid Diversity: The Effect of Fair Decisionmaking Procedures on the Legitimacy of Government*, 28 L. & SOC’Y REV. 809, 827

of decisionmaking procedures affects not only the legitimacy of Congress, but also feelings of obligation to obey the law and everyday law-following behavior.⁸⁴ These studies also show that although there are widespread differences in evaluations of substantive outcomes, there is striking agreement across ethnic, gender, education, income, age, and ideological boundaries on the criteria that define fair decision-making procedures, as well as widespread agreement that such procedures are key to legitimacy.⁸⁵

Studies by political scientists on public attitudes toward Congress and other political institutions also provide ample evidence that “people actually are concerned with the process as well as the outcome. Contrary to popular belief, many people have vague policy preferences and crystal-clear process preferences . . .”⁸⁶ These scholars’ research reveals, moreover, that the public’s deep dissatisfaction with Congress is due “in no small part” to public perceptions about the lawmaking process.⁸⁷ As two leading scholars conclude

(1994); Stacy G. Ulbig, *Policies, Procedures, and People: Sources of Support for Government?*, 83 SOC. SCI. Q. 789, 793-96 (2002).

⁸⁴ TOM R. TYLER, *WHY PEOPLE OBEY THE LAW* 273-74, 278 (2nd ed., 2006); Martinez, *supra* note 39, at 1026-27.

⁸⁵ Tyler, *supra* note 83, at 826, 829; *see also* Tom R. Tyler, *What is Procedural Justice?: Criteria Used by Citizens To Assess the Fairness of Legal Procedures*, 22 LAW & SOC’Y REV. 103, 132 (1988).

⁸⁶ JOHN R. HIBBING & ELIZABETH THEISS-MORSE, *STEALTH DEMOCRACY: AMERICANS’ BELIEFS ABOUT HOW GOVERNMENT SHOULD WORK* 6 (2002). *See also*, Gangl, *supra* note 83, at 136.

⁸⁷ JOHN R. HIBBING & ELIZABETH THEISS-MORSE, *CONGRESS AS PUBLIC ENEMY: PUBLIC ATTITUDES TOWARD AMERICAN POLITICAL INSTITUTIONS* 1 (1995) [hereinafter: HIBBING &

in summarizing research about Americans' unhappiness with government, "we are struck by the frequency with which theories and findings suggest explanations based on the way government works and not explanations based on what government produces."⁸⁸

C. Process and the Rule of Law

The rules that govern the legislative process (and the idea that this process must be rule-governed) have vital importance for the Rule of Law ideal.⁸⁹ To be sure, Rule-of-Law arguments often invite the objection that the meaning of the phrase "the Rule of Law" is so contested that such arguments "should be regarded as relatively ad hoc and conclusory."⁹⁰ Nevertheless, I argue that the idea that the legislative process should be a rule-governed process rests on a relatively uncontested view of the Rule of Law. This idea is also compatible with the three major conceptions of the Rule of Law: the "thin/formal conception" (which, following Fuller, stresses formal requirements like

THEISS-MORSE, CONGRESS]. See also, Carolyn L. Funk, *Process Performance: Public Reaction to Legislative Policy Debate*, in WHAT IS IT ABOUT GOVERNMENT THAT AMERICANS DISLIKE? (John R. Hibbing & Elizabeth Theiss-Morse, eds., 2001); Gangl, *supra* note 83, at 119 (noting that "more and more researchers have focused on the lawmaking process and Americans' reactions to it to help explain widespread public disdain toward government.").

⁸⁸ John R. Hibbing & Elizabeth Theiss-Morse, *The Means Is the End*, in Hibbing & Theiss-Morse, *supra* note 87, at 243.

⁸⁹ Bar-Siman-Tov, *Lawmakers*, *supra* note 21, at 815.

⁹⁰ Richard H. Fallon, Jr., "The Rule of Law" as a Concept in Constitutional Discourse, 97 COLUM. L. REV. 1, 6 (1997).

generality, publicity, consistency, prospectivity, and so on); the “thick/substantive conception” (which also includes human rights, fundamental substantive values, or some moral criteria); and, of course, the “procedural conception” (which emphasizes procedural requirements and safeguards in the creation and application of legal norms).⁹¹

The idea that the legislative process should be a rule-governed process stems from one of the most widely-accepted understandings of the Rule-of-Law: that government should be ruled by the law and subject to it. As a recent review of the Rule-of-Law literature noted, disagreements about rule of law definitions notwithstanding, “virtually everyone agrees” that the principle that the government is bound by law is at the core of the Rule-of-Law ideal.⁹² This principle requires that governmental power, including the legislature’s lawmaking power, be exercised under the authority of the law and in accordance to the law.⁹³ Hence, the rules that confer the necessary powers for making valid law and the rules that instruct lawmakers how to exercise their lawmaking power are both essential components of the Rule of Law.⁹⁴ These

⁹¹ On these three conceptions of the Rule of Law, see *id.* at 14-24; Jeremy Waldron, *The Concept and the Rule of Law*, 43 GA. L. REV. 1, 6-9 (2008).

⁹² Adriaan Bedner, *An Elementary Approach to the Rule of Law*, 2 HAGUE J. ON THE RULE OF LAW 48, 50, 58 (2010).

⁹³ Frederick Schauer, *Legislatures as Rule-Followers*, in *THE LEAST EXAMINED BRANCH: THE ROLE OF LEGISLATURES IN THE CONSTITUTIONAL STATE* 468, 468-69 (Richard W. Bauman & Tsvi Kahana eds., 2006).

⁹⁴ JOSEPH RAZ, *The Rule of Law and its Virtue*, in *THE AUTHORITY OF LAW* 210, 211-13, 116 (1979).

rules that “create the framework for the enactment of particular laws” play an important role in ensuring that “the slogan of the rule of law and not of men can be read as a meaningful political ideal.”⁹⁵

My claim that the rules that govern the legislative process are important for the Rule of Law ideal is not only consistent with procedural conceptions of the Rule of Law, which emphasize procedural restrictions on governmental power.⁹⁶ It is also in concert with formal conceptions of the Rule of Law. Admittedly, Lon Fuller’s famous eight requirements for the inner morality of law⁹⁷—the epitome of the formal conception of the Rule of Law⁹⁸—do not explicitly refer to the idea that lawmaking should be governed by procedural rules.⁹⁹ However, the rules that govern the legislative process are important for several of the Rule-of-Law principles Fuller identifies.

A primary example is the consistency of the law through time.¹⁰⁰ Fuller argues that of his eight principles, that which requires that laws should not be

⁹⁵ *Id.*

⁹⁶ On such procedural conceptions and their emphasis on procedural safeguards, including in the legislative process, see Fallon, Jr., *Rule of Law*, *supra* note 90, at 18; Jeremy Waldron, *Legislation and the Rule of Law*, 1 LEGISPRUDENCE 91, 106-07 (2007).

⁹⁷ LON L. FULLER, *THE MORALITY OF LAW* 33-94 (revised edition, 1969).

⁹⁸ Andrei Marmor, *The Ideal of the Rule of Law*, in *A COMPANION TO PHILOSOPHY OF LAW AND LEGAL THEORY* 666, 666 n. 1 (Dennis Patterson ed., 2d ed. 2010).

⁹⁹ Waldron, *Legislation and the Rule of Law*, *supra* note 96, at 110 n. 48.

¹⁰⁰ FULLER, *supra* note 97, at 79-80.

changed too frequently or too suddenly “seems least suited to formalization in a constitutional restriction. It is difficult to imagine, for example, a constitutional convention unwise enough to resolve that no law should be changed more often than, say, once a year.”¹⁰¹ He fails to see, however, that there is in fact a straightforward means to realize this Rule-of-Law principle through formalized rules. That means is the rules that govern the legislative process. One of the important purposes of procedural rules such as bicameral passage, discussion in committee, and three readings is precisely to slow down the legislative process, and to make legislation an arduous and deliberate (and hopefully also deliberative) process.¹⁰² These rules thereby ensure, inter alia, that laws will not change too frequently or too hastily, thereby promoting the Rule-of-Law principle of stability. The rules that govern the legislative process also serve the purpose of giving citizens notice that the law is about to change and providing them time to orient their behavior accordingly.

Finally, recognition of the importance of the rules regulating the legislative process is not in tension with substantive conceptions of the Rule of Law. As several recent substantive formulations of the Rule of Law demonstrate, one can coherently reject thin conceptions of the Rule of Law in favor of thicker conceptions that include additional requirements relating to human rights or

¹⁰¹ *Id.*

¹⁰² See Jon Elster, *Don't Burn Your Bridge Before You Come to It: Some Ambiguities and Complexities of Precommitment*, 81 TEX. L. REV. 1751, 1765 (2003); Jacob E. Gersen & Eric A. Posner, *Timing Rules and Legal Institutions*, 121 HARV. L. REV. 543, 553-55 (2007).

other substantive principles, and at the same time also recognize the importance of procedural requirements on the legislative process.¹⁰³

In conclusion, the rules that govern the legislative process serve vital functions in ensuring and promoting the Rule of Law ideal and some of its most important and widely-accepted principles.

D. Process and Democracy

The rules that govern the legislative process are also important because they embody, and are designed to promote and protect, essential democratic values.¹⁰⁴ These democratic values include, for example, majority rule, political equality, transparency and publicity, participation, procedural fairness, and deliberation.¹⁰⁵

The rules that govern the legislative process, and particularly the rules regulating voting procedures, are designed to ensure that the laws produced by the legislature reflect the will of the majority of its members—and by

¹⁰³ M. Agrast et al., *The World Justice Project: Rule of Law Index* at 2, 7-8, 11 (2010), available at <http://www.worldjusticeproject.org/>; Aharon Barak, *The Supreme Court, 2001 Term Foreword: A Judge on Judging: The Role of a Supreme Court in a Democracy*, 116 HARV. L. REV. 16, 124-26, 130-31 (2002); Bedner, *supra* note 92, at 58-60.

¹⁰⁴ Bar-Siman-Tov, *Lawmakers*, *supra* note 21, at 815; Jeremy Waldron, *Legislating with Integrity*, 72 FORDHAM L. REV. 373, 376, 379-85 (2003).

¹⁰⁵ Bar-Siman-Tov, *Lawmakers*, *supra* note 21, at 815; Navot, *supra* note 17, at 216-23.

implication, of the voters whom they represent.¹⁰⁶ In fact, both empirical studies and anecdotal evidence demonstrate how manipulation and violation of “even seemingly technical rules can [undermine] important objectives, such as ensuring that the will of the chamber rather than the will of its legislative officer is enacted into law.”¹⁰⁷ The rules that govern the legislative process are also designed to ensure that each member (including members of the minority party) is allowed to participate in the legislative process on equal and fair grounds.¹⁰⁸ Requirements such as bicameralism, discussion in committee, and three readings, as well as the rules that regulate discussion and require minimal periods of time between the several steps of the legislative process, are all designed to enable and promote debate and deliberation.¹⁰⁹ Other rules are designed to guarantee publicity, to promote a more transparent and accountable legislative process, and to provide citizens with an opportunity to both observe and participate in the process.¹¹⁰ In these ways, the rules that govern the legislative process serve essential principles of procedural democracy.

¹⁰⁶ Navot, *supra* note 17, at 217.

¹⁰⁷ Bar-Siman-Tov, *Lawmakers*, *supra* note 21, at 825; Monroe & Robinson, *supra* note 71, at 228-29.

¹⁰⁸ Navot, *supra* note 17, at 219-20, 222-23.

¹⁰⁹ *Cf.* Adrian Vermeule, *The Constitutional Law of Congressional Procedure*, 71 U. CHI. L. REV. 361, 431-34 (2004) (discussing the rationales of the three-reading rule).

¹¹⁰ *Id.* at 410-22; Navot, *supra* note 17, at 221-22.

There is a great body of work by democratic theorists that establishes the instrumental and intrinsic value of democratic procedures;¹¹¹ as well as important work that focuses on the principles and rules that govern the legislative process in particular.¹¹² There is also sufficient historical evidence that demonstrates that the Framers greatly valued these procedural democratic principles,¹¹³ and wanted the legislative process to be “a step-by-step, deliberate and deliberative process.”¹¹⁴ Recounting all these arguments that establish the value of the fundamental principles of procedural democracy is therefore not required here.

The relevant point here is to draw attention to the fact that part of the normative value of the rules that govern the legislative process stems from their importance in ensuring these fundamental principles of procedural democracy. Indeed, these “principles . . . explain why we have the rules of legislative process that we have, and . . . afford a basis for determining the [importance of] compliance with them.”¹¹⁵

¹¹¹ For a good overview of this literature see David Estlund, *Democratic Theory*, in OXFORD HANDBOOK FOR CONTEMPORARY PHILOSOPHY 208 (Smith & Jackson, eds., 2006).

¹¹² See, e.g., Jeremy Waldron, *Legislating with Integrity*, *supra* note 104; Jeremy Waldron, *Principles of Legislation*, in THE LEAST EXAMINED BRANCH, *supra* note 93, at 15.

¹¹³ Cass R. Sunstein, *Beyond the Republican Revival*, 97 YALE L.J. 1539, 1558-63 (1988)

¹¹⁴ *INS v. Chadha*, 462 U.S. 919, 947-51, 958-59 (1983); *Clinton v. City of New York*, 524 U.S. 417, 439-40 (1998).

¹¹⁵ Waldron, *Legislating with Integrity*, *supra* note 104, at 376.

E. The Importance of Process

Legislation scholars have long observed and lamented the legal academia's general tendency to disregard the rules that govern the legislative process, either overlooking these rules¹¹⁶ or seeing them as mere technicalities or "mindless proceduralism."¹¹⁷ This Part argued that legislative procedures and rules have vital practical and normative importance, emphasizing their importance for legislative outcomes, legitimacy, the Rule-of-Law, and essential procedural democratic values. Other scholars have additionally argued that these rules are crucial for the functioning of the legislature and for solving various collective-action problems facing a large multi-member body that must come to agreement.¹¹⁸

The great importance of the rules that regulate the legislative process establishes my claim that the legislative process and its rules are no less deserving of judicial review than the outcomes of this process. Of course, this

¹¹⁶ Vermeule, *supra* note 109, at 362; cf. Elizabeth Garrett, *Legal Scholarship in the Age of Legislation*, 34 TULSA L.J. 679, 679 (1999) ("Notwithstanding the importance of the legislative process... the legal academy focuses very little of its attention on Congress and state legislatures.").

¹¹⁷ Waldron, *Principles of Legislation*, *supra* note 112, at 31. This attitude is beginning to change. Bar-Siman-Tov, *Lawmakers*, *supra* note 21, at 809 (arguing that "[a]fter many years of largely neglecting the rules that govern the legislative process, legal scholars are increasingly realizing [the importance of] these rules").

¹¹⁸ Elizabeth Garrett, *The Purposes of Framework Legislation*, 14 J. CONTEMP. LEGAL ISSUES 717, 741-48 (2005); Waldron, *Principles of Legislation*, *supra* note 112, at 28-29, 31.

still does not establish the legitimacy of such judicial review. That is, one may fully recognize the importance of protecting the integrity of the legislative process, but still deny that it is the legitimate role of courts to serve as protectors of this process. The next part addresses this issue.

IV. THE IRONIES OF CONSTITUTIONAL THEORY

If constitutional theory is “an exercise in justification,”¹¹⁹ constitutional theorists’ favorite exercise seems to be developing justifications for judicial review.¹²⁰ This Part argues that some of the major arguments that constitutional theorists raise in defense of substantive judicial review turn out to be even more persuasive when used to justify JRLP. Moreover, some of the arguments against judicial review are mitigated when applied to judicial review of the legislative process. Finally, some of the arguments raised by leading critics of judicial review can in fact serve as arguments in favor of judicial review of the legislative process. Given the plethora of scholarship dedicated to justifying judicial review, this Article does not purport to discuss all the existing justifications for substantive judicial review that are also

¹¹⁹ David A. Strauss, *What is Constitutional Theory?*, 87 CAL. L. REV. 581, 582 (1999).

¹²⁰ Rebecca L. Brown, *Accountability, Liberty, and the Constitution*, 98 COLUM. L. REV. 531, 531 (1998) (beginning her article by asking her readers to “honk if you are tired of constitutional theory” and describing how “contender after contender has stepped forward to try a hand” at justifying judicial review); Barry Friedman, *The Birth Of An Academic Obsession: The History Of The Countermajoritarian Difficulty, Part Five*, 112 YALE L.J. 153, 155 (2002) (arguing that for decades, the problem of justifying judicial review has been the central obsession of constitutional theory).

applicable to JRLP. Rather, it only focuses on some of the most prominent examples.

A. *Marbury v. Madison*

Notwithstanding the criticisms it has attracted throughout the years, the centrality of *Marbury v. Madison* in discussions of judicial review cannot be denied.¹²¹ *Marbury* “contains almost all the standard arguments in favor of instituting the judicial review of the constitutionality of laws—the same arguments that could be raised (and have been, historically) in all other circumstances.”¹²² It is, therefore, the natural place to begin.

1. Constitutional Supremacy Justifications

Marbury’s main argument can be summarized as follows: (1) The Constitution is supreme law, superior to ordinary legislative acts;¹²³ (2) a legislative act, repugnant to the Constitution, is void;¹²⁴ (3) courts may not

¹²¹ Michel Troper, *Marshall, Kelsen, Barak and the Constitutionalist Fallacy*, 3 INT’L J. CONST. L. 24, 37-38 (2005).

¹²² *Id.* at 24.

¹²³ *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 176-77 (1803).

¹²⁴ *Id.* at 177.

enforce a legislative act repugnant to the Constitution.¹²⁵ Chief Justice Marshall argued that the purpose of creating a written Constitution was to create a government in which “[t]he powers of the legislature are defined, and limited,”¹²⁶ and that judicial enforcement of “a legislative act repugnant to the Constitution” would undermine this purpose.¹²⁷ In a passage that some constitutional theorists regard as *Marbury*’s primary argument and as “[t]he classic, and . . . most powerful, argument for judicial review,”¹²⁸ Marshall argued that the idea that courts would enforce a legislative act repugnant to the Constitution

would subvert the very foundation of all written constitutions. It would declare that an act, which, according to the principles and theory of our government, is entirely void; is yet, in practice, completely obligatory. It would declare, that if the legislature shall do what is expressly forbidden, such act, notwithstanding the express prohibition, is in reality effectual. It would be giving to the legislature a practical and real omnipotence, with the same breath which professes to restrict their powers within narrow limits. It is prescribing limits, and declaring that those limits may be passed at pleasure.¹²⁹

To the extent that one accepts the argument that judicial enforcement of unconstitutional statutes undermines the very idea of a supreme written

¹²⁵ *Id.* at 177-78; Troper, *supra* note 121, at 26.

¹²⁶ *Marbury*, 5 U.S. (1 Cranch) at 176.

¹²⁷ *Id.* at 178.

¹²⁸ Erwin Chemerinsky, *Losing Faith: America Without Judicial Review?*, 98 MICH. L. REV. 1416, 1424 (2000) (book review).

¹²⁹ *Marbury*, 5 U.S. (1 Cranch) at 178.

constitution—and of its primary purpose of limiting the legislature—this argument is particularly applicable to a statute enacted in violation of the constitutionally prescribed procedure. It is well-established that the purpose of the lawmaking provisions in the Constitution was to “prescribe and define” Congress’s legislative power, and to limit it to a specific procedure.¹³⁰ Indeed, the text, history and purposes of these provisions “clearly [confirm] that the prescription for legislative action in Art. I, §§ 1, 7 represents the Framers’ decision that the legislative power of the Federal government be exercised in accord with a single, finely wrought and exhaustively considered, procedure.”¹³¹

In fact, the Supreme Court itself has recognized (in dicta) over a hundred years ago that the idea that “under a written constitution, no branch or department of the government is supreme” requires “the judicial department to determine . . . whether the powers of any branch of the government, and *even those of the legislature in the enactment of laws*, have been exercised in conformity to the Constitution; and if they have not, to treat their acts as null and void.”¹³² This idea that the principles of constitutional supremacy and

¹³⁰ *E.g.*, *Chadha*, 462 U.S. at 945; *Clinton v. New York*, 524 U.S. at 438, 439-40, 446, 448-49; *Munoz-Flores*, 495 U.S. at 397.

¹³¹ *Chadha*, 462 U.S. at 946-51. For a more detailed version of this argument, see Bar-Siman-Tov, *EBD*, *supra* note 5, at 376-77.

¹³² *Kilbourn v. Thompson*, 103 U.S. 168, 199 (1880) (emphasis added); *see also Powell v. McCormack*, 395 U.S. 486, 506 (1969).

“constrained parliamentarism” require courts to ensure that the legislature exercise all its powers, including in the legislative process, in accordance with the constitution was central to the development of JRLP in several constitutional democracies.¹³³

Moreover, while it is debatable whether substantive limits on the power of the legislature are an essential feature of all written constitutions and of constitutionalism, it is generally accepted that a constitution “will certainly contain . . . procedural prerequisites for valid ordinary lawmaking.”¹³⁴ As Hans Kelsen has suggested, “regulations . . . that determine the legislative procedure” are necessarily “part of the material constitution.”¹³⁵

More importantly, Kelsen theorized that while a constitution may also limit the content of future statutes, the defining feature that establishes the superiority of the constitution is that it regulates the way in which statutes are created.¹³⁶ Indeed, Kelsen argued that the basis of the entire hierarchal structure of the legal order is that the creation of lower norms is regulated by higher norms, and that any norm in the legal system “is valid because, and to the extent that, it had been created in a certain way, that is, in a way

¹³³ See Bar-Siman-Tov, *EBD*, *supra* note 5, at 367, 371-72, 380.

¹³⁴ Frank I. Michelman, *Thirteen Easy Pieces*, 93 MICH. L. REV. 1297, 1301 & n. 17 (1995).

¹³⁵ HANS KELSEN, *PURE THEORY OF LAW* 225 (Max Knight trans., 2005).

¹³⁶ *Id.* at 221-23; Troper, *supra* note 121, at 30.

determined by another [higher] norm.”¹³⁷ If one accepts this view, then judicial enforcement of a law that was enacted in violation of Article I Section 7 would undermine the very idea of constitutional supremacy even more than enforcing a law that infringes upon freedom of speech.¹³⁸

Marshall argued, furthermore, that the Constitution is supreme and binding on the legislature because it represents the “original and supreme will” of the people, who as the real sovereign have “an original right” to organize their government and set the principles by which they will be governed.¹³⁹ This argument is particularly fitting to the Constitution’s lawmaking provisions, in which the sovereign people delegated their original lawmaking power to their legislature, and prescribed the specific procedure by which the legislature may exercise this power. Judicial review of the legislative process protects the people’s right not to be governed by “laws” which were not really passed by their elected legislature, or which were not enacted in accordance with the only procedure by which the people agreed to be bound.¹⁴⁰

¹³⁷ Kelsen, *supra* note 135, at 221.

¹³⁸ Admittedly, Kelsen suggests at certain points that the higher norm’s regulation of the creation of the lower norm includes determining “the organ by whom and the procedure by which the lower norm is to be created,” but can also include determining the content; and that determining the organ is the minimum that is required to ensure the hierarchy between the norms. *Id.* at 235 However, at other points Kelsen suggests that the regulations that determine the legislative procedure are necessarily part of the material constitution, and certainly more essential to the hierarchy of norms than regulations regarding content. *see id.* at 225.

¹³⁹ *Marbury*, 5 U.S. (1 Cranch) at 176.

¹⁴⁰ Bar-Siman-Tov, *EBD*, *supra* note 5, at 383.

2. Rule-of-Law Justifications

Marshall's most direct invocation of Rule-of-Law principles was in holding that violations of vested legal rights should have a judicial remedy.¹⁴¹ However, Marshall's justification for judicial review is also often interpreted as resting on a Rule-of-Law argument. As one scholar argues, "Marshall[']s argument for judicial review is well known, as is [his] rule-of-law justification: Only the judiciary can impartially determine whether the elected branches have complied with constitutional limits on their authority."¹⁴² Other scholars have also cited *Marbury* as a significant source for the strong association of the Rule of Law with judicial review in American constitutional theory.¹⁴³

At any rate, whether or not *Marbury* is the source for such arguments, it is undeniable that Rule-of-Law arguments of the sort associated with *Marbury* are prevalent in constitutional theorists' justifications for judicial review.¹⁴⁴ The Rule-of-Law justification can be summarized along the following lines:

(1) The Rule-of-Law requires that the government conducts its activities in

¹⁴¹ *Marbury*, 5 U.S. (1 Cranch) at 163 ("The government of the United States has been emphatically termed a government of laws, and not of men. It will certainly cease to deserve this high appellation, if the laws furnish no remedy for the violation of a vested legal right.").

¹⁴² Robert J. Pushaw, Jr., *Justiciability and Separation of Powers: A Neo-Federalist Approach*, 81 CORNELL L. REV. 393, 503 (1996).

¹⁴³ Fallon, Jr., *Rule of Law*, *supra* note 90, at 9 n.33.

¹⁴⁴ Daniel B. Rodriguez et al., *The Rule of Law Unplugged*, 59 EMORY L. J. 1455, 1476-77 (2010).

accordance to the law; (2) judicial review “is necessary (or at least extremely important) to maintaining a disinterested eye on the conduct and activities of government . . . therefore [(3) judicial review is key to] the rule of law.”¹⁴⁵

This justification is particularly applicable to JRLP. As I have argued in Part III.C., the argument that the Rule-of-Law entails the requirement that the legislative process be rule-governed rests on a relatively uncontested understanding of the Rule-of-Law, certainly no more contested than substantive conceptions that argue that this ideal must also include a commitment for human rights.

Indeed, it seems that some leading Rule-of-Law theorists would more readily accept a Rule-of-Law justification for JRLP than for substantive judicial review. Joseph Raz’s seminal account of the Rule of Law is particularly illustrative. Raz argues that one of the important principles that “can be derived from the basic idea of the rule of law” is that courts should have judicial review power over parliamentary legislation, but only “a very limited review—merely to ensure conformity to the rule of law.”¹⁴⁶ It is clear that Raz does not mean substantive judicial review, as he insists that the Rule-of-Law “is not to be confused with democracy, justice, equality . . . human

¹⁴⁵ *Id.*

¹⁴⁶ Raz, *supra* note 94, at 214, 217.

rights of any kind or respect for persons or for the dignity of man.”¹⁴⁷ He argues, rather, that the type of judicial review that is required by the Rule-of-Law ideal is review power over the implementation of the Rule-of-Law principles he enumerates, including the important principle that the enactment of particular laws should be rule-governed.¹⁴⁸

Although the Rule-of-Law justification and the constitutional supremacy justification discussed in the previous section are often mentioned in tandem, there is an important difference between them. The Rule-of-Law justification does not rest on accepting the idea of constitutional supremacy, but rather on the acceptance of the Rule-of-Law principle that government must be subject to the law, and may only wield its power according to the law. This distinction has two important implications. First, Rule-of-Law arguments can justify JRLP even in legal systems that lack a written constitution and in which courts lack the power of substantive judicial review. Second, in constitutional systems, the Rule-of-Law justification can legitimize judicial enforcement of both constitutional and subconstitutional rules that govern the legislative process.

As Fredrick Schauer recognizes:

If the commands of . . . the rule of law . . . demand that legislation be made according to law, then the full range of laws that constitute and constrain the legislative function would be within the purview of [the courts]. Courts might plausibly,

¹⁴⁷ *Id.* at 211.

¹⁴⁸ *Id.* at 217.

therefore, be understood not only as enforcers of [constitutional rules,] but also as enforcers of the process by which legislators are expected to follow their own rules . . .¹⁴⁹

Indeed, in countries in which courts decided to also enforce the subconstitutional rules that govern the legislative process, Rule-of-Law arguments have played a central role in the courts' decisions.¹⁵⁰

3. Constitutional Basis and the Supremacy Clause

In addition to his general arguments, Marshall found support for judicial review in the “particular phraseology of the constitution.”¹⁵¹ Marshall relied, for example, on Article III, section 2, which states that “The judicial Power shall extend to all Cases . . . arising under this Constitution,” and on the oath imposed on judges to support the Constitution.¹⁵² The judicial duty to support the Constitution, and to adjudicate “all Cases” arising under it, clearly applies

¹⁴⁹ Schauer, *supra* note 93, at 477-78.

¹⁵⁰ *R. v. Mercure*, [1988] 1 S.C.R. 234, 279 (Can.) (“I cannot accept that in a nation founded on the rule of law, a legislature is free to ignore the law in its constituent instrument prescribing the manner and form in which legislation must be enacted” even if that constituent instrument is not “an entrenched constitutional provision.”); *Litzman*, [2004] IsrLR at 369 (holding that the scope of judicial review of the legislative process should be determined according to a proper “balance between the need to ensure the rule of law in the legislature and the need to respect the unique nature of the Knesset” and concluding that courts should enforce both constitutional and subconstitutional rules that govern the legislative process); Barak, *supra* note 103, at 131 (“The rule of law implies that [the legislature] must observe the rules that apply to [its] internal operations. As long as the [legislature] does not change them, its rules bind it as does any other legal norm”).

¹⁵¹ *Marbury*, 5 U.S. (1 Cranch) at 178-80.

¹⁵² *Id.*

to violations of the Constitution’s lawmaking provisions as well. As I have argued in more detail elsewhere, the text, purpose and original meaning of these provisions confirm that they were meant to be binding,¹⁵³ and nothing in the Constitution requires committing their enforcement to another branch.¹⁵⁴

Most important for present purposes, however, is Marshall’s reliance on the Supremacy Clause, which states, in part, that “[t]his Constitution, and the Laws of the United States which shall be made in Pursuance thereof . . . shall be the supreme Law of the Land.”¹⁵⁵ This argument remains central to debates about judicial review, with contemporary supporters of judicial review still arguing that “[t]he text, history, and structure of the Constitution confirm that the Supremacy Clause authorizes judicial review of federal statutes.”¹⁵⁶ As Bradford Clark summarizes the argument:

Although the Clause requires . . . courts to follow “the supreme Law of the Land” over contrary state law, the Clause conditions the supremacy of federal statutes on their being “made in Pursuance” of the Constitution. Thus, the Clause constitutes an express command for judges not only to prefer federal to state law, but also to prefer the Constitution to federal statutes. This means that, in deciding whether to follow state law or a contrary

¹⁵³ See Bar-Siman-Tov, *EBD*, *supra* note 5, at 376-77.

¹⁵⁴ *Id.* at 377-78.

¹⁵⁵ US CONST Art VI, cl 2; *Marbury*, 5 U.S. (1 Cranch) at 180.

¹⁵⁶ Bradford R. Clark, *The Supremacy Clause as a Constraint on Federal Power*, 71 GEO. WASH. L. REV. 91, 92 (2003); Saikrishna B. Prakash & John C. Yoo, *The Origins of Judicial Review*, 70 U. CHI. L. REV. 887, 902-13 (2003).

federal statute, courts must first resolve any challenges to the constitutionality of the federal statute at issue.¹⁵⁷

If one accepts that the Supremacy Clause commands courts to examine whether statutes are “made in Pursuance” of the Constitution, this should clearly include authority to determine compliance with the Constitution’s procedural lawmaking requirements.

Indeed, some of the leading critics of *Marbury’s* reliance on the Supremacy Clause, such as Alexander Bickel, have based their criticisms, to a large extent, on the argument that the phrase “made in pursuance thereof” is more plausibly interpreted as *only* requiring enactment in accordance with the Constitution’s procedural lawmaking requirements.¹⁵⁸

To be sure, defenders of *Marbury’s* reliance on the Supremacy Clause have contested Bickel’s argument that the Supremacy Clause relates *exclusively* to procedural requirements.¹⁵⁹ However, even some of these scholars conceded that the Clause also “undoubtedly incorporates the procedural [requirements] that Professor Bickel invoked.”¹⁶⁰ In fact, in his earlier work, Bradford Clark himself noted that the phrase “Laws . . . which

¹⁵⁷ Bradford R. Clark, *Unitary Judicial Review*, 72 GEO. WASH. L. REV. 319, 322 (2003).

¹⁵⁸ ALEXANDER M. BICKEL, *THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS* 9 (2d ed. 1986); William W. Van Alstyne, *A Critical Guide to Marbury v. Madison*, 1969 DUKE L.J. 1, 20; Cf. John Harrison, *The Constitutional Origins and Implications of Judicial Review*, 84 VA. L. REV. 333, 346 n.48 (1998).

¹⁵⁹ Clark, *Supremacy Clause as a Constraint*, *supra* note 156, at 115-16.

¹⁶⁰ *Id.* at 115. See also Prakash & Yoo, *supra* note 156, at 903, 908-909.

shall be made in Pursuance thereof” suggests that this Clause “is tied to compliance with federal lawmaking procedures.”¹⁶¹

Interestingly, research about the original understanding of this Clause suggests that even at the time of ratification there were both judicial review supporters and skeptics who understood the Clause as establishing, at least, judicial enforcement of Article I, Section 7.¹⁶²

In short, one can certainly argue that “‘Pursuance’ embodies the expectation of constitutional review, the substantive and not merely the procedural sufficiency of ‘the Laws of the United States.’”¹⁶³ However, it is hard to see how one could claim that the Supremacy Clause authorizes substantive judicial review while denying that it also authorizes JRLP.

4. “The Very Essence of Judicial Duty”

Finally, Marshall also famously argued that judicial review is “of the very essence of judicial duty.”¹⁶⁴ The argument, in short, is that those who apply the law must determine what the law is, and hence, when confronted with cases in

¹⁶¹ Bradford R. Clark, *Separation of Powers as a Safeguard of Federalism*, 79 TEX. L. REV. 1321, 1334 (2001).

¹⁶² Prakash & Yoo, *supra* note 156, at 956-57 (discussing the understanding of the Supremacy Clause in Pennsylvania’s ratifying convention).

¹⁶³ Peter L. Strauss, *The Perils of Theory*, 83 NOTRE DAME L. REV. 1567, 1570 (2008).

¹⁶⁴ *Marbury*, 5 U.S. (1 Cranch) at 178.

which a law conflicts with the Constitution, courts must determine which of these conflicting norms governs the case.¹⁶⁵

A similar argument was suggested by Kelsen, who argued that “[s]ince [courts] are authorized to apply the statutes, they have to determine whether something whose subjective meaning is to be a statute has objectively this meaning; and it does have the objective meaning only if it conforms to the constitution.”¹⁶⁶ Hence, although Kelsen believed that the constitution should vest judicial review power in the hands of a single constitutional court, he argued that “[i]f the constitution contains no provision concerning the question who is authorized to examine the constitutionality of statutes, then the organs competent to apply statutes, that is, especially, the courts, have the power to perform this examination.”¹⁶⁷

This argument is also particularly applicable to JRLP. As one of the state supreme courts held as early as 1852 in establishing its authority to exercise JRLP:

I hold the authority to inquire [into the enactment process] for the purpose of ascertaining whether the [Act] has a constitutional existence to be incident to all courts of general jurisdiction, and necessary for the protection of public rights and liberties Courts are bound to know the law, both statute and common. It is

¹⁶⁵ *Id.* at 177-78.

¹⁶⁶ KELSEN, *supra* note 135, at 272.

¹⁶⁷ *Id.*

their province to determine whether a statute be law or not
 [I]t must be tried by the judges, who must inform themselves in
 any way they can¹⁶⁸

In fact, the next section argues that this argument is most persuasive when justifying JRLP.

*B. Rule-of-Recognition Theories*¹⁶⁹

After many years of shaping “much of the current debate in Anglo-American jurisprudence,”¹⁷⁰ H.L.A. Hart’s “rule of recognition” idea is increasingly influencing debates in constitutional theory as well.¹⁷¹ In the first sub-section I build upon Hart’s theory to develop an argument for JRLP. In the second sub-section I turn to the leading existing rule-of-recognition constitutional theory, and argue that it is most persuasive when applied to JRLP.

¹⁶⁸ *Fowler v. Peirce*, 2 Cal. 165, 170–71 (1852), *overruled by* *Sherman v. Story*, 30 Cal. 253, 279–80 (1866).

¹⁶⁹ This Section builds upon, and further develops, some of the ideas I originally discussed much more briefly in *Bar-Siman-Tov*, *EBD*, *supra* note 5, at 360-61.

¹⁷⁰ Dorf, *Legal Indeterminacy*, *supra* note 56, at 910.

¹⁷¹ See Matthew D. Adler & Kenneth Einar Himma, *Introduction*, in *THE RULE OF RECOGNITION AND THE U.S. CONSTITUTION* xiii, xiii-xv (Matthew D. Adler & Kenneth Einar Himma ed., 2009).

1. Judicial Review of the Legislative Process and the Recognition of Law

Hart argued that any legal system necessarily possesses a “rule of recognition”—a rule that sets out criteria for identifying the legal rules of the system.¹⁷² The rule of recognition provides the system’s test of legal validity: “To say that a given rule is valid is to recognize it as passing all the tests provided by the rule of recognition and so as a rule of the system.”¹⁷³ According to a dominant understanding of Hart’s theory—which was reportedly accepted by Hart himself—the rule of recognition is “a duty-imposing rule.”¹⁷⁴ As Joseph Raz explains, “the rule of recognition imposes an obligation on the law-applying officials to recognize and apply all and only those laws satisfying certain criteria of validity spelled out in the rule . . .”¹⁷⁵

In addition to the rule of recognition, Hart introduced two other rules that lie at the heart of a legal system. The “rule of change” confers the power to legislate—to create, alter, or abolish the legal rules of the system—typically by specifying the persons or institution authorized to legislate and the required procedure for legislating.¹⁷⁶ The “rule of adjudication” confers judicial

¹⁷² H.L.A. HART, *THE CONCEPT OF LAW* 94-95, 100-10 (2d ed. 1994).

¹⁷³ *Id.* at 103.

¹⁷⁴ See Scott J. Shapiro, *What is the Rule of Recognition (And Does It Exist)?*, in Adler & Einar Himma, *supra* note 171, at 235, 240 & n. 20.

¹⁷⁵ Raz, *supra* note 94, at 93.

¹⁷⁶ HART, *supra* note 172, at 95-96.

powers—the authority to determine whether a certain legal rule has been violated in a particular case, and usually also to impose sanctions in case of violation.¹⁷⁷ It identifies the individuals or bodies who are authorized to adjudicate and the procedure to be followed.¹⁷⁸

The nuances and complications in Hart’s theory have been the subject of much discussion in analytic jurisprudence.¹⁷⁹ This brief and necessarily simplistic sketch is all that is required, however, as background for developing an argument for JRLP. To clarify, I am not arguing that Hart himself would support JRLP. In fact, at least some statements in *The Concept of Law* may suggest that he would deny that his theory necessitates such judicial review.¹⁸⁰ Moreover, while Hart’s theory was descriptive, I am not making a descriptive claim that any legal system must have JRLP. Rather, I am building upon Hart’s theory and some of its arguments to develop the claim that the authority to exercise JRLP is inherent to adjudicative authority.

Hart noted that adjudication is necessarily related to the rule of recognition: “[t]his is so, because if courts are empowered to make authoritative determinations of the fact that a rule has been broken, these

¹⁷⁷ *Id.* at 96-98.

¹⁷⁸ *Id.* at 97.

¹⁷⁹ On some of these debates see, e.g., Shapiro, *supra* note 174, at 239-42 & n.29.

¹⁸⁰ HART, *supra* note 172, at 96 (the rule of recognition “need not refer to all the details of procedure involved in legislation.”).

cannot avoid being taken as authoritative determinations of what the rules are.”¹⁸¹ The direct point Hart was making in this passage is that the rule of adjudication which confers jurisdiction constitutes at least part of the rule of recognition, because it allows people to identify the legal rules of the system through the judgments of the courts.¹⁸²

This passage invites an argument about the inescapable relation between adjudication and the authority to determine what the legal rules are: if the rule of adjudication empowers courts to apply legal rules to cases brought before them (to authoritatively determine whether a certain rule was violated in a particular case); and if the rule of recognition obligates them to apply only those rules satisfying the criteria of validity specified in that rule; then the courts’ authority to adjudicate necessarily entails the authority and duty to determine the validity of the legal rules coming before them.¹⁸³

Note that this argument about the judicial authority to determine the validity of statutes is not contingent upon the existence of a written constitution or upon arguments about the supremacy of such a constitution. This argument would suggest that courts in any legal system should have the

¹⁸¹ *Id.* at 97.

¹⁸² *Id.*

¹⁸³ Bar-Siman-Tov, *EBD*, *supra* note 5, at 360. *See also* Matthew D. Adler & Michael C. Dorf, *Constitutional Existence Conditions and Judicial Review*, 89 VA. L. REV. 1105, 1123–24 (2003).

authority to determine the validity of legislation in the sense of recognizing it as passing the criteria provided by the rule of recognition, and these criteria can theoretically refer to extraconstitutional and subconstitutional sources as well.¹⁸⁴

Of course, the authority to determine validity in the rule-of-recognition sense need not necessarily translate into a full-blown authority of judicial review of legislation. Indeed, writing at a time in which the English legal system was still unqualifiedly characterized by the traditional British model of parliamentary supremacy, Hart suggested that in such a legal system, the ultimate criterion for the identification of law might simply be captured by the expression “whatever the Queen in Parliament enacts is law.”¹⁸⁵ However, I argue that the rule-of-recognition argument can support the claim that courts have JRLP authority even in a legal system without a written constitution, and in which courts have no power to exercise substantive judicial review. Indeed, Hart’s work lends support to the argument that rules that specify the procedure for enactment are inevitable in any legal system, as well as to the argument that such rules have vital importance for the identification of the law.

¹⁸⁴ On a rule-of-recognition account of extraconstitutional limitations on the legislature see generally Michael C. Dorf, *How the Written Constitution Crowds Out the Extraconstitutional Rule of Recognition*, in Adler & Einar Himma, *supra* note 171, at 69.

¹⁸⁵ HART, *supra* note 172, at 102, 106-07.

Hart argued that even in an imaginary society governed by an absolute monarch, in which whatever the monarch orders is the law, there must be a way to distinguish her orders, which she wishes to have “official” status, from her private utterances and orders to her household, which she does not wish to have “official” status of law.¹⁸⁶ Hence, even in such a simple legal system, in which absolute lawmaking power is vested in a single person, ancillary rules will be adopted to specify the “manner and form” which the monarch is to use when she legislates.¹⁸⁷ Of course, the need for secondary rules that specify the procedure for legislating significantly increases in more sophisticated legal systems with multimember legislatures and more complex procedures for producing law. Hart noted that every legal system—even one in which there is no written constitution and no substantive limits on the legislative power—must have “manner and form” rules that specify what the legislature must do to legislate.¹⁸⁸

Hart noted that such rules are not “duty-imposing” rules, and seemed to accept the argument that these rules should not be counted as “limits” on the sovereign’s legislative powers since they do not limit the content of the legislative power.¹⁸⁹ He noted, however, that these rules “must be taken

¹⁸⁶ *Id.* at 67-68.

¹⁸⁷ *Id.* at 68.

¹⁸⁸ *Id.* at 71; *cf. id.* at 95-96.

¹⁸⁹ *Id.* at 68-69.

seriously if they are to serve their purpose,” indicating that these rules’ essential purpose is to allow the sovereign’s subjects to recognize which of the sovereign’s utterances is “law.”¹⁹⁰ The relationship between the “manner and form” rules and the rule of recognition becomes clearer when Hart turns to discuss a legal system that does have a written constitution. Hart argued that constitutional provisions that specify “the form and manner of legislation,” as well as the provisions that define the scope of the legislative power, “are parts of the rule conferring authority to legislate.”¹⁹¹ These provisions “vitaly concern the courts, since they use such rule as a criterion of the validity of purported legislative enactments coming before them.”¹⁹²

Hart raised these arguments in the context of rejecting Austin’s doctrine of sovereignty and its claim that conceptually there could be no legal limitations on the sovereign’s legislative power.¹⁹³ Indeed, the importance of these arguments in rejecting the view that the legislative process is a sphere of unfettered omnipotence in favor of the view that “law-making cannot be understood except as a rule-governed process” is well recognized.¹⁹⁴ Even

¹⁹⁰ *Id.* at 68.

¹⁹¹ *Id.* at 68-69.

¹⁹² *Id.* at 69. See also Jeremy Waldron, *Who Needs Rules of Recognition?*, in Adler & Einar Himma, *supra* note 171, at 327, 340-41.

¹⁹³ HART, *supra* note 172, at 66.

¹⁹⁴ Waldron, *Legislating with Integrity*, *supra* note 104, at 375.

more important for present purposes, however, is the implication of Hart's arguments as to the connection between the rules that govern the legislative process and the rule of recognition. These passages suggest that the rules that specify the procedure for legislating are of vital importance for the rule of recognition, for they provide at least some of the rule of recognition's criteria for identifying the legal rules of the system.¹⁹⁵

These passages also seem to bring Hart very close to the "new view" of parliamentary sovereignty, which was already gaining popularity among British constitutional theorists around the time *The Concept of Law* was first published.¹⁹⁶ The "new view" scholars argued that the rules that prescribe the sovereign's composition and lawmaking procedures are "logically prior to the sovereign," and that these rules are "necessary for the identification of the sovereign and for the ascertainment of [its] will" in any legal system.¹⁹⁷ They

¹⁹⁵ Waldron, *Who Needs Rules of Recognition?*, *supra* note 192, at 342. To clarify, this does not mean that all the constitutional and subconstitutional rules that govern the legislative process are necessarily part of the rule of recognition. In any legal system there will be room for interpretation for determining which of these rules set necessary conditions for valid enactment, and only these rules will be part of the rule of recognition. The point here is merely that the rules that specify the procedural requirements for valid enactment are necessary for the courts' identification of the law.

¹⁹⁶ The "new view" of parliamentary sovereignty was most prominently introduced by W.I. Jennings, and was already endorsed by other constitutional scholars, such as G. Marshall and R.F.V. Heuston when the first edition of the *The Concept of Law* was published. For good overviews of the emergence of the "new view" of parliamentary sovereignty in constitutional theory, see PETER C. OLIVER, *THE CONSTITUTION OF INDEPENDENCE: THE DEVELOPMENT OF CONSTITUTIONAL THEORY IN AUSTRALIA, CANADA, AND NEW ZEALAND* 80–92 (2005); R. Elliot, *Rethinking Manner and Form: From Parliamentary Sovereignty to Constitutional Values*, 29 *OSGOODE HALL L.J.* 215, 222–30 (1991).

¹⁹⁷ Katherine Swinton, *Challenging the Validity of an Act of Parliament: The Effect of Enrolment and Parliamentary Privilege*, 14 *OSGOODE HALL L.J.* 345, 360–61 (1976).

argued therefore that procedural rules that govern the legislative process should not be viewed as limits on the will of the sovereign Parliament, but as “a necessary pre-condition to the validity of [its] acts.”¹⁹⁸

To be sure, the “new view” scholars focused on challenging Dicey’s classic view of parliamentary sovereignty in English constitutional theory,¹⁹⁹ whereas Hart was mostly focused on challenging Austin’s doctrine of sovereignty in legal philosophy.²⁰⁰ It appears, however, that Hart largely accepted the “new view” scholars’ views about the rules that govern the legislative process and their relation to parliamentary sovereignty.²⁰¹ This is significant, because some of the leading “new view” scholars expressly argued that the logical consequence of their arguments is that even under the principle of parliamentary sovereignty, which prohibits substantive judicial review, courts must “have jurisdiction to question the validity of an alleged Act of Parliament on [procedural] grounds.”²⁰² They argued that judicial examination of the enactment process is necessary in order for courts to determine the

¹⁹⁸ *Id.* at 361.

¹⁹⁹ Elliot, *supra* note 196, at 220-23.

²⁰⁰ HART, *supra* note 172, at 66.

²⁰¹ *Id.* at 67-71, 149-52, 299.

²⁰² R.F.V. HEUSTON, *ESSAYS IN CONSTITUTIONAL LAW* 6-7 (1961); *see also* Bar-Siman-Tov, *EBD*, *supra* note 5, at 369-70.

authenticity of a putative Act, and conceptualized such judicial review as an inquiry whether Parliament has “spoken.”²⁰³

Admittedly, all of the above is in tension with one passage in *The Concept of Law*. In discussing the relationship between the rule of recognition and the rules of change, Hart noted that there will plainly be “a very close connection” between the two, and that the rule of recognition will “necessarily incorporate a reference to legislation.”²⁰⁴ He added, however, that the rule of recognition “need not refer to all the details of procedure involved in legislation. Usually some official certificate or official copy will, under the rules of recognition, be taken as a sufficient proof of due enactment.”²⁰⁵ I argue, however, that determining the procedural validity of legislation is not merely a factual question of “proof,” and, therefore, the judicial need to recognize what constitutes valid law cannot be entirely resolved by “some official certificate.” In fact, I argue that some of Hart’s own arguments in later parts of *The Concept of Law* help to establish this claim.

²⁰³ Denis V. Cowen, *Legislature and Judiciary Reflections on the Constitutional Issues in South Africa: Part 2*, 16 MOD. L. REV. 273, 280 (1953); see also Swinton, *supra* note 197, at 360 (arguing that under the principle of parliamentary sovereignty courts must enforce any Act of Parliament, “but in so doing they have a duty to scrutinize the procedure of enactment to ensure that ‘Parliament’ has acted. This exercise is a necessity in any situation where the sovereign is not a single person.”).

²⁰⁴ HART, *supra* note 172, at 96.

²⁰⁵ *Id.*

In discussing the possibility of uncertainty in the rule of recognition, Hart conceded that even in a legal system “in which there is no written constitution specifying the competence of the supreme legislature,” the formula “whatever the Queen in Parliament enacts is law” will not always be an adequate expression of the ultimate criterion for the identification of law.²⁰⁶ Hart acknowledged that even in such a legal system, “doubts can arise as to [this criterion’s] meaning or scope.”²⁰⁷ Importantly, he noted that “we can ask what is meant by ‘enacted by parliament’ and when doubts arise they may be settled by the courts.”²⁰⁸

Hart went on to examine some of the vexing questions relating to the English doctrine of parliamentary sovereignty, including the extent to which Parliament can alter the “manner and form” requirements for legislation and entrench such provisions.²⁰⁹ Hart’s conclusion is significant enough to be presented in verbatim:

It is quite possible that some of [these] questionable propositions . . . will one day be endorsed or rejected by a court called on to decide the matter. Then we shall have an answer . . . and that answer . . . will have a unique authoritative status among the answers which might be given. The courts will have made determinate at this point the ultimate rule by which valid

²⁰⁶ *Id.* at 148.

²⁰⁷ *Id.*

²⁰⁸ *Id.*

²⁰⁹ *Id.* at 149-52.

law is identified. Here ‘the constitution is what the judges say it is’ does *not* mean merely that particular decisions of supreme tribunals cannot be challenged.... [H]ere are courts exercising creative powers which settle the ultimate criteria by which the validity of . . . laws . . . must . . . be tested.²¹⁰

This statement is astounding when we remember that Hart was discussing a legal system in which the legislature is sovereign and supreme, and courts lack judicial review power.²¹¹

Two main arguments can be developed based on these passages. First, Hart seemed to recognize an important and often overlooked aspect of determining the procedural validity of legislation: this determination does not merely entail a factual determination that the requirements for enactment were met. It also entails an interpretative task of determining what the requirements are and what should count as satisfying these requirements.²¹² Indeed, I have argued elsewhere that determining whether a bill has been properly enacted in compliance with the Constitution is not merely a factual inquiry, for it raises the interpretative “questions of what exactly are the procedural requirements set forth in Article I and what constitutes compliance with these requirements (for example, what constitutes ‘passage’)...”²¹³ Hart’s discussion in the

²¹⁰ *Id.* at 152.

²¹¹ Indeed, Hart himself realized that “[a]t first sight the spectacle seems paradoxical.” *Id.* at 152.

²¹² Bar-Siman-Tov, *EBD*, *supra* note 5, at 359.

²¹³ *Id.*

passages above supports the claim that such interpretative questions of “what is meant by ‘enacted by parliament’” can arise even in legal systems that lack a written constitution which prescribes the procedure for enactment.²¹⁴

Second, Hart seemed to realize that the authority to answer the question of “what is meant by ‘enacted by parliament’” entails “exercising creative powers” which settle the content of the ultimate criteria of validity itself.²¹⁵ The combination of these two arguments reveals the real consequence of courts’ relying on “some official certificate” of “due enactment” instead of determining the validity of legislation on their own. The consequence is that the courts cede to the legislative officers who prepare this official certificate not only the power to make the factual determination that all lawmaking requirements were met, but also the power to determine the contents of the rule of change and, ultimately, of the rule of recognition itself.²¹⁶

Finally, there is an even graver consequence of judicial acceptance of “some official certificate” in lieu of an independent judicial determination of the validity of legislation, which Hart seemed to overlook. When courts treat as valid “law” any document that bears this official certificate, they in fact give the certifying officers not only the power to determine the content of the rule

²¹⁴ HART, *supra* note 172, at 148.

²¹⁵ *Id.* at 148, 152.

²¹⁶ Bar-Siman-Tov, *EBD*, *supra* note 5, at 358-62.

of change, but in fact the power to make law in violation of the rule of change.²¹⁷ That is, the fact that courts accept any document that bears the official certificate as “law” allows the certifying officers to produce such a document on their own and this piece of paper that was never enacted by the legislature will be part of the valid laws of the legal system.²¹⁸ This argument may sound farfetched. In fact, however, there is at least one recent case in which the legislative officers of Congress allegedly certified and presented to the President a bill that they knew was not enacted in the same form by both Houses of Congress as mandated by the Constitution.²¹⁹ Since the federal courts refuse to undertake an independent judicial examination of the procedural validity of legislation even in “cases involving allegations that the presiding officers of Congress . . . conspired to violate the Constitution by enacting legislation that had not passed both the House and Senate,”²²⁰ this “law” is now part of the legal system.

Thus, the rule-of-recognition argument for JRLP can be summarized as follows: adjudication entails the authority to determine whether legislation satisfies the validity criteria provided by the rule of recognition; the rule of recognition’s validity criteria are provided, in turn, at least in part, by the rules

²¹⁷ *Id.* at 362-63.

²¹⁸ *Id.*

²¹⁹ *Id.*

²²⁰ *OneSimpleLoan*, 496 F.3d at 208.

that specify the procedure for legislating. Hence, while resort to these rules will not always be required, whenever there is doubt as to whether a certain statute was enacted by the legislature, courts should be authorized to determine compliance with those rules. This authority is not contingent upon the authority of constitutional judicial review, or even on the existence of a constitution. Rather, since rules that specify the procedure for legislating are inevitable in any legal system, and are vital for recognizing the law (which, in turn, is an inherent part of adjudication), the authority to adjudicate should entail the authority of JRLP in any legal system.

To clarify, I am not claiming that the rule-of-recognition argument necessitates the conclusion that JRLP must exist, as a descriptive matter, in any legal system. Rather, I argue that the rule-of-recognition argument can provide a basis for the authority for such judicial review in any legal system. The fact that courts in some countries, such as the U.S., abdicate their inherent authority and duty to examine the procedural validity of legislation is therefore not detrimental to my claim. On the contrary, my rule-of-recognition argument helps underscore the serious negative consequences of such judicial abdication.

2. “Constitutional Existence Conditions”

The best example of a constitutional theory that develops a rule-of-recognition argument for judicial review in the American constitutional system

is Adler and Dorf's "constitutional existence conditions" theory.²²¹ These scholars argue that many provisions of the Constitution are best understood as setting "existence conditions"—that is, as stating the necessary conditions that statutes must meet in order to be recognized as law.²²² While these provisions do not constitute the entire and ultimate rule of recognition in the American legal system,²²³ they operate like the rule of recognition in the sense that they provide courts (and other officials) with criteria for identifying the system's legal rules.²²⁴

Adler and Dorf claim that "[o]nce one acknowledges that courts have the duty to apply statutes,"²²⁵ it becomes clear that judicial enforcement of constitutional provisions that state existence conditions is unavoidable:

If (1) the judge is under a legal duty to take account of [statutes] in reaching her decisions, then (2) she is under a legal duty to determine whether putative legal propositions of that type, advanced by the parties, really do have legal force. Yet this entails (3) a legal duty to determine whether these putative legal propositions satisfy the existence conditions stated by relevant constitutional provisions.²²⁶

²²¹ Adler & Dorf, *supra* note 244.

²²² Adler & Dorf, *supra* note 244, at 1108-09, 1114, 1119.

²²³ *See id.* at 1130 n. 53, 1131-33.

²²⁴ *Id.* at 1109 n. 13.

²²⁵ *Id.* at 1107.

²²⁶ *Id.* at 1123-24.

They argue, therefore, that even if *Marbury v. Madison* was to be overruled, it would still be the inevitable legal duty of judges to exercise judicial review, in the sense of determining whether a putative statute satisfied the “constitutional existence conditions” of legislation.²²⁷

If one accepts this argument for judicial review, the remaining question is which constitutional provisions set “existence conditions”—or more generally, what are the validity criteria under the American rule of recognition. Adler and Dorf are mostly interested in developing their argument into a justification of substantive judicial review. They “aim to dislodge the intuition that procedural mechanisms such as Article I, Section 7 are the only existence conditions, whereas substantive provisions such as the enumerated powers and individual rights clauses are [not].”²²⁸

Importantly, however, Adler and Dorf’s argument begins from the recognition that “there is a certain intuitive logic” to consider the constitutional provision that identifies the procedure for legislating as setting forth existence conditions;²²⁹ and that this provision is the primary example of those provisions that “Americans intuitively understand as (partly) constituting the

²²⁷ *Id.* at 1107-08, 1123-25.

²²⁸ *Id.* at 1136.

²²⁹ *Id.* at 1114.

difference between law and nonlaw.”²³⁰ They concede, moreover, that even under the most minimalist rule of recognition, the bare minimum that the validity criterion in the U.S. must include is the premise that a “proposition constitutes a federal statute if and only if it satisfies the procedures for promulgating statutes set forth in the Constitution.”²³¹

Adler and Dorf reject this narrow approach, arguing instead that the validity criteria in the American system include “the rule of recognition itself, the Constitution, and all other rules derivative of these” and that “[w]hether a constitutional provision sets forth an existence condition for some type of law is itself a constitutional question.” Based on this approach, they go on to establish their claim that many provisions of the Constitution, including substantive provisions, state existence conditions.²³² Even under this approach, however, they note that the provisions that define the mechanisms of lawmaking are among the “constitutional provisions that most clearly function as existence conditions.”²³³

In short, notwithstanding their primary goal of establishing that substantive constitutional provisions constitute existence conditions, every step

²³⁰ *Id.* at 1129.

²³¹ *Id.* at 1131.

²³² *Id.* at 1136-71.

²³³ *Id.* at 1136, 1145-50.

in Adler and Dorf's argument confirms that their argument for judicial review is most persuasive when applied to JRLP. To their credit, they readily admit that Article I, Section 7 is "the clearest case of a constitutional existence condition,"²³⁴ and that the courts' refusal to enforce this provision is hard to reconcile with their constitutional theory.²³⁵

The question of what constitutes the validity criteria in the U.S. is far from settled in the analytic jurisprudence and constitutional theory literature.²³⁶ There seems to be significant support, however, for the premise that the validity criteria include, at the very least, the procedural requirements for lawmaking set out in the Constitution.²³⁷ In fact, even some of the critics of a rule-of-recognition justification to constitutionalism base their objection, in part, on the argument that "[t]he rule-of-recognition notion justifies . . . constitutional provisions defining the [procedural] conditions for the enactment of valid national legislation... But [it] hardly justifies the numerous substantive

²³⁴ *Id.* at 1172.

²³⁵ *Id.*

²³⁶ See Kent Greenawalt, *The Rule of Recognition and the Constitution*, in Adler & Einar Himma, *supra* note 171, at 1 (noting the difficulty of determining the rule of recognition for the U.S.).

²³⁷ See, e.g., Shapiro, *supra* note 174, at 240; Waldron, *Who Needs Rules of Recognition?*, *supra* note 192, at 340-41. Cf. Michelman, *supra* note 134, at 1300-01 (noting that a constitution "functions as what H.L.A. Hart calls a rule of recognition" in the sense that it "sets conditions of validity for ordinary law" and that this "certainly" includes "procedural prerequisites for valid ordinary lawmaking").

limitations on the national lawmaking power contained in [the Constitution].”²³⁸

In short, the rule-of-recognition argument provides a powerful reply to attacks on the legitimacy of judicial review. It suggests that debates about the legitimacy of judicial review are misdirected, because, legitimate or not, judicial review is simply an inevitable part of adjudication.²³⁹ As Adler and Dorf claim, it is simply “impossible to take the entire Constitution away from the courts.”²⁴⁰ If one accepts this argument, then the resistance to JRLP becomes particularly puzzling, because there is significant agreement—from Adler and Dorf to Klareman and Waldron—that the procedural requirements for lawmaking specified in the Constitution are inevitably part of the validity criteria in the U.S.

C. Dialogue Theories

Dialogue theories are becoming increasingly influential and widespread in constitutional theory in recent years.²⁴¹ Dialogue theorists argue that judicial

²³⁸ Michael J. Klarman, *What's So Great About Constitutionalism?*, 93 NW. U. L. REV. 145, 183 (1998).

²³⁹ *Id.*

²⁴⁰ Adler & Dorf, *supra* note 244, at 1107.

²⁴¹ Christine Bateup, *The Dialogic Promise: Assessing the Normative Potential of Theories of Constitutional Dialogue*, 71 BROOK. L. REV. 1109, 1109 (2006); Kent Roach, *Constitutional, Remedial, and International Dialogues about Rights: The Canadian Experience*, 40 TEX.

review should not be viewed as an instance of unaccountable judges superseding the will of elected representatives; but rather, as part of an ongoing dialogue about the meaning of the Constitution, in which all three branches of government and the general public participate.²⁴² This Section argues that some of the major arguments underlying dialogue theories can in fact be used to underscore the claim that JRLP is more defensible than substantive judicial review.

One of the crucial arguments underlying the dialogue justification is the claim that a judicial decision that invalidates a statute is merely an invitation for reconsideration by the elected branches. Dialogue theorists seek to undermine the counter-majoritarian argument's assumption that judicial review trumps majority will, by claiming that the political branches can respond to judicial decisions with which they disagree.²⁴³ Some dialogue theorists focus on the ability of the legislature to respond to judicial invalidations of statutes;²⁴⁴ others focus on the responses of the political process more

INT'L L.J. 537, 537-38 (2005).

²⁴² While there are many versions of dialogue theories, this article focuses on the theories that seek to undermine the counter-majoritarian argument's assumption that judicial review trumps majority will. *E.g.* Barry Friedman, *Dialogue and Judicial Review*, 91 MICH. L. REV. 577 (1993); Peter W. Hogg & Allison Bushell, *The Charter Dialogue between Courts and Legislatures (or Perhaps the Charter Isn't Such a Bad Thing After All)*, 35 OSGOODE HALL L.J. 75 (1997).

²⁴³ Bateup, *supra* note 241, at 1118-19.

²⁴⁴ *E.g.*, Hogg & Bushell, *supra* note 242.

broadly.²⁴⁵ The important point, however, is that both advocates and critics of dialogue theories agree that the dialogue argument is based on the legislature's (or the political process') ability to respond to judicial invalidations.²⁴⁶

Substantive judicial review—at least in its American “strong-form” version, in which the Court’s constitutional judgments are purportedly final and unreviseable²⁴⁷—poses a serious challenge to dialogue theory.²⁴⁸ To be sure, American dialogue theorists argue that notwithstanding the Court’s claim to finality,²⁴⁹ the Court does not *really* have the final word on constitutional matters.²⁵⁰ The argument, in brief, is that controversial constitutional decisions by the Court create a backlash from the public and the political branches, which eventually—through “the gradual attrition of the Justices, and through presidential appointment of successors”—pushes the Court to reverse its earlier

²⁴⁵ Barry Friedman, *The Importance of Being Positive: The Nature and Function of Judicial Review*, 72 U. CIN. L. REV. 1257, 1291-95 (2004).

²⁴⁶ See, e.g., Hogg & Bushell, *supra* note 242, at 79-80; Kent Roach, *Dialogic Judicial Review and its Critics*, 23 SUP. CT. L. REV. (2d) 49, 55-57 (2004); Luc B. Tremblay, *The Legitimacy of Judicial Review: The Limits of Dialogue between Courts and Legislatures*, 3 INT’L J. CONST. L. 617, 618, 623 (2005).

²⁴⁷ Tushnet, *supra* note 38, at 817-18.

²⁴⁸ Robert C. Post & Reva B. Siegel, *Protecting the Constitution from the People: Juricentric Restrictions on Section 5 Power*, 78 IND. L.J. 1, 30, 43 (2003) (arguing that the Court’s increasing assertion of ultimate power to interpret the Constitution stifles inter-branch constitutional dialogue); Roach, *Dialogic Judicial Review*, *supra* note 246, at 55-56, 63-64 (arguing that under the American model, unlike the Canadian model, the legislature’s ability to respond to judicial invalidations is very limited).

²⁴⁹ See, e.g., *Cooper v. Aaron* 358 U.S. 1, 18 (1958); *City of Boerne v. Flores*, 521 U.S. 507, 519, 529 (1997); *United States v. Morrison*, 529 U.S. 598, 617 n.7 (2000).

²⁵⁰ Friedman, *Dialogue*, *supra* note 242, at 643-48.

decision and to “come into line with popular opinion.”²⁵¹ However, even the proponents of this claim admit that it takes great efforts and a long time to reverse judicial decisions under this scheme, and that in the meantime “majority will still is frustrated.”²⁵² Moreover, empirical data suggests that even when Congress responds to judicial invalidations of legislation, the Court tends to get the final word on constitutional interpretation, limiting the legislature’s role to salvaging some of its policy objectives within the constitutional confines imposed by the Court.²⁵³

JRLP, in contrast, is, by design, particularly apt for enabling reenactment of invalidated statutes. A distinctive feature of JRLP is that the judicial decision remands the invalidated statute to the legislature, which is entirely free to reenact the exact same legislation, provided that a proper legislative process is followed.²⁵⁴ There is no claim to judicial finality or supremacy; instead, the invitation for a “second legislative look” is inherent to this form of judicial review.²⁵⁵ JRLP allows for faster, easier and much more

²⁵¹ Friedman, *Importance of Being Positive*, *supra* note 245, at 1291-95.

²⁵² *Id.* at 1293-94.

²⁵³ J. Mitchell Pickerill, *Congressional Responses to Judicial Review*, in CONGRESS AND THE CONSTITUTION 151, 161-65, 167-69 (Neal Devins & Keith E. Whittington eds., 2005).

²⁵⁴ Linde, *supra* note 9, at 243.

²⁵⁵ See Coenen, *Constitution of Collaboration*, *supra* note 37, at 1582-84, 1587-92; Richard Neely, *Obsolete Statutes, Structural Due Process, and the Power of Courts to Demand a Second Legislative Look*, 131 U. PA. L. REV. 271, 277-78 (1982).

direct political response to judicial invalidations.²⁵⁶ Moreover, JRLP provides more room for a legislative response that engages both policy and constitutional aspects of the legislation. Hence, to the extent that the ability of the legislature (or the political process more broadly) to respond to judicial invalidations is what takes the sting out of the countermajoritarian difficulty, this argument is more persuasive as support for JRLP.

For some dialogue theorists the dialogue justification revolves entirely around the claim discussed above—that judicial invalidations of statutes “usually leave room for, and usually receive, a legislative response.”²⁵⁷ Other dialogue theorists argue further that judicial review is justified because it promotes constitutional dialogue outside the courts.²⁵⁸ The argument is that judicial review not only leaves room for, but in fact encourages and facilitates,

²⁵⁶ To be sure, skeptics argue that the claim that judicial invalidations of statutes under JRLP are merely provisional overestimates the ease with which a legislature can revisit its earlier decisions. See Tushnet, *supra* note 22, at 2794-95; Mark Tushnet, *Subconstitutional Constitutional Law: Supplement, Sham, or Substitute?*, 42 WM. & MARY L. REV. 1871, 1872-75 (2001). It should be clarified, therefore, that the point here is merely that the legislature’s ability to meaningfully respond to judicial invalidations is greater under JRLP than under (strong-form) substantive judicial review. This does not deny that reenactment may be costly and sometimes even politically unfeasible, regardless of the reason for judicial invalidation. It should also be noted that different models of JRLP impose different levels of reenactment costs, as some enactment costs can be influenced by the degree of procedural demands that the invalidating judicial decision imposes. For example, a decision that remands the statute to Congress and permits it to re-pass it as long as the constitutional bicameralism requirement is met imposes significantly less reenactment costs than a decision that requires evidence of a high degree of deliberation and fact-finding in the legislative record. Cf. Matthew C. Stephenson, *The Price of Public Action: Constitutional Doctrine and the Judicial Manipulation of Legislative Enactment Costs*, 118 YALE L.J. 2, 49 (2008).

²⁵⁷ Peter W. Hogg et al., *Charter Dialogue Revisited – or “Much Ado about Metaphors,”* 45 OSGOODE HALL L.J. 1, 7 (2007) (noting that this claim is their substantive thesis).

²⁵⁸ Friedman, *Importance of Being Positive*, *supra* note 245, at 1290-91, 1295-97.

an extra-judicial debate about the meaning of the Constitution.²⁵⁹ Barry Friedman argues, for example, that the “Court acts as a catalyst for debate, fostering a national dialogue about constitutional meaning. Prompting, maintaining, and focusing this debate about constitutional meaning is the primary function of judicial review.”²⁶⁰ According to Friedman, the Court plays a dual role in this dialogue: the role of “speaker”—declaring rights and “telling us what the Constitution means”—and the role of “shaper or facilitator.”²⁶¹

The problem is that under the current model of substantive judicial review, the Court is much more a speaker and shaper than a mere facilitator in the national conversation about constitutional meaning—even if we fully accept dialogue theorists’ descriptive account that the Court does not have the final word. In contrast, under JRLP the court is neither a speaker nor a shaper, but rather merely and truly a facilitator of the dialogue. Under JRLP, the court expresses no view on the content of the legislation, with all the value and policy judgments it entails. It leaves the debates about the proper meaning of the Constitution and about rights and policy entirely to the political branches

²⁵⁹ *Id.*

²⁶⁰ *Id.* at 1295-96.

²⁶¹ Friedman, *Dialogue*, *supra* note 242, at 668; Friedman, *Importance of Being Positive*, *supra* note 245, at 1289, 1295-96.

and the public. Unlike semiprocedural judicial review, moreover, the court does not even have to provide provisional substantive interpretation.

At the same time, JRLP also has inherent features that may contribute to improving constitutional deliberations outside the courts.²⁶² By focusing on the process of legislation, and enforcing rules whose purpose is to enable and encourage deliberation and participation, it promotes dialogue within the political branches and the public.²⁶³ Indeed, even new-governance scholars, who are usually skeptical of courts, have recently argued that judicial review that focuses on the decision-making process of the other branches can be particularly useful in promoting dialogue outside the courts.²⁶⁴ Hence, under JRLP, courts truly are merely facilitators of the dialogue about the meaning of the Constitution.

In short, dialogue theory goes a long way in rebutting claims that JRLP is more intrusive and disrespectful toward the legislature than substantive judicial review. It helps to demonstrate that JRLP is particularly apt for

²⁶² Coenen, *Constitution of Collaboration*, *supra* note 37, at 1583, 1868-69.

²⁶³ William N. Eskridge, Jr. & John Ferejohn, *Constitutional Horticulture: Deliberation-Respecting Judicial Review*, 87 TEX. L. REV. 1273, 1296-97 (2009).

²⁶⁴ Joanne Scott & Susan Sturm, *Courts as Catalysts: Re-thinking the Judicial Role in New Governance*, 13 COLUM. J. EUR. L. 565 (2007). *See also*, KEREN AZULAY, BREAKING THE WALL: TOWARD A NEW MODEL OF CONSTRUCTIVE DELIBERATIONS 72-75 (2008), available at <http://books.google.com/books?id=exUHAtBq5rEC&printsec=frontcover#v=onepage&q&f=false>.

enabling legislative response and that the judicial role under this type of judicial review is much more modest.

D. Process Theories

The resistance to JRLP is perhaps most puzzling given the centrality of process-based justifications for judicial review in constitutional theory. Ely's "representation-reinforcing" theory,²⁶⁵ in particular, is arguably the most influential constitutional theory in the past few decades.²⁶⁶

Accepting the charge that substantive judicial review is countermajoritarian, and therefore prima facie incompatible with democratic theory,²⁶⁷ Ely sought to develop an approach to judicial review that "unlike its rival value-protecting approach, is not inconsistent with, but on the contrary (and quite by design) entirely supportive of . . . representative democracy."²⁶⁸ He argued that rather than dictating substantive results or protecting substantive constitutional values, courts should only intervene when the

²⁶⁵ JOHN H. ELY, *DEMOCRACY AND DISTRUST, A THEORY OF JUDICIAL REVIEW* 73-104 (1980).

²⁶⁶ JOHN H. GARVEY ET AL., *MODERN CONSTITUTIONAL THEORY: A READER 2* (5th ed., 2004) (Observing that Ely's book is "probably the most influential book on constitutional law in the past few decades"). Even Ely's critics concede that "[f]ew, if any, books have had the impact on constitutional theory of John Hart Ely's *Democracy and Distrust*." Daniel R. Ortiz, *Pursuing a Perfect Politics: The Allure and Failure of Process Theory*, 77 VA. L. REV. 721, 721 (1991).

²⁶⁷ ELY, *supra* note 265, at 4-5, 7-8, 11-12.

²⁶⁸ *Id.* at 88.

political process malfunctions.²⁶⁹ Ely argued that judicial review that focuses on the political process, rather than substance, is not only more legitimate, but also, “again in contradiction to its rival, involves tasks that courts, as experts on process and . . . as political outsiders, can sensibly claim to be better qualified and situated to perform than political officials.”²⁷⁰ While Ely was interested in the political process more broadly, he indicated that his theory is concerned “with the process by which the laws that govern society are made.”²⁷¹

Based on this brief description of Ely’s theory, the uninitiated reader might be tempted to conclude that Ely was advocating JRLP against substantive judicial review. However, Ely and most process theorists do not advocate JRLP.²⁷² Instead, they mostly use process-based theories to justify some version of substantive judicial review, and to delineate the areas in which substantive judicial review is legitimate.²⁷³ Generally speaking, process

²⁶⁹ *Id.* at 102-03.

²⁷⁰ *Id.* at 88.

²⁷¹ *Id.* at 74.

²⁷² Although there are, of course, rare but notable exceptions. *See, e.g.*, William N. Eskridge, Jr., *Pluralism and Distrust: How Courts Can Support Democracy By Lowering the Stakes of Politics*, 114 YALE L.J. 1279, 1301-02 , 1317 (2005) (suggesting a process-theory that is mostly aimed at developing “a Constitution-based philosophy for interpreting the open-textured clauses of the First and Fourteenth Amendments,” but also noting that his process-theory requires, among other things, judicial enforcement of the rules of the political game, including the procedural rules governing lawmaking).

²⁷³ Hamilton, *supra* note 2, at 501, 502-19; Goldfeld, *supra* note 32, at 395-98.

theorists try to define the categories of cases in which the political process is likely to be untrustworthy and argue that substantive judicial review is (only) legitimate in these cases.²⁷⁴ They also typically seek to legitimize judicial protection of certain rights—democracy-enforcing rights, such as voting rights and freedom of speech—while delegitimizing judicial enforcement of other constitutional rights.²⁷⁵ Ely’s theory itself was mostly an effort to justify and reconcile the Warren Court’s decisions under “a coherent theory of representative government;”²⁷⁶ and to provide a “constitutionally justified recipe for filling in the ‘open texture’ of the Free Speech, Due Process, and Equal Protection Clauses.”²⁷⁷

The process theorists’ arguments, however, are particularly applicable to justifying JRLP. In fact, the one premise from Ely’s theory that seems to be most widely accepted is that correcting the defects in the political process is a legitimate function of judicial review.²⁷⁸ Indeed, many constitutional theorists, such as subsequent process theorists, public choice theorists, and civic

²⁷⁴ See Dorf, *Legal Indeterminacy*, *supra* note 56, at 895-97.

²⁷⁵ *Id.* at 896-97.

²⁷⁶ ELY, *supra* note 265, at 73-74.

²⁷⁷ Eskridge, Jr., *supra* note 272, at 1284.

²⁷⁸ Michael C. Dorf & Samuel Issacharoff, *Can Process Theory Constrain Courts?*, 72 U. COLO. L. REV. 923, 931 (2001) (“Notwithstanding the judicial departures from and academic criticism of Ely’s process theory, a premise of that theory has generally been accepted. Even though there has been debate over whether and how much activist judicial review can be justified outside the area of non-self-correcting defects in the political process, most have assumed that correcting such defects is a legitimate judicial function.”).

republican theorists adopted the premise that there are defects (of one sort or another) in the legislative process and that courts can and should cure such process failures.²⁷⁹ Ironically, even Justice Scalia, perhaps the staunchest opponent of JRLP on the Court,²⁸⁰ embraced this argument in the service of justifying his textualist theory of interpretation.²⁸¹

Admittedly, given its focus only on the enactment process, JRLP cannot by itself cure all the broader political process maladies targeted by process theorists. However, to the extent that these process theorists advocate substantive judicial review for the correction of procedural pathologies in the enactment process itself, JRLP is a more direct (and therefore more promising, and more straightforward) means to deal with such procedural defects.²⁸²

Furthermore, JRLP avoids much of the criticisms leveled against Ely and other process theories. For one thing, much of the criticism Ely attracted was due to his argument that courts should avoid protecting substantive values and individual liberties that are not directly process-related. Laurence Tribe has famously argued that “[o]ne difficulty that immediately confronts process

²⁷⁹ Hamilton, *supra* note 2, at 502-19.

²⁸⁰ See, e.g., *Munoz-Flores*, 495 U.S. at 408–10 (Scalia, J., concurring); *Thompson*, 487 U.S. at 876-77 (Scalia, J., dissenting).

²⁸¹ *United States v. Taylor*, 487 U.S. 326, 345–46 (1988) (Scalia, J., concurring); Bar-Siman-Tov, *EBD*, *supra* note 5, at 357.

²⁸² See DANIEL A. FARBER & PHILIP P. FRICKEY, *LAW AND PUBLIC CHOICE: A CRITICAL INTRODUCTION* 117 (1991).

theories is the stubbornly substantive character of so many of the Constitution's most crucial commitments."²⁸³ Or as William Eskridge puts it, "[t]aking substance (liberty) out of the Constitution, or relegating it to the shadows as Ely does, is like taking God out of the Bible."²⁸⁴ JRLP avoids this criticism, because it does not entail rejection of judicial protection of fundamental rights and liberties. As courts that exercise JRLP demonstrate, this model can coexist side by side with substantive judicial review.

Another major criticism of Ely's theory focuses on its blurry distinction between substance and process. Critics have argued that "under Dean Ely's expansive definition of 'process,' virtually every constitutional issue can be phrased in procedural terms that justify judicial review."²⁸⁵ JRLP, on the other hand, draws a sharper (even if not perfect) distinction between judicial review that examines the content of legislation and judicial review that examines the procedures leading to enactment.²⁸⁶ Moreover, the "process" in JRLP is more narrow and clear: rather than referring to "the democratic process" or "the

²⁸³ Laurence H. Tribe, *The Puzzling Persistence of Process-Based Constitutional Theories*, 89 YALE L.J. 1063, 1065 (1980).

²⁸⁴ Eskridge, Jr., *supra* note 272, at 1291.

²⁸⁵ Erwin Chemerinsky, *The Price of Asking the Wrong Question: An Essay on Constitutional Scholarship and Judicial Review*, 62 TEX. L. REV. 1207, 1222 (1984).

²⁸⁶ *Cf.*, Hamilton, *supra* note 2, at 493 (drawing "a sharp distinction between judicial review of legislative outcomes... and judicial review of the legislature's deliberative or policymaking process. The former requires invalidation of statutes producing unconstitutional results, while the latter... would also permit the invalidation of a statute where the legislative process in a particular instance was perceived to be unconstitutional regardless of the quality of the outcome.").

political process” more broadly, it refers only to the enactment process within the legislature. The borders of this process are much clearer: from the initial introduction of the bill in one of the legislature’s chambers to its signature by the President (or Congress’s override of her veto). The definition of what such “process” entails is also relatively clearer, because it is specified in the written constitutional and subconstitutional rules that prescribe the requirements for valid enactment.

A related common criticism relates to Ely’s claim that he was advancing a value-neutral approach to judicial review. Critics have argued that procedural protections inevitably serve underlying values.²⁸⁷ This Article embraces this criticism. It argues that part of the justification for JRLP is precisely that it protects essential democratic values. Note, however, that JRLP only requires a commitment to a relatively uncontested set of procedural democratic values.²⁸⁸ In this regard it is markedly different than semiprocedural judicial review, which employs review of the enactment process in order to protect substantive values, thereby inevitably inviting the question of which substantive values the courts should promote through heightened procedural lawmaking requirements.²⁸⁹ As JRLP applies across the board, regardless of the

²⁸⁷ Dorf, *Legal Indeterminacy*, *supra* note 56, at 897.

²⁸⁸ See Part III.D. *supra*.

legislation's content and the substantive values it represents or endangers, it largely avoids this problem.

Finally, and also related, process theories have invited concerns as to the extent that such theories curb judicial discretion or merely provide a platform for judges to inject their own ideological preferences under the guise of a neutral approach to judicial review.²⁹⁰ JRLP is more suitable for curbing judicial discretion. To be sure, no model of judicial review can be entirely objective and discretion-free, and JRLP is no exception. Indeed, I have stressed earlier that determining whether a certain bill was properly enacted into law is not merely a factual question, and often interpretative questions will be unavoidable.²⁹¹ Some rules that regulate the legislative process, moreover, may require more interpretation than others.²⁹² Nevertheless, as a general matter, it seems that a model of judicial review that requires judges to examine whether a bill originated in the House, passed both chambers in the same form or passed three readings, provides judges with less opportunity to instill their personal political views than a model requiring them to decide whether a

²⁸⁹ Cf. Gillian E. Metzger, *Administrative Law as the New Federalism*, 57 DUKE L.J. 2023, 2094 (2008) (“[S]ubconstitutionalism's legitimacy cannot really be established as a general matter; rather, this determination rests on the particular constitutional values and doctrines at issue.”).

²⁹⁰ Dorf & Issacharoff, *supra* note 278.

²⁹¹ See Part IV.B.1 *supra*.

²⁹² See, e.g., Richard Briffault, *The Item Veto in State Courts*, 66 TEMP. L. REV. 1171 (1993) (arguing that the states' “item veto” rule requires significant interpretation).

certain law serves compelling interests, is cruel and unusual, infringes upon substantive due process and so on.²⁹³

Hence, the irony should be clear by now: the most influential theory in American constitutional law bases the legitimacy of judicial review upon ensuring the proper functioning of “the process by which the laws that govern society are made.”²⁹⁴ The premise that courts are both justified and competent in correcting defects in the legislative process is widely employed in justifying substantive judicial review. And yet, there is significant reluctance to accept the model of judicial review that is most directly aimed at ensuring the integrity of the legislative process and correcting its defects.

E. A Waldronian Case For Judicial Review

Most of the arguments in the preceding parts were primarily aimed at challenging the prevalent view that rejects JRLP as illegitimate, while taking substantive judicial review for granted. This section turns to one of the leading critics of (substantive) judicial review, Jeremy Waldron. I claim that several of Waldron’s arguments—including some of his leading arguments against judicial review—can in fact be developed into a justification for JRLP.

²⁹³ Cf. Linde, *supra* note 9, at 242 (arguing that most lawmaking rules are sufficiently concrete so that observers could relatively easily determine whether they were violated).

²⁹⁴ ELY, *supra* note 265, at 74.

While other prominent critics of judicial review (such as Mark Tushnet) may also be candidates for developing such a claim,²⁹⁵ Waldron's theory is particularly interesting for a number of reasons. Waldron is commonly regarded as one of the leading critics of judicial review,²⁹⁶ and one of the foremost proponents of legislatures and legislative supremacy.²⁹⁷ Furthermore, being one of the few thinkers who are active in both constitutional theory and academic jurisprudence,²⁹⁸ he is, inter alia, a strong critic of H.L.A. Hart's rule of recognition theory,²⁹⁹ and of Rule-of-Law arguments in favor of judicial review.³⁰⁰

²⁹⁵ Indeed, Mark Tushnet's scholarship is certainly interesting here as well. Tushnet's attitude toward due process of lawmaking and semiprocedural judicial review is complex, appearing to be somewhere between critical and ambivalent. To give but one interesting example: Tushnet has perhaps most prominently advanced the claim that judicial review has negative impact on the constitutional performance of legislatures (the so-called "judicial overhang effect"). *E.g.*, MARK TUSHNET, *TAKING THE CONSTITUTION AWAY FROM THE COURTS* 57-65 (1999). However, in the context of criticizing semiprocedural judicial review, and claiming that it may undermine the case for substantive judicial review, he strikingly argues that semiprocedural judicial review is "likely to improve the political branches' performance." Mark Tushnet, *Subconstitutional Constitutional Law*, *supra* note 256, at 1877. This merits greater study, which is beyond the scope of this Article.

²⁹⁶ Dorf, *Legal Indeterminacy*, *supra* note 56, at 890 & n. 41.

²⁹⁷ James Allan, *The Paradox of Sovereignty: Jackson and the Hunt for a New Rule of Recognition?*, 18 KING'S L. J. 1, 21 & n. 66 (2007).

²⁹⁸ Dorf, *Legal Indeterminacy*, *supra* note 56, at 878.

²⁹⁹ Waldron, *Who Needs Rules of Recognition?*, *supra* note 192.

³⁰⁰ Jeremy Waldron, *The Core of the Case Against Judicial Review*, 115 YALE L.J. 1346, 1354 (2006) ("The... proposition [that j]udicial review is just the subjection of the legislature to the rule of law... is precisely the contestation we are concerned with here."); Waldron, *Legislation and the Rule of Law*, *supra* note 96 (attacking substantive conceptions of the rule of law, including their claim that the rule of law requires judicial review of legislation).

Although Waldron has never explicitly expressed his opinion about JRLP,³⁰¹ one might expect that he would object to this form of judicial review as well. The next subsections claim, however, that some of Waldron's arguments in different areas of his scholarship actually lend support to several of the arguments for JRLP that I developed in the previous parts. In fact, some of Waldron's arguments would lend support for a more comprehensive model of JRLP than the one defended by this Article. In the last subsection, I build upon Waldron's rights-based argument against judicial review to develop a rights-based argument for JRLP.

1. The Rule-of-Recognition Argument

In Part IV.B. I have built upon Hart's rule-of-recognition theory to develop an argument for JRLP.³⁰² In *Who Needs Rules of Recognition?* Waldron challenges Hart's rule-of-recognition theory itself.³⁰³ His underlying arguments, however, lend support for some of my main claims. Part of my argument rested on the claim that the rules that specify the procedure for

³⁰¹ In some of his writings Waldron has clarified that his attack on judicial review is primarily targeted at the strong-form version of judicial review practiced by American courts rather than some of the weaker versions of weak-form substantive judicial review, like the one practiced in the U.K. See Waldron, *Case Against Judicial Review*, *supra* note 300, at 1354. However, to the best of my knowledge, Waldron has never said his attack on judicial review does not apply to JRLP, nor did he ever explicitly endorse JRLP.

³⁰² See Part IV.B.1 *supra*.

³⁰³ Waldron, *Who Needs Rules of Recognition?*, *supra* note 192.

legislating (“the rules of change” in Hart’s terms) provide at least some of the rule of recognition’s criteria for identifying valid law.³⁰⁴ In the context of attacking Hart’s theory, Waldron actually makes an even stronger claim that “the criteria of validity are given in the first instance by the rule of change.... The rule of recognition gets its distinctive [and entire] content from the rule of change...”³⁰⁵

Waldron argues, moreover, that “the constitutional clauses that authorize and limit the making of federal laws” are among the legal system’s “fundamental secondary rules of change.”³⁰⁶ Strikingly (albeit slightly less explicitly), Waldron seems to base his argument that these constitutional clauses negate the need for a separate rule of recognition, on the argument that these clauses provide all that *courts* need in order to recognize valid law:

If we regard these provisions as part of the system’s rule of change, then how should we think about the role of the rule of recognition? ... [One possibility is] that, given the operation of the rule of change, there is no need for a rule of recognition.... [This possibility] is analogue of what I said... about wills and contracts. To recognize a valid will, all a court needs to do is apply the rule of change... The court just runs through the checklist of valid procedures for this kind of legal change... It does not need a separate rule of recognition. I personally do not see why this could not be a sufficient account of what is going on at the constitutional level as well.³⁰⁷

³⁰⁴ See Part IV.B.1 *supra*.

³⁰⁵ Waldron, *Who Needs Rules of Recognition?*, *supra* note 192, at 342.

³⁰⁶ *Id.* at 340.

³⁰⁷ *Id.*

Waldron continues to say that at least in one place in *The Concept of Law* Hart seems to agree with this claim, and that “Hart is saying that the courts use a rule of change as a criterion of the legal validity of the norms that come before them.”³⁰⁸ Hence, in the process of attacking Hart’s rule-of-recognition theory, Waldron has actually lent support to my rule-of-recognition argument for JRLP.

2. *Legislating with Integrity*

In *Who Needs Rules of Recognition?* Waldron focused on the constitutional requirements for lawmaking, whereas I have argued that the rule-of-recognition argument can also apply to judicial enforcement of subconstitutional and extraconstitutional procedural requirements for lawmaking.³⁰⁹ However, some of Waldron’s other scholarship suggests that he in fact supports the view that Hart’s secondary rules of change should be interpreted as including not only subconstitutional procedural rules, but also unwritten procedural values and principles. In *Legislating with Integrity* Waldron argues that

legal positivists maintain that law-making cannot be understood except as a rule-governed process... I believe [that t]he

³⁰⁸ *Id.* at 340-41.

³⁰⁹ See Part IV.B.1 *supra*.

legislative process... ought to be understood not just in reference to the secondary rules that happen to constitute it and govern it, but also in reference to the... deeper values and principles that explain why the rule-governed aspects of the process are important to us. Another way of putting this is to say that the secondary tier of a legal system—what Hart called the secondary rules—comprises not only rules but principles as well.³¹⁰

Hence, Waldron’s arguments in this passage provide support for models of JRLP that enforce formal rules as well as unwritten procedural values. Waldron’s scholarship here would support an even more expansive version of JRLP than the one defended by this Article.

Legislating with Integrity also lends important support, however, for the more modest model of JRLP that focuses exclusively on the enforcement of formal (constitutional and subconstitutional) rules. According to Waldron, “principles do not just complement the enacted rules. Their role is also to explain why we have the rules of legislative process that we have, and to afford a basis for determining the proper mode of our compliance with them.”³¹¹ Indeed, *Legislating with Integrity* lends very strong support to my arguments in Part III about the importance of the rules that govern the legislative process, which stems, in part, from their important underlying democratic values and principles.³¹²

³¹⁰ Waldron, *Legislating with Integrity*, *supra* note 104, at 375-76.

³¹¹ *Id.* at 376.

³¹² See Part III.D. *supra*.

In fact, *Legislating with Integrity* even lends *some* support to the claim that courts may also have a role to play in ensuring the integrity of the legislative process. Waldron argues that “[l]egislative integrity is not just a principle for legislators” and that “[t]he integrity of the legislative process can also be a concern for other actors in the legal system. I have in mind particularly the role of judges... Judges have a duty to keep faith with the integrity of the legislative process too.”³¹³ To clarify, Waldron certainly does not advocate JRLP in this passage. He is quite clear that he is referring here to the role of courts in statutory interpretation.³¹⁴ Nevertheless, in the process of making his argument that courts should assume a modest role in statutory interpretation, Waldron raises strong arguments that lend support to my claim that the integrity of the legislative process is no less deserving of judicial protection than the outcomes of this process.

3. The Rule-of-Law Argument

I have argued that the Rule-of-Law ideal requires the idea that the legislative process be rule-governed, and that this argument would support judicial enforcement of both constitutional and subconstitutional procedural

³¹³ Waldron, *Legislating with Integrity*, *supra* note 104, at 385.

³¹⁴ *Id.* In Waldron’s view, the judicial duty “to keep faith with the integrity of the legislative process” would mean that courts should resist the “judicial temptation to try and ‘clean up’ the statutes they are presented with,” and also limit their use of legislative history in statutory interpretation. *Id.* at 385-88.

rules.³¹⁵ Waldron has famously argued that the Rule of Law is “an essentially contested concept.”³¹⁶ However, in later scholarship—in the context of criticizing substantive conceptions of the Rule-of-Law—Waldron has argued that the procedural rules that govern the legislative process are crucial for the Rule of Law, and that this understanding “has been prominent in the rule-of-law tradition” since Aristotle.³¹⁷

In fact, he argued that the Rule-of-Law ideal requires even more than compliance with constitutional and subconstitutional procedural rules, suggesting that “procedural virtues—legislative due process, if you like—are of the utmost importance for the rule of law.”³¹⁸ Waldron argued that legislation that is, *inter alia*, “enacted in a rush, in a mostly empty chamber, without any proper provision for careful deliberation and debate... with a parliamentary majority... used to force closure motions in debate after debate” “flouts the notion of legislative due process.”³¹⁹ Such legislation, according to Waldron, is “in opposition to the rule of law.”³²⁰ Of course, Waldron does not go on to argue that courts should play any role in ensuring the legislature’s

³¹⁵ See parts III.C. and IV.A.2 *supra*.

³¹⁶ Jeremy Waldron, *Is the Rule of Law an Essentially Contested Concept (in Florida)?*, 21 *LAW & PHIL.* 137, 153-64 (2002).

³¹⁷ Waldron, *Legislation and the Rule of Law*, *supra* note 96, at 107.

³¹⁸ *Id.* at 107.

³¹⁹ *Id.* at 108

³²⁰ *Id.*

compliance with this conception of the Rule-of-Law. However, if one would like to develop a Rule-of-Law justification for a model of judicial review that enforces “due deliberation” principles in addition to the formal procedural rules, this would be a primary source of support.

4. *The Core of the Case against Judicial Review*

Even some of Waldron’s arguments in his scholarship against judicial review may lend support for JRLP. In *The Core of the Case against Judicial Review* Waldron sets out some assumptions “to distinguish the core case... from non-core cases in which judicial review might be deemed appropriate as an anomalous provision to deal with special pathologies.”³²¹ These assumptions include the assumption that “the procedures for lawmaking are elaborate and responsible, and incorporate various safeguards, such as bicameralism, robust committee scrutiny, and multiple levels of consideration, debate, and voting.”³²² The accompanying footnotes appear to suggest that a legislature that fails miserably in following the requirements of “legislative due process” and “legislating with integrity” discussed above may fall “outside the benefit of the argument developed in [Waldron’s] Essay.”³²³

³²¹ Waldron, *Case Against Judicial Review*, *supra* note 300, at 1359.

³²² *Id.* at 1361.

³²³ *Id.* at 1361 nn. 46, 47; Waldron, *Legislation and the Rule of Law*, *supra* note 96, at 108.

To be sure, we should be careful not to read too much into these qualifications. Waldron clarifies that although his argument is conditioned on these assumptions, “it does not follow that judicial review of legislation is defensible whenever the assumptions fail,” because there may be other arguments against judicial review that are not contingent upon these assumptions.³²⁴ Nevertheless, if significant failures in following a proper legislative process may be a consideration for qualifying the case against substantive judicial review, perhaps they can also be a consideration in supporting the case for JRLP, which is a more direct means to deal with such process pathologies.

Another assumption that Waldron specifies is “that the institutions, procedures, and practices of legislation are kept under constant review” to ensure that they do not “derogate seriously from the ideal of political equality.”³²⁵ Waldron is obviously referring here to review by society as a whole rather than by courts.³²⁶ However, this assumption does lend support to the importance of external review for ensuring political equality in the

Jeremy Waldron, *Disagreement and Response*, 39 *ISR. L. REV.* 50, 63 n. 44 (2006).

³²⁴ Waldron, *Case Against Judicial Review*, *supra* note 300, at 1402.

³²⁵ *Id.* at 1362.

³²⁶ *Id.*

legislative process. This brings us, finally, to Waldron's rights-based argument against judicial review in *Law and Disagreement*.³²⁷

5. A Rights-based Justification for JRLP

In his influential rights-based argument against judicial review, Waldron argued, in brief, that judicial review infringes upon the people's "right to democratic participation"—that is, "a right to participate on equal terms in social decisions..."³²⁸ Waldron argued that "the right of having a share in the making of the laws" is the "right of rights."³²⁹ This argument against judicial review is in fact equally applicable for developing a rights-based argument for JRLP.³³⁰

The key for developing a rights-based argument for JRLP is the understanding that the people's right "to participate on equal terms in social decisions" must also be protected in the legislative process itself. The people's

³²⁷ JEREMY WALDRON, *LAW AND DISAGREEMENT* (1999).

³²⁸ *Id.* at 213.

³²⁹ *Id.* at 232.

³³⁰ Some have already suggested that Waldron's right to participate can equally lend support for judicial review, but they have focused on substantive judicial review, arguing, for example, that "rights-based judicial review can be regarded as an alternative form of participatory democracy." Alon Harel, *Notes on Waldron's Law and Disagreement: Defending Judicial Review*, 39 *ISR. L. REV.* 13, 18 (2006); see also Ori Aronson, *Inferiorizing Judicial Review: Popular Constitutionalism in Trial Courts*, 43 *U. MICH. J.L. REFORM* 971, 983 (2010); Barak Medina, *Four Myths of Judicial Review: A Response to Richard Posner's Critique of Aharon Barak's Judicial Activism*, 49 *HARV. INT'L L.J. ONLINE* 1 (2007), <http://www.harvardilj.org/online/116>.

right to have “a share in the making of the laws” can be diluted, and even completely undermined, if their elected representatives’ ability to participate on equal terms in the legislative process is violated. Indeed, courts in countries that exercise JRLP have acknowledged this crucial point. The German Constitutional Court has held, for example, that “[t]he principle of formal equality, which has been developed by the Constitutional Court in its jurisprudence dealing with the right to vote” also requires that “each [Parliament] member participates equally in the legislative process.”³³¹ The Israeli Supreme Court has similarly derived the “principle of participation, according to which each [legislator] has a right to participate in the legislative process” as a necessary implication of representative democracy and voters’ rights to political equality and democratic participation.³³²

Admittedly, this argument is stronger in supporting models of JRLP, such as the one adopted by the Israeli Supreme Court, in which courts enforce the principle of equal participation in the legislative process, rather than merely enforcing the formal rules that govern this process.³³³ Nevertheless, models of JRLP that are limited to enforcing the written rules governing lawmaking also protect the people’s rights “to participate on equal terms in social decisions.”

³³¹ BVerfGE 80, 188, at pp. 218, 220, translated in D.P. KOMMERS, *THE CONSTITUTIONAL JURISPRUDENCE OF THE FEDERAL REPUBLIC OF GERMANY* 175-176 (2d ed., 1997).

³³² *Isr. Poultry Farmers Ass’n*, [2004] IsrSC 59(2) at 46-48.

³³³ *Id.* at 41-48.

This is because, as Part III.D. elaborated, one of the important functions of these rules is ensuring legislators' ability to participate on equal grounds in the legislative process. Such rules, therefore, essentially protect the people's right of equal participation in the making of laws.

Ironically, the strongest support for developing such a rights-based justification for the enforcement of lawmaking rules may come from Waldron himself. Waldron argued (in other work) that only a combination of the system of elections and the procedures within the legislature "as a package" can satisfy political equality.³³⁴ He argued that the rules of the legislative process are no less essential than fair representation in the legislature and democratic enfranchisement "in order to relate what happens in the legislature to the fair conditions of decision for a society whose ordinary members disagree with one another about the laws that they should be governed by."³³⁵ Neither of them "does it by itself; it is the package that works."³³⁶ This supports the argument that the people's rights to democratic participation and political equality should be protected not only by ensuring compliance with the rules that govern elections, but also with the rules that govern the legislative process.

³³⁴ Waldron, *Principles of Legislation*, *supra* note 112, at 30.

³³⁵ *Id.* at 31.

³³⁶ *Id.* at 30.

In sum, I am not arguing that Waldron would necessarily support JRLP. There may be good reason to believe he would not. However, this Section has argued that several of Waldron's arguments can in fact lend strong support for developing the core of the case *for* JRLP. Ironically, a Waldronian-based case for JRLP would appear to support the most far-reaching and controversial models of JRLP.

F. The Irony Revealed

This Article began with Calabresi's observation that the irony of the great debates in constitutional theory is that both sides have the same model of judicial review in mind—strong-form substantive judicial review that is focused on protecting individual rights. This Part has revealed that there is another great irony in constitutional theory, and particularly American constitutional theory.

This Part examined several of the leading justifications for substantive judicial review—from *Marbury v. Madison* to some of today's most influential and in-vogue constitutional theories. It argued that each of these justifications is equally persuasive as a justification for JRLP, and most are actually stronger when applied to JRLP. It also demonstrated that the arguments raised by critics of these justifications—particularly criticisms of process theories—are significantly mitigated when JRLP is concerned. Finally, and perhaps most

ironically, this Part claimed that some of the arguments raised by leading judicial review skeptics—from Bickel’s criticism of *Marbury*’s reliance on the Supremacy Clause to Waldron’s rights-based critique of judicial review—can actually lend support for the case for JRLP.

The next Part claims that the arguments in this Article do more than revealing a great irony in constitutional theory, and challenging the prevalent position that JRLP is less legitimate than substantive judicial review. It claims that what emerges from these arguments is a basis for a theoretical foundation for JRLP.

V. THE CASE FOR JUDICIAL REVIEW OF THE LEGISLATIVE PROCESS

The previous Part argued that JRLP is no less justifiable and defensible than substantive judicial review. This Part briefly demonstrates that the arguments in the previous parts of this Article can form a basis for an affirmative theoretical case for JRLP, which can stand on its own feet, independently of one’s acceptance of substantive judicial review. These arguments establish the authority for JRLP, the importance of JRLP, and the legitimacy of such judicial review. They also provide at least a partial response to the two main objections to JRLP—the argument that judicial review should only be aimed at protecting individual rights; and the argument that JRLP constitutes an illegitimate intrusion into the working of the legislature.

A. Authority

The previous Part’s arguments suggest that the authority for JRLP can be grounded in the Constitution itself. This grounding stems from the general constitutional provisions that are often interpreted as furnishing a constitutional basis for (substantive) judicial review, and particularly the Supremacy Clause,³³⁷ as well as from the Constitution’s lawmaking provisions themselves.³³⁸ Indeed, even under some of the most conventional modalities of constitutional argument—arguments based on the text, structure, purposes and original meaning of the Constitution—there is a relatively strong basis for judicial authority to enforce at least the constitutional requirements for valid enactment.³³⁹

More importantly, however, the rule-of-recognition argument developed above establishes the courts’ authority to review the enactment process on their authority to adjudicate.³⁴⁰ The authority to determine compliance with lawmaking rules is inherent in the courts’ inevitable need to identify the law as part of their authority to apply statutes to the cases coming before them. The

³³⁷ See Part IV.A.3 *supra*.

³³⁸ See *Id.*; Part IV.A.1 *supra*.

³³⁹ On the “modalities of constitutional argument” see PHILIP BOBBITT, CONSTITUTIONAL INTERPRETATION 12-22 (1991).

³⁴⁰ See Part IV.B.1 *supra*.

rule-of-recognition argument provides a source of authority that is not contingent upon the existence of a written constitution or on arguments about constitutional supremacy, and can provide authority to enforce both constitutional and subconstitutional rules that specify the procedural requirements for enactment.³⁴¹

B. Importance

JRLP is important because the legislative process and the rules that govern it have great practical and normative importance.³⁴² These rules are crucial, *inter alia*, for legislative outcomes; for the legitimacy of the law and of the legislature; for the Rule-of-Law ideal; for the procedural aspects of democracy;³⁴³ and ultimately, for ensuring the people's rights for political equality and democratic participation.³⁴⁴ Hence, the integrity of the legislative process and the rules that govern it warrant judicial protection.

In previous scholarship I examined Congress's capacity and incentives to enforce these important rules, and concluded that Congress lacks both the

³⁴¹ *Id.*

³⁴² *See* Part III.E. *supra*.

³⁴³ *Id.*

³⁴⁴ *See id.*; Part IV.E.5 *supra*.

capability and will to adequately enforce these rules on its own.³⁴⁵ I argued that contrary to popular belief, the rules that restrict the legislative process are in fact an area in which political safeguards are particularly unreliable, and sometimes even create an incentive to violate the rules.³⁴⁶ JRLP is therefore important because it serves an essential function that cannot be adequately performed by the legislature or the political process alone.

The function served by JRLP also cannot be adequately achieved through substantive judicial review. Substantive judicial review focuses on the outcomes of the legislative process and on the protection of individual liberties and substantive values. In contrast, by focusing on the integrity of the enactment process itself, JRLP ensures procedural democratic values and political or democratic rights.³⁴⁷ JRLP therefore protects essential aspects of democracy, which are no less deserving of protection, and which cannot be adequately guaranteed through substantive judicial review. Indeed, the Supreme Court of Israel has perhaps been most explicit in recognizing that the purpose of JRLP is the protection of the fundamental principles of procedural

³⁴⁵ See Bar-Siman-Tov, *Lawmakers*, *supra* note 21.

³⁴⁶ *Id.*

³⁴⁷ See Part IV.E.5 *supra*.

democracy, “without which (and without the principles of substantive democracy) democracy would not exist...”³⁴⁸

Taken together, these arguments go a long way in challenging the argument that courts should not “waste” their limited institutional capital on protecting the integrity of the legislative process.

C. Legitimacy

The discussion in Part IV provides several arguments for establishing the justification for JRLP and for replying to claims that JRLP is objectionable or illegitimate.

The constitutional supremacy arguments suggest that judicial enforcement of the constitutional provisions that regulate enactment can be justified both through a Kelsenian hierarchy-of-norms theory and via the popular sovereignty argument developed above.³⁴⁹ The rule-of-law arguments provide a promising basis for justifying judicial enforcement of both constitutional and subconstitutional rules that regulate lawmaking.³⁵⁰ The constitutional supremacy and rule-of-law arguments also provide a basis for rebutting

³⁴⁸ *Isr. Poultry Farmers Ass 'n*, [2004] IsrSC 59(2) at 43.

³⁴⁹ *See* Part IV.A.1 *supra*.

³⁵⁰ *See* Parts III.C & IV.A.2 *supra*.

arguments that the legislative process is a sphere of legislative prerogative, which should be regarded as immune from any external regulation.

The arguments about process theories and dialogue theories are particularly helpful for highlighting the features of JRLP that are crucial for defending such judicial review against claims that it violates the separation of powers and is disdainful to a coequal branch. One important feature of JRLP is that it leaves the content of legislation entirely to the legislature. Process theories represent a widely-accepted belief that judicial review is less objectionable when courts merely serve as an external, independent, referee that ensures that the rules of the game are observed, rather than participating in the game itself or dictating its outcomes.³⁵¹ Similarly, dialogue theories highlight the argument that judicial review is less intrusive when courts act as an impartial facilitator of the dialogue, rather than dictating the content for the political and societal dialogue about constitutional meaning, rights and policy.³⁵²

Hence, both theories help to demonstrate that judicial review that focuses only the process of enactment, rather than its content, should be viewed as more respectful and less intrusive toward the legislature. These theories also help to establish the claim that such a judicial role is more legitimate; and can be more easily justified based on the courts' expertise and institutional position

³⁵¹ See Part IV.D *supra*.

³⁵² See Part IV.C *supra*.

among the three branches and in society.³⁵³ Such a judicial role can also better maintain courts' reputation (or at least appearance) as impartial and independent institutions, which are above the ideological controversies of society—a reputation which is the basis for their legitimacy.

Dialogue theories are also instrumental, of course, in emphasizing the strong and sensible intuition that judicial review is more defensible when the decision of the courts is not final; when the elected branches can respond to judicial invalidations.³⁵⁴ Another important feature of JRLP is that judicial invalidations under JRLP are merely provisional. As we have seen, JRLP is particularly apt for enabling a legislative response, and for leaving room for a meaningful response that engages both policy and constitutional meaning.³⁵⁵

Finally, the rule-of-recognition argument developed above provides perhaps the most promising reply to claims that JRLP is objectionable or illegitimate. By arguing that judicial review is simply inevitable and inherent to adjudication itself, this argument avoids the normative debates about the legitimacy of judicial review.³⁵⁶ As Michael Klarman noted in discussing the rule-of-recognition conception of constitutionalism, “it seems pointless to offer

³⁵³ See Part IV.D *supra*.

³⁵⁴ See Part IV.C *supra*.

³⁵⁵ *Id.*

³⁵⁶ See Part IV.B.2 *supra*.

normative criticisms of the inevitable.”³⁵⁷ Moreover, unlike most justifications for judicial review, it provides an argument for judicial review that does not depend on any argument about comparative institutional competence, or about instrumental and consequentialist arguments.³⁵⁸

The rule-of-recognition argument is also particularly promising for it appeals to a very strong intuition that a bill that was not enacted in accordance with the procedural requirements for valid enactment is simply not law.³⁵⁹ When courts refuse to recognize a purported statute as validly enacted law, they do not strike down a “law.” Rather, they ensure that only that which was truly enacted by the legislature is recognized and treated as law.³⁶⁰ By determining compliance with the rules that the legislature must follow in order to express its will, courts do not undermine the will of the elected representatives of the people. Instead, they ensure that only true expressions of this will are enforced.³⁶¹ This also helps rebut claims that concerns about

³⁵⁷ Klarman, *supra* note 238, at 183.

³⁵⁸ Cf. Alon Harel & Tsvi Kahana, *The Easy Core Case for Judicial Review*, 2 J. LEGAL ANALYSIS 227 (2010) (arguing that instrumentalist justifications for judicial review are bound to fail and that adequate defenses of judicial review require justifying it on non-instrumentalist grounds, inherent in the judicial process itself).

³⁵⁹ See Part IV.B.2 *supra*; Adler & Dorf, *supra* note 244, at 1129. This intuition was nicely captured in Editorial, *Not a Law: A Bill Passed by Only One House of Congress Just Doesn't Count*, WASH. POST, Apr. 1, 2006, at A16 (describing a case in which a bill was enacted in violation of Article I, Section 7's requirement that the same bill be passed in identical form by both houses of Congress).

³⁶⁰ Bar-Siman-Tov, *EBD*, *supra* note 5, at 384-85.

³⁶¹ *Id.*

judicial review are “at their zenith when courts invalidate the work of the elected branches based on perceived deficiencies in the lawmaking process.”³⁶²

This, of course, is only a brief sketch of the core of the theoretical case for JRLP. It does not purport to cover all the justifications for JRLP; nor does it purport to fully discuss all the arguments raised by its critics.³⁶³ It does establish, however, that courts have the authority to review the enactment process, and that it is both legitimate and important for courts to exercise this inherent authority.

CONCLUSION

The prevalent view that takes substantive judicial review for granted, while adamantly rejecting JRLP, is hard to sustain. Countering the orthodoxy in American constitutional law and theory, this Article argued that JRLP is no less important, and in fact, more justifiable than substantive judicial review.

³⁶² Staszewski, *supra* note 10, at 468.

³⁶³ For scholarship more directly dedicated to discussing, and responding to, specific objections to JRLP or semiprocedural judicial review see, e.g., Coenen, *Pros and Cones*, *supra* note 65; Coenen, *Constitution of Collaboration*, *supra* note 37, at 1851-70; John Martinez, *Rational Legislating*, 34 *STAN. L. REV.* 547, 606-12 (2005); Cass R. Sunstein, *Interest Groups in American Public Law*, 38 *STAN. L. REV.* 29, 75-85 (1985); Goldfeld, *supra* note 32, at 412-20. For my own contributions see Bar-Siman-Tov, *EBD*, *supra* note 5 (challenging many of these objections, including the separation-of-powers or lack-of-respect argument); Bar-Siman-Tov, *Lawmakers*, *supra* note 21 (challenging the “political safeguards” types of arguments and the claim that Congress has the capacity and incentives to enforce the rules that regulate the enactment process on its own).

But beyond inviting supporters of substantive judicial review to reexamine their objection to JRLP, this Article also invites *critics* of judicial review to see how they might well favor JRLP, in part for the very reasons they object to substantive judicial review. For uneasy supporters of JRLP, this Article provides a much needed theoretical foundation and justification. For staunch skeptics of courts and steadfast opponents of JRLP, it is, hopefully, a respectful challenge.

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