

NONCONTEMPORANEOUS LAWMAKING:  
CAN THE 110TH SENATE ENACT A BILL  
PASSED BY THE 109TH HOUSE?

*Seth Barrett Tillman\**

I have always thought that, as your Constitution has no prorogation or dissolution, and as both of your Houses are continuing bodies (notwithstanding that all of the House seats turn over at the same time), it makes little sense to speak of different congresses, sessions or terms, and the convention of bills dying at the end of a “term” also has no basis.

Email from Harry Evans, Clerk of the Senate,

Parliament of Australia,

to

Seth Barrett Tillman

November 4, 2004

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United States House of Representatives  
Office of Legal Counsel

September 30, 2006

Speaker J. Dennis Hastert  
United States House of Representatives  
Washington DC 20515

Dear Speaker Hastert:

You asked me for legal advice going *into* the next election. I have none. But, I do have some confidential legal advice for you regarding the upcoming lame duck session of the 109th Congress. Currently your party has control of both the House and the Senate. It is possible that the election might change things. This advice will help you negotiate difficulties and opportunities in the event that the Republicans *lose* the House, but *keep* the Senate. On the other hand, if the Republicans keep the House, or if the Republicans fail to keep the Senate, then I advise you to destroy this memorandum.

First, let me give you some necessary background. I will try not to bore you with legal mumbo jumbo. We all learned in grade school that for a bill to become a law, both houses of Congress must pass it and then send it to the President for his signature or veto. Actually, it is a little more complex than that. As I am sure you are well aware, these complexities are usually handled by congressional staff and so remain largely invisible to the public. After a bill is passed by one house, custom<sup>1</sup> and statute<sup>2</sup> require that the Government Printing Office prepare a special

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<sup>1</sup> See CHARLES W. JOHNSON, *Parliamentarian*, United States House of Representatives, *How Our Laws are Made* § 13 (2000) (describing engrossment), available at <http://thomas.loc.gov/home/lawsmade.bysec/engrossment.html>; Robert B. Dove, *Parliamentarian*, United States Senate, *Enactment of a Law* § Engrossment and Transmittal to the House (1997), available at <http://thomas.loc.gov/home/enactment/engrossment.html>.

<sup>2</sup> See 1 U.S.C. § 106 (2002) (emphasis added):

Every bill or joint resolution in each House of Congress shall, when such bill or resolution passes either House, be printed, and such printed copy shall be called the engrossed bill or resolution as the case may be. Said engrossed bill or resolution shall be signed by the Clerk of the House or the Secretary of the Senate, and shall be sent to the other House, and in that form shall be dealt with by that House and its officers, and, if passed, returned signed by said Clerk or Secretary. When such bill, or joint resolution shall have passed both Houses, it shall be printed and shall then be called the enrolled bill, or joint resolution, as the case may be, and shall be signed by the presiding officers of both Houses and sent to the President of the United States. During the last six days of a session such engrossing and enrolling of bills and joint resolutions may be done otherwise than as above prescribed, upon the order of Congress by *concurrent resolution*.

Nothing in this statute specifically precludes noncontemporaneous House-Senate action. Moreover, there is no reason to believe that the formalities of this procedure are mandatory if the bill otherwise complies with the requirements for enacting a bill into a law found in Arti-

copy. This is the so-called “engrossed copy.” If the engrossed bill passes the House, it is signed by the Clerk of the House and forwarded to the Senate.<sup>3</sup> If the engrossed bill passes the Senate, it is signed by the Secretary of the Senate and forwarded to the House.<sup>4</sup> The Clerk or Secretary’s signature at this stage is a mere formality: it indicates to the sister-house that passage by the originating house is now complete and that the receiving house may now act on the bill. Barring complications, once the sister-house passes the bill in identical form, a new copy of the bill is produced.<sup>5</sup> This is the so-called “enrolled copy.”<sup>6</sup> The presiding officers of the two Houses, the Vice President for the Senate and the Speaker for the House, sign the enrolled bill.<sup>7</sup> The Supreme Court has

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cle I of the Constitution. The fact that this statute creates duties for congressional staffers does not imply that a bill, otherwise meeting the requirements of Article I, is rendered invalid or ineffective because the technical requirements of engrossment or enrollment were lacking. Furthermore, the fact that the requirements of this statute can be waived by a concurrent resolution—a resolution which is not presented to the President—indicates that this statute only controls an internal or organizational matter of the two houses, and it does not control the legal relations of the Congress vis-à-vis non-members or the other branches of government. *See, e.g., United States v. Estate of Romani*, 523 U.S. 517 (1998):

The 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. Art. I, § 7. *Everything else the Members of Congress do is either prelude [to acting on a bill] or internal organization [of the Congress].*

*Id.* at 535–36 (Scalia, J., concurring in part and concurring in the judgment) (emphasis added).

<sup>3</sup> *See* 1 U.S.C. § 106 (2002).

<sup>4</sup> *Id.*

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

<sup>6</sup> *Id.*; *see also* JOHNSON, *supra* note 1 (describing enrollment); Dove, *supra* note 1 (discussing preparation of enrolled copy).

<sup>7</sup> *See* 1 U.S.C. § 106; *see also* *Field v. Clark*, 143 U.S. 649 (1892):

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 bill, thus attested, has received, in due form, the sanction of the legislative branch of the government, and that it is delivered to him in obedience to the constitutional requirement that all bills which pass congress shall be presented to him. And when a bill, thus attested, receives his 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 act upon that assurance, and to accept, as having passed congress, all bills authenticated in the manner stated; leaving the courts to determine, when the question properly arises, whether the act so authenticated, is in conformity with the constitution.

*Id.* at 672 (Harlan, J.). *But see* Vikram David Amar, *Why the “Political Question Doctrine” Shouldn’t Necessarily Prevent Courts from Asking Whether a Spending Bill Actually Passed Congress*, writ.news.findlaw.com/amar/20060413.html (April 13, 2006) (opining that *United States v. Munoz-Flores* “effectively” overruled *Field*). In *United States v. Munoz-Flores*, 495 U.S. 385, 391 n.4 (1990), the Court noted that although a challenge to the content of a bill-enacted-into-a-law cannot be based upon Congress’ journals, per *Field*, a justiciable challenge is presented where “a constitutional provision is implicated.” Even accepting Professor

held that the presence of these signatures is conclusive evidence of congressional compliance with constitutionally mandated bicameral passage.<sup>8</sup>

On the other hand, if a bill is passed by one house, and forwarded to the sister-house, but the sister-house refrains from acting on the bill, then it is *widely believed* that final adjournment kills the bill.<sup>9</sup> To put it another way, the *prevailing opinion* is that, in order to turn a bill into a law,

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Amar's position as to the current purportedly limited reach of the *Field* holding, those objecting to noncontemporaneous House-Senate action can point to no "constitutional provision" mandating contemporaneity.

In any event, a federal district court has rejected Professor Amar's reading of *Munoz-Flores* and *Field*. See *Public Citizen v. Clerk*, United States District Court for the District of Columbia, 451 F. Supp. 2d 109 (D.D.C. Aug. 11, 2006) (Bates, J.) (applying *Field* notwithstanding *Munoz-Flores*).

<sup>8</sup> The signatures of the presiding officers of the two Houses are required, but apparently, they do not have to sign the enrolled copy during an open session of Congress. Compare *Field*, 143 U.S. at 672 ("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.") (emphasis added), with 1 U.S.C. § 106 ("When such bill, or joint resolution shall have passed both Houses, it shall be printed and shall then be called the enrolled bill, or joint resolution, as the case may be, and shall be signed by the presiding officers of both Houses and sent to the President of the United States."); cf. *Munoz-Flores*, 495 U.S. at 392 n.4 (noting that "courts accept as passed all bills authenticated in the manner provided by Congress").

<sup>9</sup> See, e.g., Michael Stokes Paulsen, *A General Theory of Article V: The Constitutional Lessons of the Twenty-Seventh Amendment*, 103 YALE L.J. 677, 689 (1993) ("Individual Congresses *expire* every two years. Bills passed by only one house have no legal significance. To become laws, they must be passed by both houses and not vetoed by the *President within the same term of Congress*.") (emphasis added); *id.* (grounding demand for concurrent House, Senate and presidential action in passing statutes in unspecified "constitutional rules"); *id.* at 730 ("Proposals of the Senate or House expire if not acted on by the other within that term of the Congress. . . . In each case, a proposal has limited life by virtue of the term of the proposing body.") (emphasis added); Michael Stokes Paulsen, *I'm Even Smarter than Bruce Ackerman: Why the President Can Veto His Own Impeachment*, 16 CONST. COMM. 1, 3 (1999) ("The same-Congress position, even as applied to ordinary bills, was always *merely* an inference from the Constitution's text and structure.") (emphasis added). Professor Paulsen fails to cite any "constitutional rules," a term of unknown origin and meaning, and he likewise fails to explain the basis of any inference from text and so-called structure, as opposed to a pure intuition on his part. But see *infra* note 12 (collecting case law, domestic and foreign, taking a position similar to, but different from, Professor Paulsen's). See, e.g., CHARLES TIEFER, CONGRESSIONAL PRACTICE AND PROCEDURE: A REFERENCE, RESEARCH, AND LEGISLATIVE GUIDE 27 (1989) ("[A]s a formal matter, all bills either receive enactment in a Congress, or lapse at the Congress' end."); *id.* at 31 ("[T]he pace [of the second session of a Congress] . . . is truly forced, for all the work of the Congress must be completed or die."); *id.* at 32 ("When the [two-year] session ends, all bills not enacted into law die.") (footnote omitted). Professor Tiefer offers no authority or support for any of the positions he takes. See, e.g., Catherine Fisk & Erwin Chemerinsky, *The Filibuster*, 49 STAN. L. REV. 181, 184 n.19 (1997) ("The filibuster is effective in paralyzing legislation because a bill must pass both the House and Senate in identical form and be signed by the President *during a single two-year Congress to become a law*.") (emphasis added) (citing Article I, Section 7, Clause 2; TIEFER, *supra*, at 27-32). Professors Fisk and Chemerinsky fail to tie the constitutional text cited to the proposition it purportedly supports. Their reliance on Tiefer's treatise is equally misplaced. See, e.g., Bruce Ackerman, *Impeachment Inquiry: William Jefferson Clinton, President of the United States/*

both houses must act contemporaneously within a single two-year Congress. *However, the requirement for contemporaneous action is not ex-*

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*Presentation on Behalf of the President before the House Committee on the Judiciary*, 105th Cong., 2d Sess., H.R. No. 68, at 37 (Dec. 8–9, 1998) (emphasis added):

As a constitutional matter, the House of Representatives is not a continuing body. When the 105th House dies on January 3rd, all its unfinished business dies with it. To begin with the *most obvious example*, a bill passed by the 105th House that is still pending in the 105th Senate on January 3rd cannot be enacted into law unless it once again is approved by the 106th House of Representatives. This is as it should be.

*See also, e.g.*, Bruce Ackerman, Editorial, *Lame-Duck Impeachment? Not So Fast*, Op-Ed, N.Y. TIMES, Dec. 8, 1998, at A28 (taking the same position as in his impeachment inquiry testimony). Professor Ackerman offers no on-point authority to support his position. *But see* *Edwards v. United States*, 286 U.S. 482 (1932):

The Constitution is *silent as to the time of [the President's] signing*, except that his approval of a bill duly presented to him—if the bill is to become a law merely by vire [sic] of such approval—must be manifested by his signature within ten days, Sundays excepted, after the bill has been presented to him.

*Id.* at 491-92 (Hughes, C.J.) (emphasis added). *Edwards* is not an outlier. The *Edwards* position is the prevailing view world-wide across colonial and former-colonial English speaking jurisdictions. *See, e.g.*, *Attorney General for Western Australia v. Laurence Bernhard Marquet*, Clerk of the Parliament of Western Australia, [2003] HCA 67, 202 ALR 233, 2003 WL 22664249, ¶ 85 (High Court of Australia 2003) (per Gleeson, C.J., for the majority) (noting that in Australia, royal assent can follow prorogation because bills were no longer pending before either house—prorogation having only the effect of terminating business pending before either or both houses of Parliament); *Purushothaman v. State of Kerala*, [1962] A.I.R. (Sup. Ct. India) 694, 701, at [13] (per Gajendragadkar, J., for the majority) (“[A] Bill pending assent of the Governor or President . . . cannot be said to lapse on the dissolution of the Assembly.”); *Simpson v. Attorney General*, [1955] N.Z.L.R. 271, 282–84 (Sup. Ct. N.Z. 1954) (per Hutchison, J., for the majority) (holding that Parliament need not be sitting when Governor-General gives assent to bill); *see also, e.g.*, SIR JOHN GEORGE BOURINOT, *PARLIAMENTARY PROCEDURE AND PRACTICE: WITH A REVIEW OF THE ORIGIN, GROWTH, AND OPERATION OF PARLIAMENTARY INSTITUTIONS* n.(g) (Thomas Barnard Flint ed., 3d ed. 1903) (noting that prorogation does not terminate legislative business pending before Governor-General in Canada, but—of course—these procedures lost force with the end of the empire) (citing JOHN HATSELL’S *PRECEDENTS OF PROCEEDINGS IN THE HOUSE OF COMMONS*). *But see infra* note 28 (explaining that in the United Kingdom, all proceedings are quashed by prorogation); Royal Assent Act, Statutes of Canada, 2002, c.15 (mandating that royal assent is only given during session of Parliament); *cf.* 13 REGISTER OF DEBATES IN CONGRESS 417 (Wash. 1837) (recording John C. Calhoun’s January 14, 1837 Senate floor statement: “Talk of precedents [with regard to a disputed point of congressional procedure]? and precedents drawn from a foreign country? They don’t apply.”).

Note the shift in meaning of the term “pending.” In the United Kingdom, prorogation and dissolution quash all “pending” business, all intermediate stages of a bill before final enactment—i.e., anything prior to final action of the Queen in Parliament. *But compare infra* note 28 (explaining traditional position of the United Kingdom Parliament), *with* UK Parliament Home Page, *Major Parliamentary Occasions*, available at <http://www.parliament.uk/works/occasion.cfm> (“Prorogation brings to an end nearly all parliamentary business. Following a recommendation of the House Modernisation Committee it was agreed that in certain circumstances, Public Bills should be able to be carried over from one session to the next . . .”) (last visited Oct. 29, 2006). In other Commonwealth jurisdictions, prorogation only quashes items “pending” on a legislative house’s agenda paper—i.e., the government’s agenda. Finalized items, no longer on the agenda, and in possession of a sister institution, i.e., another house or the Governor-General, may or may not be quashed, depending on local law.

*pressly written into the text of the Constitution.*<sup>10</sup> Textually, the Constitution only requires that both houses pass every bill, not that both houses of the *same* two-year Congress pass every bill.<sup>11</sup> Generally, where the Constitution has created counter-majoritarian procedural limitations on the exercise of congressional power, it does so expressly, not by implication. In addition, apparently no Article III court has ever squarely held that contemporaneous passage is a necessary requirement for passing a valid statute.<sup>12</sup> More importantly, *by taking the position that the now extant customary limitations on the procedures for valid bicameral action should be contracted, we side with expanding democracy by removing constraints imposed on the most representative organ of the national government, the House.* In this context, we would be the populists and the Democrats would be the champions of form over sub-

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<sup>10</sup> Cf. Fisk & Chemerinsky, *supra* note 9, at 246 (“The challenge to Rule XXII based on entrenchment reads into Article I, Section 5, the additional words, ‘each [two-year] session of each house.’ But that is not what the constitutional provision says.”). The professors stated position is true beyond peradventure.

<sup>11</sup> There are passages in the Constitution which, if stretched, might support contemporaneous action as an implicit requirement of bicameral action. See, e.g., U.S. CONST. art. I, § 1 (“All legislative Powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and [a] House of Representatives.”) (emphasis added). *But see* Atkins v. United States, 556 F.2d 1028 (Ct. Cl. 1977):

The purpose of the clause [Article I, Section 1] is to locate the central source of legislative authority in Congress, rather than the Executive or the Judiciary. But the clause does not itself, as a textual matter, *mechanically direct the manner* in which Congress must exercise the legislative power . . . . Article I, [S]ection 1, does indeed call upon Congress to confine itself to legislative matters, but the clause allows some measure of leeway for the manner in which Congress fulfills the legislative function.

*Id.* at 1062–63 (per curiam) (emphasis added), *disapproved of on other grounds by*, INS v. Chadha, 462 U.S. 919, 958 & n.23 (1983) (Burger, C.J.). *But see* Seth Barrett Tillman, *A Textualist Defense of Article I, Section 7, Clause 3: Why Hollingsworth v. Virginia Was Rightly Decided, and Why INS v. Chadha Was Wrongly Reasoned*, 83 TEX. L. REV. 1265 *passim* (2005) (arguing that the bicameralism aspect of *Chadha*’s constitutional holding was not supported by the original public meaning of the Constitution).

<sup>12</sup> *But see* United States v. Alice Weil, 29 Ct. Cl. 523, 548 (Ct. Cl. 1894) (Richardson, J., concurring) (“[T]he President for the time being is part of the legislative power of each separate Congress, like the Senate, which is a continuing body, and that when a Congress expires by limitation his authority to approve bills of that Congress is gone.”); *but cf.* Nationsbank of Texas, N.A. v. United States, 269 F.3d 1332, 1335 (Fed. Cir. 2001) (noting, in dicta, “Article I, Section 7, Clause 2 of the Constitution prohibits enactment of a bill not presented in time”); Simpson v. Attorney General, [1955] N.Z.L.R. 271, 286 (Sup. Ct. N.Z. 1954) (per McGregor, J., concurring):

It seems to me that, in exercising a legislative power as part of the General Assembly, it is a matter of grave doubt as to whether such legislative power can be exercised by any component part at a time other than when there is in existence a General Assembly consisting of the three component parts.

Apparently, the United States Supreme Court and other persuasive authority believe otherwise. See *supra* note 9 (quoting *Edwards v. U.S.*); see also *infra* notes 19–22.

stance—*protectors of a form imposed only by custom and not by the express text of the Constitution*.<sup>13</sup>

I am sure you begin to see my point. If you lose the House in the upcoming election, then I advise you to use your lame duck majority aggressively. First, have the House act on your caucus' most important or controversial bills. Second, have the Government Printing Office produce "enrolled copies."<sup>14</sup> (If the GPO will not cooperate, make it yourself at a Kinko's.) Third, sign the copies before adjournment of the House (and have the Clerk sign too for good measure) while you are still legally Speaker. Lastly, forward these bills to Republican Majority Leader Bill Frist. If Frist (or his successor) keeps his majority on the Senate side, then he (and the Secretary of the Senate) need only sign your already "enrolled" bill following passage by the Senate.<sup>15</sup> Of course, the

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<sup>13</sup> Cf. Sanford Levinson, *Perspectives on the Authoritativeness of Supreme Court Decisions: Could Meese be Right this Time?*, 61 TUL. L. REV. 1071, 1078 (1987) ("It is ironic that those identified with the left are so quick to denounce Meese's speech, for that denunciation further legitimizes government by legally trained elites, speaking an evermore esoteric language. It is of a piece with the left's lusty opposition to the prospect of a constitutional convention.").

<sup>14</sup> *But see* 1 U.S.C. § 106 (2002) (explaining that the enrolled copy is produced *after* bicameral passage).

<sup>15</sup> Similarly, just as Majority Leader Frist (or his successor) might pass bills in the 110th Senate acted upon by the 109th House, the lame-duck session of the 109th House might attempt to pass bills sent to the House by the 108th (or some prior) Senate. However, this latter case is more problematic because the engrossed copies of Senate bills that have already been sent to the House do not bear the signature of the Vice President of the United States. Of course, in this event, one might ask Vice President Cheney, the current office holder, to sign the enrolled bill on behalf of the prior Senate which has already fully acted on the bill (i.e., the traditional three readings). I do *not* opine on the legality or validity of a current Vice President signing, without specific authorization from the full Senate, an enrolled or engrossed bill passed by a prior Senate from a period of time in which he was not the Vice President of the United States.

Professor Ackerman has categorically stated that the proposed procedure is unconstitutional. *See* Ackerman, *Impeachment Inquiry Testimony supra* note 9 (emphasis added):

As a constitutional matter, the House of Representatives is *not a continuing body*.

When the 105th House dies on January 3rd, all its unfinished business dies with it.

To begin with the most obvious example, a bill passed by the 105th House that is still pending in the 105th Senate on January 3rd cannot be enacted into law unless it once again is approved by the 106th House of Representatives.

The Senate, however, *is* a continuing body. *See* *McGrain v. Daugherty*, 273 U.S. 135, 181 (1927). If, as Professor Ackerman states, House legislative business dies at the end of its constitutional term *because* the House is not a continuing body—then, surely, Professor Ackerman must take the opposite point of view with regard to unfinished Senate legislative business. *Why else would he link the argument to the continuing/non-continuing body distinction?* Is it Professor Ackerman's position that, because the Senate is a *continuing body*, the 110th House may enact a bill passed by the 109th Senate, the 108th Senate, the *First Senate*? Does final Senate action on a bill, particularly if properly authenticated by the Vice President, survive expiry of the *House's* constitutional term? Does this inequality arise merely from the different scheduling of House and Senate elections? This seems a fairly slender reed on which to hang any significant distinction. *Compare* THOMAS JEFFERSON, A MANUAL OF PARLIAMENTARY PRACTICE FOR THE USE OF THE SENATE OF THE UNITED STATES 95 (Government Printing

Senate will have no opportunity to amend your handiwork because the newly elected incoming Democratic House majority will not concur either in the original bill or in its amendments. But if the Senate does not insist upon amendments, this process will allow you to govern without help from: (i) the incoming Democratic Speaker or House leadership; (ii) the newly elected Democratic House majority; or (iii) coalitions including any Democratic House members.

Anyway, you are probably wondering if the newly elected Democratic House majority could frustrate your efforts and if there is any legal support for this course of action. The first question is easy. The new House majority could do nothing, except perhaps sue to block enforcement of the new “law,” assuming ultimate Senate passage. Additionally, it is likely that House Democrats will demand that the Senate return the “wrongly” enrolled bills. The House, however, cannot force the Senate’s hand. As a matter of comity, the Senate might choose to comply, but it is not obligated to comply.<sup>16</sup> Indeed, the Supreme Court has held that a

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Office 1993) (1801), (“*Congress separate in two ways only, to wit, by adjournment [upon joint vote], or dissolution by the efflux of their time [followed by seating of a new Congress] . . .*”) (emphasis in the original), *with id.* (noting that any meeting per presidential proclamation or per constitutional requirement to meet once in every year “*must begin a new session*”) (emphasis in the original); compare 2 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 892 (photo. reprint Fred B. Rothman Publications, 2d printing 1999) (1833) (reporting erroneously that all Senators are sworn in at the beginning of each two year Congress—as if Senators were members of the House of Lords, all of whose members are sworn in at the beginning of each new Parliament), *with* THOMAS ERSKINE MAY, A TREATISE UPON THE LAW, PRIVILEGES, PROCEEDINGS AND USAGE OF PARLIAMENT 135 (London 1844) (noting that on the day a new Parliament meets “the lords who are present take the oaths required by law”). A legal academic’s first responsibility is to know and to report what has gone before. It may be that Professor Ackerman has adopted the “continuing body” refrain because it has been used, on occasion, by the federal courts. My own view is that constitutional law as a discipline would gain enormously if its participants would eschew terms of art, like “continuing body”—a term that lacks any serious intellectual content, in favor of plain words. *Cf.* Email from Harry Evans, Clerk of the Senate, Parliament of Australia, to Seth Barrett Tillman (Nov. 4, 2004):

I have always thought that, as your Constitution has no prorogation or dissolution, and as both of your Houses are continuing bodies (notwithstanding that all of the House seats turn over at the same time), it makes little sense to speak of different congresses, sessions or terms, and the convention of bills dying at the end of a “term” also has no basis.

It is true that our courts have adopted this neologism, but, perhaps, they ought to be put right? *Cf.* Aaron-Andrew P. Bruhl, *If the Judicial Confirmation Process is Broken, Can a Statute Fix It?*, 85 NEB. L. REV. \_\_ n.95 (forthcoming 2007), posted on SSRN (“This notion of the Senate as a continuing body is frequently stated but has not received much scrutiny and may provide a fruitful avenue for further research.”); *id.* at 34 (noting “the somewhat mysterious notion that the Senate is a continuing body”).

<sup>16</sup> Even if the originating house unanimously demands the return of an engrossed copy sent to the other house, the other or receiving-house may refuse to comply. This is established by the practice of both Houses. See LEWIS DESCHLER & WM. HOLMES BROWN, PROCEDURE IN THE U.S. HOUSE OF REPRESENTATIVES: A SUMMARY OF THE MODERN PRECEDENTS AND PRACTICES OF THE HOUSE § 9.5, at 378 (4th ed. 1982) (“By unanimous consent, the House consid-



lone house cannot create binding legal relations against non-members because the Constitution expressly requires presentment and bicameral passage in all matters.<sup>17</sup>

This takes me to the second question, as to legal support. Yes, there is some legal authority in support of our position. First, state ratification of the Twenty-Seventh Amendment, the most recent amendment to the Constitution, concluded well after it was initially proposed—by the First Congress, more than two hundred years earlier! So we know that with regard to lawmaking through constitutional amendments, there is no re-

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ered a resolution requesting the Senate to return a[n] [engrossed] bill to the House . . . .”); FLOYD M. RIDDICK & ALAN S. FRUMIN, RIDDICK’S SENATE PROCEDURE, 101st Cong., 2d Sess., S. Doc. No. 101–28 § Enrolled Bills and Joint Resolutions, at 830 & n.40 (rev. ed. 1992) (The Senate requested that an “engrossed [Senate] bill be returned to the Senate, but the House did not comply with the request.”); *cf.* *United States v. Smith*, 286 U.S. 6, 38 (1932) (Brandeis, J.) (“[I]t became the practice for the President, upon [Senate] request [if received prior to the President’s finalizing the appointment], to return [Senate] resolutions of rejection or confirmation [of presidential nominees], as a matter of *comity* . . . .”) (emphasis added). *But see* Paulsen, *A General Theory of Article V*, *supra* note 9, at 730 (“[T]he appropriate legal analogy [to the amendment process] might be the transmission of a bill passed by one house of Congress to the other, or the transmission by Congress of an enrolled bill to the President. These acts are not regarded as *rescindable*.”) (emphasis added). Here too Professor Paulsen cites no supporting authority. Paulsen’s position clearly does not conform to current practice. *See* WM. HOLMES BROWN & CHARLES W. JOHNSON, HOUSE PRACTICE: A GUIDE TO THE RULES, PRECEDENTS, AND PROCEDURES OF THE HOUSE ch. 44 § 7—Correcting Errors in Engraving, at 761 (2003) (“After a [House] bill has been messaged to the Senate [in error], the House must request that the Senate return the bill for correction.”); *id.* § 12—Corrections in Enrollment, at 763 (“The [concurrent] resolution [authorizing corrections after enrollment] may not only rescind the action of the Speaker and President of the Senate in signing the bill but also may direct the Clerk to reenroll the bill . . . .”); *id.* at 764 (“Corrections or changes in enrolled bills that have been delivered to the White House but not signed into law *traditionally* have been effected by a concurrent resolution . . . that requests the return of the bill and vacates the signatures of the Speaker and the President of the Senate.”) (emphasis added). Both here and abroad, since time out of mind, best parliamentary practice has been governed by considerations relating to *possession* and *comity*, except where otherwise directed by express and mandatory constitutional provisions. *Cf.* *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803):

Some point of time must be taken when the power of the executive over an officer . . . must cease. That point of time must be when the *constitutional* power of appointment has been exercised. And this power has been exercised when the *last act*, required from the person possessing the power, has been performed.

*Id.* at 157 (Marshall, C.J.) (emphasis added).

<sup>17</sup> *See* *INS v. Chadha*, 462 U.S. 919, 955–56 & nn.20–21 (1982) (noting the existence of exactly six constitutionally enumerated exceptions to the bicameral passage requirement: House impeachment, Senate conviction, Senate action on treaties, Senate action on appointments, specified internal matters, and contingency elections for the President and Vice President); *see also* *United States v. Estate of Romani*, 523 U.S. 517, 535–36 (1998). *But see* Tillman, *supra* note 11, at 1322 (arguing that the purpose of the Orders, Resolutions, and Votes Clause was to permit a prior statute to authorize a legally enforceable subsequent single-house order subject to presidential veto and possible veto override by Congress).

quirement that the conclusion of the state ratification process be even roughly contemporaneous with prior bicameral congressional action.<sup>18</sup>

Second, there is also no requirement for contemporaneous action in lawmaking by treaties. The President submits a proposed treaty to the Senate and if the Senate gives its advice and consent, the President ratifies the treaty. The President is not required by the express text of the Constitution to act within the two-year term of the Senate granting its advice and consent. And presidents have exercised this authority.<sup>19</sup>

Third, and more importantly, with regard to the process by which a bill becomes a law, the Supreme Court has held that a President may sign a bill after the final adjournment of Congress, and some Presidents have actually done so.<sup>20</sup> Moreover, Presidents have signed<sup>21</sup> (and

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<sup>18</sup> See U.S. CONST. amend. XXVII (proposed by the First Congress in 1789, with state ratification process concluding in 1992); see also Lawrence Tribe, *The Twenty-Seventh Amendment Joins the Constitution*, WALL ST. J., May 13, 1992, at A15 (“[N]o speedy ratification rule may be extracted from Article V’s text, structure, or history.”). But see Dillon v. Gloss, 256 U.S. 368, 375 (1921) (noting in dicta that “the fair inference or implication from [A]rticle 5 is that the ratification [of a constitutional amendment] must be within some reasonable time after the proposal”).

<sup>19</sup> See, e.g., 1958 United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 21 U.S.T. 2517, TIAS 6997, 330 UNTS 38 (1970). Senate advice and consent was granted in the 90th Congress, but presidential ratification occurred during the 91st Congress. See CON. RES. SERV., TREATIES AND OTHER INTERNATIONAL AGREEMENTS: THE ROLE OF THE U.S. SENATE, S. PRINT 106-71, at 152 & n.35 (Comm. Print 2001) (noting the Senate granted advice and consent in 1968, and presidential ratification followed in September 1970); [www.senate.gov/reference/congresses1.pdf](http://www.senate.gov/reference/congresses1.pdf) (listing dates of the constitutional term of the 1st through 108th Congresses).

<sup>20</sup> See, e.g., *Edwards v. United States*, 286 U.S. 482, 487–88 (1932) (“President Lincoln, on March 12, 1863, approved a bill after the Congress had adjourned sine die on March 4, 1863, the bill having been passed on March 3, 1863.”); *id.* at 489–90 (“Upon the opinion of Attorney General Palmer that the action was constitutional . . . President Wilson signed [sic] several bills after the adjournment sine die of the Second Session of the Sixty-Sixth Congress.”).

<sup>21</sup> Lincoln’s March 12, 1863 signing would have followed the legal termination—noon March 4, 1863—of the prior Congress. *Id.* at 487–88; <http://www.senate.gov/reference/resources/pdf/sessions.pdf> (38th Senate convened on March 4, 1863); CHARLES W. JOHNSON, CONSTITUTION, JEFFERSON’S MANUAL AND RULES OF THE HOUSE OF REPRESENTATIVES OF THE UNITED STATES ONE HUNDRED FOURTH CONGRESS, 103d Cong., 2d Sess., H.R. Doc. No. 103–342, at 52 (1995) (“President Truman signed several bills passed in the 81st Congress after the convening of the 82d Congress but within ten days . . . . President Reagan approved bills passed in the 97th Congress which were *presented after the convening* of the 98th Congress . . . .”) (emphasis added). No constitutional provision expressly precludes an enacting Congress from delaying presentment, thereby bypassing the President then in office, in favor of some next-in-time successor in office. (Indeed, were presentment made in the last ten days of an outgoing administration, both the outgoing and incoming President would be left with less than ten days to make a veto decision—because the two Presidents would have a total of ten days between them—thus congressional delay in these circumstances is not manipulative, but is, instead, best legislative practice). Contemporary legal scholars have taken a contrary position: requiring presidential signatures and vetoes of bills to be contemporaneous with congressional action, without citing any supporting authority and offering little, if any, policy justification. Compare *supra* note 9 (citing Professors Michael Stokes Paulsen, Catherine

vetoed<sup>22</sup>) bills that originated in a prior Congress after the new Congress

Fisk, Erwin Chemerinsky, and Bruce Ackerman—taking positions directly contrary to *Edwards*, a Supreme Court opinion), with *supra* note 12 (collecting lower court authority generally supporting the academics). Why have commentators gone so far off the beaten path? I can only hypothesize here. *First*, their default position for any non-individual rights focused issue is governed by separation of powers doctrine, even where that doctrine has little policy relevance. *Second*, the professoriate harbors a deep suspicion, if not an outright antipathy, towards the full expression of congressional powers—this attitude having its historical origin in Madison’s influential “vortex” metaphor. *THE FEDERALIST* NO. 48, at 257 (James Madison) (George W. Carey & James McClellan eds., 2001). *Lastly*, although legal academics have a great many contacts with Executive Branch officers and attorneys, e.g., attorneys-general, solicitors-general, Department of Justice attorneys, etc., they generally have few social contacts with Legislative Branch attorneys, legislative officers, parliamentarians, legislative secretaries and clerks. Ultimately, these attitudes color even their views of American history. *Compare*, e.g., Steven G. Calabresi, Response, *The Political Question of Presidential Succession*, 48 *STANFORD L. REV.* 155, 162 (1995) (“No constitutional oath is required of legislative officers, like the Clerk of the House of Representatives or the Secretary of the Senate, *presumably because those officers were not thought to be very important.*”) (emphasis added), with Act of 1789, ch. 1, § 1, 1 Stat. 23, (June 1, 1789) (expressly subjecting the Clerk and Secretary to an Article VI oath), and *id.* § 5 (expressly subjecting Clerk and Secretary to a second oath). The Act of 1789 was the first act passed by the First Congress, and it was passed after extensive floor debate. The Clerk and Secretary were the only officers subjected to two oaths. *See also* *The Constitution as Reported by the Committee of Detail* art. IX, § 2 (Aug. 6, 1787) (expressly assigning duties to the “Clerk of the Senate” in a preliminary draft of the Constitution), available at [http://www.constitution.org/dfc/dfc\\_0806.htm](http://www.constitution.org/dfc/dfc_0806.htm). I am not suggesting that the First Congress was correct in subjecting these officers to Article VI oaths, a matter of legitimate doubt, but only to illustrate that their importance was widely understood circa 1787–1789, even if today their successors in office are invisible to academia.

<sup>22</sup> *See* JOHNSON, *supra* note 21, at 52 (“President Truman . . . pocket vetoed several bills passed by the 81st Congress and also, after the convening of the 82d Congress, pocket vetoed one bill passed in the 81st Congress.”). My research indicates that there are no antebellum examples of a President pocket vetoing a bill by inaction during the term of a successor Congress where the bill was passed by the prior Congress. The first such example appears to have occurred during the Grant administration. *See* Walter J. Stewart & Gregory Harness, *Presidential Vetoes, 1789–1988*, S. Pub. 102–12, at 39–41 (1992) (listing ten Grant pocket vetoes, where the bill was presented on March 1 or March 3, 1871, notwithstanding the meeting of the 42d Congress on March 4, 1871).

It appears that where the President is presented with a bill passed in a prior Congress, his inaction results in a pocket veto. The basis of this view seems to be that the bill cannot be returned to the enacting Congress (or, at least the enacting House), notwithstanding that the successor Congress is in session. My own view is that, in these circumstances, presidential inaction constitutes valid passage if Congress is in session on the tenth day following presentment. Why? Because that is what the Constitution says. Although allowing for these pocket vetoes lends some counter-authority to the position argued for in the text of this memorandum, I see no good reason to believe that the postbellum Congress of 1871 was any better situated than we are today to understand the meaning of Article I, Section 7. Furthermore, were originalists to argue that noncontemporaneous bicameral action was beyond the scope of the 1787 legal and parliamentary imagination, with the implication that such processes were beyond the realm of possible original public meaning, they might not be on very firm ground. *Compare* *NEW YORK CONSTITUTION OF 1777* art. III (mandating that if adjournment frustrates return of vetoed bill, then it “shall be returned on the first day of the meeting of the legislature after the expiration of the said ten days”), with SYDNEY GEORGE FISHER, *THE EVOLUTION OF THE CONSTITUTION OF THE UNITED STATES* 161–67 (Philadelphia 1897) (arguing that the origin of Article I, Section 7 is to be found in the New York Constitution of 1777 and the Massachusetts Constitution of 1780). For what it is worth, the Supreme Court of India, has held:

had assembled, although always acting within ten days of presentment. Thus we know that lawmaking by Presidential authority need not be contemporaneous with the “enacting” Congress.<sup>23</sup> Also, as I indicated above, the Supreme Court has held that the signatures of the Speaker and Vice President are conclusive evidence binding on the federal courts that Congress has validly exercised legislative authority in accord with the constitutionally mandated bicameralism requirement.<sup>24</sup>

In short, with regard to each and every head of federal lawmaking—constitutional amendments, treaties, and statutes—there is simply no express requirement for contemporaneous action among the relevant institutions and where closely related questions have actually been addressed by the courts or by practice, the evidence leans against contemporaneity.

There is one significant legal argument against this plan: it has never been done before.<sup>25</sup> Indeed, to many judges, a long-enduring legal custom may have the force of constitutional law.<sup>26</sup> This simplistic view is mistaken. The better view is that history only ratifies one of a number of ambiguous meanings of a constitutional provision, if the asserted meaning was actually contested and the non-prevailing institution acquiesced or otherwise adopted the practice.<sup>27</sup> In this case, Congress has never asserted the authority to act noncontemporaneously. Still, in these

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[I]t would be correct to say that the Bill is being *reconsidered* because in fact it had been considered once . . . . [N]othing . . . inconsistent with the basic concept of democratic Government in asking a successor House to *reconsider* the Bill with the amendments suggested by the President . . . .

*Purushothaman*, *supra* note 9, at 703, at [17] (emphasis added).

<sup>23</sup> See *Edwards*, 286 U.S. at 491–92; *cf. supra* note 9 (citing *Marquet* and *Simpson*). *But see supra* note 12 (collecting contrary authority).

<sup>24</sup> See *Field v. Clark*, 143 U.S. 649, 672 (1892).

<sup>25</sup> Once you practice noncontemporaneous lawmaking, then an outgoing Democratic majority, in either house (or at the state level), could try it too. But until the Democrats take back the Oval Office, this gambit will present them with little opportunity for genuine success. Congressional “passage” will be followed (one hopes) with a firm presidential veto.

<sup>26</sup> See, e.g., *The Pocket Veto Case*, 279 U.S. 655, 689 (1929) (taking the position that “[l]ong settled and established practice is a consideration of great weight in a proper interpretation of constitutional provisions of this character”).

<sup>27</sup> Noncontemporaneous lawmaking powers, if asserted by Congress, could be defended as a matter of principle and distinguished from the interpretive principles put forward by the Supreme Court in *The Pocket Veto Case*. See *supra* note 26. Here, the attempt is to revivify (actually just to “vivify”) an unused, *but never contested*, constitutional power. Many never used but undoubted constitutional powers exist including, for example, the right of the States to call a constitutional convention under Article V. Moreover, in the face of ambiguous constitutional text, Executive and Judicial Branch claims to power or usurpation of authority should only influence future adjudications if followed by legislative acquiescence in response to the other branch’s actions:

[A] practice of at least twenty years duration, on the part of the executive department, acquiesced in by the legislative department, while not absolutely binding on the judicial department, is entitled to great regard in determining the true construction of a constitutional provision the phraseology of which is in any respect of doubtful meaning.

circumstances, as you might expect (from a cautious lawyer), I cannot guarantee how the courts will ultimately rule. Of course, I also do not opine on the political ramifications to taking the suggested course of action. Whether it animates your base or enrages the country is a matter for your particular expertise.

Sincerely,  
John Smith, Esq.  
Senior House Legal Counsel

#### HOW DID WE GET HERE?

In the United Kingdom, royal assent to a bill is only granted during the life of the enacting Parliament. Once Parliament is dissolved by proclamation or expiry of time—its prior legislative acts and votes, including all bills not fully enacted or not having received royal assent, are a legal nullity. Put simply, they die. This has been the tradition from time immemorial to the present day.<sup>28</sup> Lawmaking requires unity in time, in place, and among all actors: Queen, Lords, and Commons.

But in the colonies, separated by distance and time from the monarch, the process created for enacting statutes took a somewhat different path from that of the mother country. Royal assent would not (customarily) be granted by the actual person of the monarch. The monarch acted through representatives, such as royal governors, lieutenant-governors, and governors-general. But it would sometimes happen that a monarch's representative was unable, unwilling, or unsure how to proceed on a bill. For this eventuality, the British created a modified process for their colonies. Royal assent on a bill could be delayed until the bill was sent to the monarch—even if the reality was (and is) that the monarch acted on the advice of ministers. Thus, the colonial lawmaking process allowed for delayed royal assent: delayed in the sense that assent might follow the legal dissolution of the local (sovereign) parliament (the American view) or the local (subordinate) assembly (the British view) proposing a bill. Were it otherwise, the life of such assemblies would have to be continu-

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*The Pocket Veto Case*, 279 U.S. at 690 (quoting state court authority); cf. William Ty Mayton, *Recess Appointments and an Independent Judiciary*, 20 CONST. COMM. 515, 551 (2004) (“The weight of history is debatable [with regard to presidential recess appointments], though, because it doesn’t clearly include *the essential ingredient of ratification by the other branches of government.*”) (emphasis added).

<sup>28</sup> See *Attorney General for Western Australia v. Laurence Bernhard Marquet*, Clerk of the Parliament of Western Australia, [2003] HCA 67, 202 ALR 233, 2003 WL 22664249 ¶ 297 & nn.279, 280 (High Court of Australia 2003) (per Callinan, J., concurring in part, dissenting in part) (“The position in the United Kingdom is that prorogation *quashes all proceedings* pending at the time of prorogation. The Royal Assent is, in general, given to any Bills that have passed both Houses before prorogation.”) (emphasis added) (footnotes omitted) (citing ERSKINE MAY, *PARLIAMENTARY PRACTICE* 233–34 (22d ed. 1997)).

ally extended, a process fraught with inconvenience for the members and substantial costs for ratepayers paying representatives per diem or even a salary.<sup>29</sup> The colonial assemblies avoided this result by positive law—

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<sup>29</sup> In the early years of the Republic, Western States and territories frequently had a single Article III judge or magistrate. If this federal judicial officer became incapacitated or died, then a quick replacement was essential in order to meet defendants' speedy trial rights. *Cf.* U.S. CONST. amend. VI (providing speedy trial rights and ratified in 1791, after the Constitution of 1787 was proposed, ratified, and put into force in 1789). Absent Executive Branch judicial recess appointments, the only way to fill these offices would have been to convene the Senate. And if the Senators from well-settled States knew their presence was demanded only to fill a single unexpectedly vacant judicial position in some remote territory (or distant State), is it reasonable to believe that reaching a quorum was a foregone conclusion? Members' convenience and ratepayers' salary obligations were no idle concern. *Cf., e.g.,* U.S. CONST. art. II, § 2, cl. 3 (Recess Appointments Clause); THE FEDERALIST NO. 56, at 293 (James Madison) (George W. Carey & James McClellan eds., 2001) (noting that "[t]he [congressional] representatives of each state . . . will probably in all cases have been members, and may even at the very time be members, of the[ir] state legislature"); AKHIL REED AMAR, AMERICA'S CONSTITUTION: A BIOGRAPHY 72 (2005) (arguing that the pre-1787 American tradition of members serving in the legislature for no pay was a "subtle[ ] form of bribery," in which would-be members bribed their constituents). *But see* Evans v. Stephens, 387 F.3d 1220, 1224 & n.5 (11th Cir. 2004) (Edmondson, C.J.) (en banc) (taking the position that the "intent of the Framers [with regard to the Recess Appointments Clause was] to keep important offices filled and government functioning"—a purpose that could have equally been kept by keeping the Senate in session throughout the annual session) (citing THE FEDERALIST NO. 67 (Alexander Hamilton)).

Many articles on the subject of recess appointments object to the President's (purported) power to make appointments during (relatively) short intra-session breaks. These breaks are properly denominated adjournments, but are frequently denominated recesses, leading to substantial confusion. The fundamental source of the confusion is that both domestic judicial opinions and scholarly literature assume that the distinction, between recess and adjournment, is rooted in the amount of time involved—rather than the functional quality of the different type of break takes with regard to sessional business.

The chief objection to intra-session appointments is rooted in the belief that such appointments, *even absent Senate consent*, must last nearly as long as two years—the remainder of the current annual session (following the adjournment), plus the entirety of the next annual session. *This view is profoundly mistaken.* Any such two-year appointment carries implicit Senate confirmation. If the majority *actually* opposes the appointment, upon reconvening following adjournment, the Senate could declare by single-house resolution the start of a *new session* and order the Secretary of the Senate to enter an appropriate entry on its journal—with concomitant notification by message to the President and the House. *See* U.S. CONST. art. I, § 5, cl. 3 ("Each House shall keep a Journal . . ."). The Senate's declaration of the start of a new session would effect *all* presidential recess appointments made during the prior intra-session adjournment: the term of every such appointment would end with the expiration of the remainder of the current (annual) session. *And were the Senate to immediately terminate (by order) that (newly announced) session, all recess appointees' term of service would end.* If any presidential recess appointment lasts more than a year (*or even a year*), it is by the grace of the United States Senate. I do not opine on the constitutional propriety of intra-session appointments per se. My comments are put forward only to illustrate the invalidity of the two-year objection frequently propounded in the scholarly literature. The Senate has substantial powers and prerogatives from which it may actively defend its role in the appointments process, if it chooses to avail itself of those defenses. That said, there is absolutely no compelling reason for the federal courts to (once again) play the constitutional cavalry coming to the (oppressed) Senate's rescue, unless and until the Senate makes use of the full set of powers at its undoubted disposal.

by writing charters, organic acts, colonial statutes, and constitutions. No longer would their lawmaking require unity of time and place. The indivisible atom of parliamentary unity of time and place was irrevocably split.

Positive law, however, is a creature of words. Words meant to accomplish one thing might not, on their face, precisely mirror the norms and practices that they were designed to mimic or depart from.<sup>30</sup> Bicameralism was built into the Constitution of 1787, apparently with allowances for the executive to act during or beyond the termination of a two-year House. But in doing so, the drafters did not include any actual language in the Constitution mandating that prior to sending the bill to the President, a concurrent House and Senate had to effect passage.

*That American statutory lawmaking*<sup>31</sup> has been bicamerally contemporaneous has nothing to do with the Constitution. Rather, our legisla-

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When the Senate is in session it takes a *majority* of Senators to *confirm* the President's nomination, on the other hand, when the Senate returns from recess the Senate can *decommission* any or all recess appointments by *majority* action. Cf. THE FEDERALIST NO. 77, at 396 (Alexander Hamilton) ("The consent of [the Senate] would be necessary to displace [federal officers] as well as to appoint<sub>t,1</sub>") but not specifically referring to recess appointments) (editors' footnote omitted). In the former case, with an evenly split Senate the confirmation fails (absent vice presidential intervention), but in the latter case, if the Senate is evenly divided (absent vice presidential intervention), the officer continues in office. In either case, at least half the Senate is willing to support the President's appointment or appointments, publicly in the former case, implicitly in the latter.

<sup>30</sup> Cf. JOHN HART ELY, DEMOCRACY AND DISTRUST 94 (1980) ("[A] [constitutional] provision cannot responsibly be restricted to less than its *language* indicates simply because a particular purpose received more attention than others . . .") (emphasis added).

<sup>31</sup> The general interpretive position put forward here with regard to contemporaneity in the federal statutory lawmaking context applies with greater force to congressionally proposed constitutional amendments. See U.S. CONST. art. V ("The Congress, *whenever* two thirds of both Houses shall deem it necessary, shall propose Amendments to this Constitution . . .") (emphasis added). The text does not expressly demand joint action by a concurrent House and Senate. Indeed, the text's use of "whenever" seems to indicate precisely the opposite. *But see* Paulsen, *A General Theory of Article V*, *supra* note 9, at 722 ("[T]he actions taken by Congress and by state legislatures in voting for any particular amendment language *must* be understood as ordinary legislative enactments of those bodies (with supermajority requirements for Congress), made in accordance with each body's usual processes and subject to the usual understanding of how legislation is made.") (emphasis added) (footnote omitted). Professor Paulsen's confusion arises from the fact that he misidentifies legislatures (the actors mandated by Article V to propose and ratify amendments) with legislation (the work product of legislatures). Historically, another work product of legislatures includes resolutions expressing the opinion of one or two houses. The preliminary and intermediate steps of the amendment process are more akin to these resolutions than to formal statutes. It is because Article V commits the amendment process to (federal and state) legislative houses, but not to statutory lawmaking processes per se, that the President and state governors have been traditionally left out of this process—although admittedly, on some rare occasions, States have acted by bill when ratifying amendments. See Seth Barrett Tillman, *Betwixt Principle and Practice: Tara Ross's Defense of the Electoral College*, 1 N.Y.U. J. OF LAW & LIBERTY 921, 924–25 & n.9 (2005) (explaining that New York enacted the Bill of Rights by statute with Governor Clinton's participation, although "[l]ongstanding practice has 'ratified' the non-New York view with regard to the meaning of Article V"); see also CLYDE E. JACOBS, THE ELEVENTH AMEND-

tive practice arises from the fortuity of the rules passed by the First Congress. Each house of the First Congress passed a rule requiring authentication of bills by its presiding officer, Speaker and the Vice President,<sup>32</sup> following joint passage.<sup>33</sup> Authentication was a joint activity (following bicameral passage), not a sequential one (following passage in the first house, but prior to passage in the sister-house). So if only one house fully enacted a bill before the termination of a two-year Congress, there was no *evidence*<sup>34</sup> of final single-house action to be taken up by the

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MENT AND SOVEREIGN IMMUNITY 180 n.96 (1972) (indicating that some governors participated in the Eleventh Amendment's ratification).

<sup>32</sup> The chief legislative officers, Clerk of the House and Secretary of the Senate, have not been used to authenticate actual enrolled bills, bills in final form awaiting presentment, although they have been used to authenticate bills in less than final form en route to the sister-house. Occasionally, the chief legislative officers attested to the signatures of the presiding officers. *See, e.g.*, 5 BERNARD SCHWARTZ, *THE ROOTS OF THE BILL OF RIGHTS* 1165 (1980) (illustrating that authenticated copy of Bill of Rights is signed by Speaker and Vice President, Clerk of the House and Secretary of the Senate—with the latter two signatures attesting to the prior signatures); *id.* 1154 & caption 135 (1980) (reproducing image of enrolled parchment including signatures).

<sup>33</sup> *See* IV ASHER C. HINDS, *HINDS' PRECEDENTS OF THE HOUSE OF REPRESENTATIVES* § 3430, at 312 & n.3 (Government Printing Office 1907) (noting that the rule was passed on July 27, 1789).

<sup>34</sup> Arguably, every time a bill passes one house by a majority, there is *some* evidence of final single-house action. The evidence is the journal entry noting final passage. This is weak evidence of passage. The understanding that a final vote of a house is coextensive with Article I, Section 7, Clause 2's bill passage requirements is rooted in the widespread misunderstanding that authentication by a presiding officer is a ministerial action. No judicially cognizable constitutional provision or statute obligates a presiding officer of either house of Congress to authenticate following majority action on third reading, although this is the majority's expectation. *Cf.* MINN. CONST. art. IV, § 20 ("Any presiding officer refusing to sign a bill passed by both houses shall thereafter be disqualified from any office of honor or profit in the state."). Were a presiding officer to refuse to authenticate, the majority's recourse is not the courts, but to appoint a new presiding officer, with notification of their new selection to the other house and to the President. A house that dissolves prior to authentication risks strategic action by an out-going presiding officer. It is for that reason that well-organized legislative majorities demand authentication during the session—where the majority could still enforce its will against a recalcitrant (or insane) presiding officer. Post-adjournment and post-dissolution authentication comes with other attendant, but less noticed, risks: death, (constructive or actual) resignation, and arrest of the presiding officer. All these scenarios could frustrate the majority's will. *Cf.* MINN. CONST. art. IV, § 20 ("Each house by rule shall provide the manner in which a bill shall be certified for presentation to the governor in case of [a presiding officer's] refusal [to authenticate]."). *Compare* *Field v. Clark*, 143 U.S. 649, 672 (1892) (authentication "in open session"), *with* *United States v. Munoz-Flores*, 495 U.S. 385, 392 n.4 (1990) (holding that "courts accept as passed all bills authenticated in the manner provided by Congress"). The better view is that final single-house action prior to authentication is likened to an offer to the sister-house, with the offer contingent on joint passage during that two-year Congress. Furthermore, although an offer has been made, implicit in such an offer is the right to rescind prior to actual authentication by the presiding officer. Consider this scenario: the House passes a bill, the Senate passes the same bill and notifies the House, the House changes its minds and directs its Speaker not to authenticate the bill. *Could the courts intervene on behalf of the disappointed Senate majority? What provision of the Constitution would support such an intervention? And were the courts to attempt to rely on the Journal, the House would simply expunge the Journal of the controverted entry. See* IV HINDS, *HINDS' PRECEDENTS,*



other house in any successor Congress. Dissolution of the House absent authentication by the presiding officers required all bills to be taken up anew by any successor Congress.

These rules are old, and perhaps archaic. They can be modified by each house at any time by simple majority action.<sup>35</sup>

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*supra* note 33, § 2730 n.1, at 4 (recording that Senator “Benton’s resolution to expunge from the Senate Journal the resolution censuring President Jackson was agreed to January 16, 1837”—with debate discussing English, colonial, and post-independence American parliamentary history); *cf.* CHARLES W. JOHNSON, CONSTITUTION, JEFFERSON’S MANUAL, AND RULES OF THE HOUSE OF REPRESENTATIVES OF THE UNITED STATES ONE HUNDRED EIGHTH CONGRESS, H.R. Doc. No. 107–284 § 71, at 32 (“In rare instances the House and Senate have rescinded or expunged entries in Journals of preceding Congresses.”). Furthermore, were the Speaker willing to rely on the now stale first-in-time passage and attempt to authenticate the bill absent continuing majority support, the majority would have no choice but to remove the Speaker, with notification of their deed to the Senate and to the President. Their failure to effectuate removal is a political problem, not a legal one. *See, e.g.*, MARK TUSHNET, TAKING THE CONSTITUTION AWAY FROM THE COURTS 95–128 (1999) (describing an incentive-compatible constitution).

<sup>35</sup> *See* U.S. CONST. art. I, § 5, cl. 2 (Rules of Proceedings Clause).

