

# ARTICLES

## Legislative Supremacy in the United States?: Rethinking the “Enrolled Bill” Doctrine

ITTAI BAR-SIMAN-TOV\*

*This Article revisits the “enrolled bill” doctrine which 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. It argues that this time-honored doctrine has far-reaching ramifications that were largely overlooked in existing discussions. In addition to reexamining the soundness of this doctrine’s main rationales, the Article introduces two major novel arguments against the 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, it establishes that this doctrine is inextricably related to the traditional English concept of legislative supremacy. 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. The Article argues, therefore, that the doctrine is incompatible with the U.S. Constitution.*

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\* Associate-in-Law, Morris Fellow, and Fulbright Scholar at Columbia Law School. Columbia Law School, LL.M.; Hebrew University, LL.B. © 2008, Ittai Bar-Siman-Tov. My deepest gratitude to Michael Dorf for his invaluable guidance, support, and comments and to Richard Briffault and Peter Strauss for extremely helpful advice and insightful suggestions. Earlier drafts of this Article were presented at Columbia Law School’s J.S.D. Colloquium in March 2007 and Columbia’s Associates-in-Law Workshop in January 2008. This Article also benefited greatly from discussions on prior drafts with Keren Azulay, Loni Bahar, Mark Barenberg, Noa Ben-Asher, Marc DeGirolami, Reut Gelblum, Philip Hamburger, and Ana Lorenzo Sobrado. Thanks also to Sonia Ignatova, David Shaw, and the staff of *The Georgetown Law Journal*. Special thanks to Chief Justice Dorit Beinisch for introducing me to the field and teaching me so much about the law. Finally, and most importantly, I would like to thank my wife, Reut, for her endless support and encouragement during the writing of this Article.

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#### 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.”<sup>1</sup> 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.<sup>2</sup> Although the federal courts have consistently and uniformly invoked this doctrine for more than a century,<sup>3</sup> it has received relatively little attention.<sup>4</sup>

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.<sup>5</sup> Some even alleged “‘a conspiracy’ to violate the Constitution”<sup>6</sup> or a “legally improper arrangement among certain representatives of the House, Senate and Executive Branch to

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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.) (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.

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 coconspira-

have the President sign legislation that had not been enacted pursuant to the Constitution.”<sup>7</sup> 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.<sup>8</sup> 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 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.”<sup>9</sup> 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.<sup>10</sup> Any 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 jurispru-

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tors, 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 II*, 486 F.3d at 1355; *Zeigler v. Gonzales*, No. 06-0080-CG-M, 2007 WL 1875945, at \*1 (S.D. Ala. June 28, 2007); *Public Citizen I*, 451 F. Supp. 2d at 128; *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).

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 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”).

dence. A doctrine that finds some issues exempt from judicial review cries for strict and skeptical scrutiny.”<sup>11</sup>

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 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 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.

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

## 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.<sup>12</sup> 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, is forwarded to archives from which the *Statutes at Large* are copied and the United States Code is subsequently compiled.<sup>13</sup>

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.<sup>14</sup>

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.”<sup>15</sup> 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.<sup>16</sup> It stated:

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

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

13. 1 U.S.C. § 106 (2002); see 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.

independent departments requires the judicial department to . . . accept, as having passed congress, all bills authenticated in the manner stated . . . .<sup>17</sup>

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,”<sup>18</sup> 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.”<sup>19</sup> 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.<sup>20</sup> 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 houses are kept by the subordinate officers charged with the duty of keeping them.”<sup>21</sup> 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.”<sup>22</sup>

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.”<sup>23</sup> 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.”<sup>24</sup> 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.<sup>25</sup>

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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.

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

## 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.<sup>26</sup> The doctrine is also still followed in a number of states.<sup>27</sup> In fact, some state supreme courts have recently reaffirmed their adherence to the doctrine.<sup>28</sup>

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).<sup>29</sup> Modern-day supporters of the doctrine argue that this justification is “as powerful today as when *Marshall Field* was decided.”<sup>30</sup> The public’s interest in the certainty of the law is also still commonly cited as a justification for the doctrine.<sup>31</sup> “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.<sup>32</sup>

In contrast, the other original reason enunciated by the *Field* Court in support

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); Kristen L. Fraser, “Original Acts,” “Meager Offspring,” and Titles in a Bill’s Family 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); Elizabeth Hunter Cobb, Comment, *Judicial Review of the Legislative Enactment Process: Louisiana’s “Journal Entry” Rule*, 41 LA. L. REV. 1187, 1190 (1981), see also *Public Citizen I*, 451 F. Supp. 2d 109, 126 (D.D.C. 2006) (noting that the respect due a coequal branch is the primary rationale currently stated by state courts that still adhere to 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.

of EBD—the unreliability of legislative records—is much less common in contemporary sources.<sup>33</sup> 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 journals or other evidence.<sup>34</sup> Hence, rather than completely disappearing, the justification for EBD based on the unreliability of legislative records has evolved into the “comparative probative value” argument.<sup>35</sup>

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.<sup>36</sup>

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.<sup>37</sup> 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.”<sup>38</sup> It has also been argued that even if violations of constitutional requirements, procedural abuses, and other defects in the legislative process do occur, they are better remedied by the elected branches or the electorate.<sup>39</sup>

## 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

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

34. See William J. Lloyd, *Judicial Control of Legislative Procedure*, 4 SYRACUSE L. REV. 6, 12–13 (1952); Cobb, *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).

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. 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); see 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 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); Cobb, *supra* note 29, at 1190.

Senate in all but one provision.<sup>40</sup> In budgetary terms, this seemingly minor difference had significant consequences, amounting to an estimated \$2 billion over five years.<sup>41</sup> When the enrolled bill was prepared, a Senate clerk apparently “corrected” this discrepancy by changing this provision back to the 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).<sup>42</sup> 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.”<sup>43</sup> 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, the Act did not meet the lawmaking requirements of the Constitution and was thus invalid.<sup>44</sup>

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.<sup>45</sup> 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

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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 109, 111 n.7 (D.D.C. 2006).

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).

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 . . . .”); see also *Clinton v. City of New York*, 524 U.S. 417, 448 (1998); *Public Citizen II*, 486 F.3d 1342, 1343 (D.C. Cir. 2007).

signatures . . . any bill not passed by congress.”<sup>46</sup> Even most of the facts in this case are largely undisputed.<sup>47</sup> 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 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.”<sup>48</sup> 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*.<sup>49</sup> The Supreme Court denied petitions for writ of certiorari in these cases,<sup>50</sup> 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.<sup>51</sup> 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 demonstrate that the doctrine forces courts to enforce statutes even when it is obvious that their enactment was a deliberate and much more egregious constitutional violation.

### 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.”<sup>52</sup> One of the recognized considerations for overruling an earlier case is significant change in circumstances that undermines the factual assumptions of the earlier case.<sup>53</sup> Sections III.A to III.D describe some of the

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

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

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.

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).

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.<sup>54</sup> Some even argue that “much of the *Marshall Field* ruling 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.”<sup>55</sup> 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,”<sup>56</sup> 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.”<sup>57</sup> These decisions also stressed “the danger . . . from the intentional corruption of evidences of this character.”<sup>58</sup>

This argument was a widespread justification for EBD in the late nineteenth century.<sup>59</sup> When the doctrine was originally formulated in the United States, legislative record keeping was “so inadequate”<sup>60</sup> that in almost every instance in the earlier cases “it was an excuse for sustaining the enrolled bill on the theory that a careless record should not impeach an act solemnly signed.”<sup>61</sup> 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?”<sup>62</sup>

With the improvement of record-keeping in the legislatures, however, this argument's strength significantly diminished, and it has largely been abandoned

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

55. Vikram David Amar, *Why the “Political Question Doctrine” Shouldn't Necessarily Prevent Courts from Asking Whether a Spending Bill Actually Passed Congress*, FINDLAW, 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).

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).

in modern cases.<sup>63</sup> 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.”<sup>64</sup> 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).<sup>65</sup> It is undeniable, however, that there has been dramatic 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.<sup>66</sup> 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.<sup>67</sup> Since 1996, there has also been live webcast coverage of House and Senate floor proceedings and committee hearings.<sup>68</sup> These recordings provide an effective check on the official legislative records.<sup>69</sup>

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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. Cf. *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. 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.” (internal 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](http://thomas.loc.gov/home/abt_thom.html) (last visited Aug. 20, 2008).

67. See Ron Garay, Museum of Broad. Commc’ns, U.S. Congress and Television, <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](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, <http://www.scotusblog.com/wp/analysis-hamdan-and-a-few-minutes-in-the-senate> (Mar. 23, 2006, 17:17 EST).

## 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.<sup>70</sup> 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 bill, thus attested, has received, in due form, the sanction of the legislative branch . . . .<sup>71</sup>

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.”<sup>72</sup> 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”<sup>73</sup> 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 . . . .”<sup>74</sup> 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.

The modern process of enrollment, however, is quite different than the enrollment procedure described in *Field*. The original procedure of enrollment

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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 (1834)).

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

was molded to fit a Congress that passed only 118 bills in its two years.<sup>75</sup> 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."<sup>76</sup> 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.<sup>77</sup> 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!).<sup>78</sup> 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 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.<sup>79</sup> 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,<sup>80</sup> and at least since the 1980s, they have regularly signed enrolled bills when their houses are not in session.<sup>81</sup>

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 . . . ."<sup>82</sup> 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 merely symbolic) role in authenticating bills. Today, the enrolled bill represents, in

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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.

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.

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.”<sup>83</sup> 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”).<sup>84</sup>

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.”<sup>85</sup>

### 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.<sup>86</sup> 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 dispar-

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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.”).

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

86. See 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.”).

ate policy areas in one highly complex and long bill.<sup>87</sup> 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.<sup>88</sup> 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.”<sup>89</sup>

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.<sup>90</sup> 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.<sup>91</sup>

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.”<sup>92</sup>

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.<sup>93</sup> 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.<sup>94</sup>

Scholarship about the contemporary Congress provides ample evidence that

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

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.

these new legislative processes occasionally produce errors,<sup>95</sup> as well as enable stealth legislation that serves rent-seeking interest groups but has not really passed majority muster.<sup>96</sup> To be sure, this Article is certainly not arguing that the contemporary Congress is worse than the late-nineteenth-century Congress.<sup>97</sup> 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.<sup>98</sup> This Article, however, makes a more modest 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, has significantly diminished.

#### 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.<sup>99</sup> Although care must be exer-

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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 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 Omnibus Budget Reform Act of 1981 is apparently another example. See 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. Cf. 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 cf.* 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); 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); Goldfeld, *supra* note 96.

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,

cised 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.<sup>100</sup> 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,”<sup>101</sup> this argument is much less persuasive today. The experiences from 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.<sup>102</sup>

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.<sup>103</sup> And yet, between 1873 and 1950 only nine challenges were brought, and since 1950, there have been apparently only seven reported challenges.<sup>104</sup> 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.<sup>105</sup> Moreover, there seems to be no indication in any of these states that the stability of the law was

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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).

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).

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

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”<sup>106</sup> and seemed to dismiss this possibility as “too remote to be seriously considered.”<sup>107</sup> 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.”<sup>108</sup> Moreover, state courts have often noted (and demonstrated) that EBD “frequently . . . produces results which do not accord with facts,”<sup>109</sup> and is “conducive to fraud, forgery, corruption and other wrongdoings.”<sup>110</sup> 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.<sup>111</sup> 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.”<sup>112</sup> 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 can know what happened.’”<sup>113</sup> 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 restric-

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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.

109. See, e.g., *D & W Auto Supply v. Dep’t of Revenue*, 602 S.W.2d 420, 423–24 (Ky. 1980); see also *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*, 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).

113. *Id.* at 180.

tions.<sup>114</sup> 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.”<sup>115</sup>

The experience of Illinois is also particularly interesting. EBD was adopted in Illinois through a new section in the 1970 state constitution.<sup>116</sup> 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 would not be needed because violations of the constitutionally required procedures would be rare.<sup>117</sup>

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.”<sup>118</sup> Several later decisions by Illinois courts reaffirm this conclusion.<sup>119</sup>

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,<sup>120</sup> and suggests that increased judicial enforcement would likely result in greater legislative compliance with constitutional requirements.<sup>121</sup> Some scholars even argue that EBD not only permits, but also “no doubt encourages” “cut[ting] procedural corners” in the enactment process.<sup>122</sup> Even one of the federal

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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*, 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).

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.

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 the rigors of constitutional law-making.”<sup>123</sup> 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 constitutions 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.<sup>124</sup> 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 constitutional [lawmaking] mandates?”<sup>125</sup> 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,”<sup>126</sup> or have stressed the doctrine’s power to shield the legislative process from judicial review in concluding that it “transcends the merely procedural.”<sup>127</sup> 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

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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.

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).

reliable evidence than legislative journals or other evidence.<sup>128</sup> 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 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.<sup>129</sup> 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.<sup>130</sup> 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.<sup>131</sup> 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 enacted in violation of the constitutional requirements for lawmaking.<sup>132</sup> 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”<sup>133</sup> and that the doctrine “frequently . . . produces results which do not accord with facts.”<sup>134</sup> 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.<sup>135</sup> It “disregards the

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

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.

132. See, e.g., *D & W Auto Supply v. Dep’t of Revenue*, 602 S.W.2d 420, 422–23 (Ky. 1980) (“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 *Geja’s Cafe v. Metro Pier & Exposition Auth.*, 606 N.E.2d 1212, 1220–21 (Ill. 1992); *Power, Inc. v. Huntley*, 235 P.2d 173, 180–81 (Wash. 1951).

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

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

135. *Ass’n of Tex. Prof’l Educators v. Kirby*, 788 S.W.2d 827, 829 (Tex. 1990); see also *D & W Auto*, 602 S.W.2d at 423–24; SINGER, *supra* note 27, § 15:3, at 822.

primary obligation of the courts to seek the truth.”<sup>136</sup>

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 nature is most appropriate,” as the *Gardner* Court had suggested in 1867.<sup>137</sup> 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.<sup>138</sup> 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.

##### A. NINETEENTH-CENTURY DECISIONS

By the time *Field* was decided, state courts had already expressed a variety of positions on the enrolled bill question.<sup>139</sup> 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.”<sup>140</sup> 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?

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136. 602 S.W.2d at 423–24.

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).

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).

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 appropriate . . . .<sup>141</sup>

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 of Representatives to determine whether a quorum had been present in the House when passing a bill.<sup>142</sup> 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*,<sup>143</sup> and EBD became the dominant approach in the federal courts.<sup>144</sup>

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*,<sup>145</sup> 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.<sup>146</sup> 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 . . . .”<sup>147</sup> 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 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.”<sup>148</sup>

The *Powell* Court also held that the case was justiciable and not barred by the political question doctrine.<sup>149</sup> 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

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.

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

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

144. See Lloyd, *supra* note 34, at 22; see, e.g., *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)).

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

149. *Id.* at 516–49.

branch.<sup>150</sup>

Other important decisions include *INS v. Chadha*,<sup>151</sup> invalidating the legislative veto, and *Clinton v. New York*,<sup>152</sup> striking down the line-item veto.<sup>153</sup> 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 without amending the Constitution.<sup>154</sup> *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.”<sup>155</sup>

In *INS v. Chadha* the Court also rejected arguments that the case presented a political question.<sup>156</sup> 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,”<sup>157</sup> 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 . . . .”<sup>158</sup>

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,<sup>159</sup> 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.

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.

154. *Chadha*, 462 U.S. at 945–46, 951, 954; *Clinton*, 524 U.S. at 438–40, 446, 448–49; *see also* ESKRIDGE 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).

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).

## 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.”<sup>160</sup> While the “classical” political question doctrine holds that the doctrine applies only when the Constitution itself commits an issue to another branch of government,<sup>161</sup> 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 avoid conflict with the political branches.”<sup>162</sup> 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*.<sup>163</sup>

This Article expresses no opinion about the political question doctrine, which has been sufficiently debated in legal scholarship.<sup>164</sup> 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 found a political question.<sup>165</sup> Some scholars argue, moreover, that *Powell* and *Chadha* effectively eliminated *Baker*’s “respect due coordinate branches” factor,<sup>166</sup> and that the

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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.

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).

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)).

Court refrained from expressly relying on it in subsequent decisions.<sup>167</sup> 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*.<sup>168</sup> 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."<sup>169</sup> He argued that the Act was a bill for raising revenue and that it had originated in the Senate and, thus, was passed in violation of the Clause.<sup>170</sup> 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.<sup>171</sup> 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."<sup>172</sup>

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."<sup>173</sup> The Court held, however, that this cannot be sufficient to render an issue nonjusticiable.<sup>174</sup> "If it were," the Court added, "every judicial resolution of a constitutional challenge to a congressional enactment would be impermissible."<sup>175</sup> The Court noted that Congress often explicitly considers whether bills violate constitutional provisions, but adopted *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."<sup>176</sup>

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.<sup>177</sup> Justice Scalia quoted *Field* and

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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.

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

171. *Id.* at 390.

172. *Id.*

173. *Id.*

174. *Id.*

175. *Id.*

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

177. *Id.* at 408 (Scalia, J., concurring).

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.”<sup>178</sup> 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.<sup>179</sup>

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.”<sup>180</sup> The Court added in a footnote that Justice Scalia’s argument could not be supported by *Field*.<sup>181</sup> 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.”<sup>182</sup>

There have been various opinions as to the impact of this footnote on the applicability of *Field*’s EBD.<sup>183</sup> 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.<sup>184</sup> Other scholars argue that *Munoz-Flores* limits EBD to the bicameralism provi-

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178. *Id.* at 409.

179. *Id.* at 409–10.

180. *Id.* at 391 (majority opinion).

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 *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)); 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)).

sion rather than other constitutional requirements.<sup>185</sup> 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).<sup>186</sup> According to this interpretation, *Munoz-Flores* limits EBD to constitutional provisions of the second kind.<sup>187</sup> Some even argue that *Munoz-Flores* “effectively overruled” *Field*.<sup>188</sup>

The district and appellate courts in the DRA cases, however, held that *Munoz-Flores* does not overrule or limit the holding of *Field*.<sup>189</sup> The position of the lower federal courts seems to be that *Munoz-Flores* has, at most, declined to extend EBD to Origination Clause cases and that in all other cases EBD “remains in full effect today.”<sup>190</sup> 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.<sup>191</sup> 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.”<sup>192</sup>

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

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).

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/Am. 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)).

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

*Field*.<sup>194</sup>

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.<sup>195</sup> 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.”<sup>196</sup>

The Court also rejected the Government’s argument that judicial intervention is unwarranted because the case does not involve individual rights.<sup>197</sup> 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.”<sup>198</sup> 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.<sup>199</sup>

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

#### 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

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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).

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.

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.<sup>201</sup> However, examining the relationship between EBD and textualism is worthwhile because the greatest supporter of EBD on the Court, Justice Scalia,<sup>202</sup> is also the great champion of textualism on the Court.<sup>203</sup>

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.<sup>204</sup> Indeed, several 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.<sup>205</sup>

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."<sup>206</sup> 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 [his] interpretative approach."<sup>207</sup>

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201. *U.S. Nat'l Bank of Or. v. Indep. Ins. Agents of Am., 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* (Amy Gutmann ed., 1997); *see also* ESKRIDGE 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 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).

207. Bell, *supra* note 29, at 1279.

In addition, if indeed the textualists’ arguments “are deeply rooted in a suspicion of legislators and their motives,”<sup>208</sup> 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.<sup>209</sup> In the context of defending textualism, Justice Scalia has argued, 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”<sup>210</sup> 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.”<sup>211</sup>

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.<sup>212</sup> 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

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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 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.”<sup>213</sup> In this sense, it is no different than legislative journals or committee reports.<sup>214</sup> 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,<sup>215</sup> EBD does exactly that by treating the enrolled bill as “conclusive in every sense”<sup>216</sup> 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 courts in effect permits Congress to engage in delegation of its authority to subunits of the legislature, in violation of the separation of powers.<sup>217</sup> 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,”<sup>218</sup> 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.’”<sup>219</sup> Hence, argues Justice Scalia, Congress may not leave to its committees the details of legislation or the formation of Congress’s intent.<sup>220</sup> “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.”<sup>221</sup> 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.<sup>222</sup> The only conceiv-

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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).

217. SCALIA, *supra* note 203, at 35; *see* *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 (quoting JOHN LOCKE, SECOND TREATISE ON GOVERNMENT 87 (R. Cox ed., 1982) (1960)); SCALIA, *supra* note 203, at 35.

220. 516 U.S. at 280.

221. SCALIA, *supra* note 203, at 35.

222. *See infra* section V.B.

able basis for considering the enrolled bill 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,”<sup>223</sup> 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 decision-making and drafting.”<sup>224</sup> 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.”<sup>225</sup> 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 textualism because “we have an obligation to conduct our exegesis in a fashion which fosters that democratic process.”<sup>226</sup> 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.<sup>227</sup> 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

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

224. *ESKRIDGE 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*.”).

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).

authority to these presiding officers.

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."<sup>228</sup> Professor Berman distinguishes between constitutional doctrines that are "constitutional operative propositions" and doctrines that are "constitutional decision rules."<sup>229</sup> 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).<sup>230</sup> "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 constitutional operative proposition] has been complied with."<sup>231</sup> 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.<sup>232</sup>

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.<sup>233</sup>

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228. Berman, *supra* note 4, at 72.

229. *Id.* at 9.

230. *Id.*

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.

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 results which do not accord with facts or constitutional provisions.”<sup>234</sup> 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.<sup>235</sup> 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.”<sup>236</sup> 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.<sup>237</sup> The problem is that EBD takes the authority to 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

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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 208, at 522–28 (arguing that the requirements of bicameral 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.

it according to the judicial understanding of what the Constitution means.<sup>238</sup> This result is in sharp contrast with the prevailing judicial position that this authority is “emphatically the province and duty of the judicial department,”<sup>239</sup> 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.<sup>240</sup> To clarify, this Article does not argue for judicial exclusivity or even supremacy in the interpretation and enforcement of the Constitution.<sup>241</sup> It concedes that Congress and the President may have an important role to play in constitutional interpretation.<sup>242</sup> 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.”<sup>243</sup> 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.<sup>244</sup> Hence, determining the validity of primary rules, in the sense of recognizing them as 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).<sup>245</sup> 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

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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 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); and 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).

245. *Id.* at 103, 148, 152.

nondemocratic legal systems)<sup>246</sup> 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.”<sup>247</sup> 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.<sup>248</sup>

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].<sup>249</sup>

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.<sup>250</sup> As these scholars point out, Article I, Section 7 is “the clearest case of a constitutional existence condition.”<sup>251</sup> Even under the most minimalist rule of recognition in the United States, a “proposition constitutes a federal statute if and only if it satisfies the procedures for promulgating statutes set forth in . . . Article I, Section 7.”<sup>252</sup>

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:

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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.

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

250. *Id.* at 1107–08, 1123–25.

251. *Id.* at 1172.

252. *Id.* at 1131.

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 can . . .<sup>253</sup>

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 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."<sup>254</sup> 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."<sup>255</sup> 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 correction of an error when enrollment is made.<sup>256</sup> 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.

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

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

255. *See supra* Part II.

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

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,<sup>257</sup> 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.<sup>258</sup>

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,”<sup>259</sup> 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.”<sup>260</sup> 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.<sup>261</sup> 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.’”<sup>262</sup> 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 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

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257. 1 U.S.C. § 106 (2002).

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

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 (citing *INS v. Chadha*, 462 U.S. 919, 959 (1983)).

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.”<sup>263</sup> 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.<sup>264</sup>

## 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 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.<sup>265</sup> Although these origins can perhaps be traced back to the time of Henry

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

264. *Bowsher*, 478 U.S. at 737; *see also* *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); *Chadha*, 462 U.S. at 945–46, 951, 954.

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).

VI in fifteenth-century England,<sup>266</sup> 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.<sup>267</sup>

This rule is based, to a large extent, on the traditional English view of parliamentary supremacy (or sovereignty).<sup>268</sup> According to the orthodox view 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.<sup>269</sup> The orthodox English view considers lawmaking as a sovereign prerogative and the legislative process as a sphere of unfettered omnipotence.<sup>270</sup> 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.<sup>271</sup>

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.<sup>272</sup> 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

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; and 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 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; and 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).

and commons? I deny that any such 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.<sup>273</sup>

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.<sup>274</sup>

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.<sup>275</sup>

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.<sup>276</sup> Indeed, this rule is still so much tied to the principle of parliamentary supremacy in 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.”<sup>277</sup> 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 England<sup>278</sup> and concede that EBD “is inextricably related to . . . parliamentary sovereignty.”<sup>279</sup>

Hence, the origins of EBD establish the historical link between this doctrine and the orthodox view of parliamentary supremacy. The link between this

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273. *Lee v. Bude & Torrington Junction Ry. Co.*, (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.) (U.K.).

275. *See, e.g., Manuel v. Att’y Gen.*, [1983] Ch. 77, 89 (C.A.) (U.K.) (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. Att’y Gen.*, [2006] 1 A.C. 262 at para. 168 (H.L.) (appeal taken from Eng.) (U.K.).

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.

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.

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”<sup>280</sup> 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 manner . . . .<sup>281</sup>

This position was also accepted by the English judges in the Privy Council.<sup>282</sup> *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.”<sup>283</sup> In legal systems where such an instrument does exist, however, “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.”<sup>284</sup> Stressing the judicial “duty to see that the Constitution is not infringed and to preserve it inviolate,”<sup>285</sup> the Privy Council enforced procedural (or “manner and form”) lawmaking restrictions on Commonwealth legislatures in this and other cases.<sup>286</sup> 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.”<sup>287</sup>

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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.

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.).

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 England<sup>288</sup> and that this erosion warrants a reconsideration of the English EBD.<sup>289</sup> In the recent House of Lords decision regarding the validity of the Hunting Act,<sup>290</sup> 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.”<sup>291</sup> 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.<sup>292</sup> Significantly, however, the House of Lords also seemed to 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.<sup>293</sup> Indeed, this position seems to be

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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).

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.

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

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.”<sup>294</sup>

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.”<sup>295</sup> 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, on several fronts, by legal philosophers and constitutional scholars.<sup>296</sup> 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.”<sup>297</sup> 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.<sup>298</sup> These scholars argue that lawmaking cannot be understood except as a law-governed process.<sup>299</sup> 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.<sup>300</sup>

Based on this “new view” of parliamentary sovereignty, several scholars in the British Commonwealth have argued that judicial review of the legislative process is consistent with parliamentary sovereignty.<sup>301</sup> 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.<sup>302</sup> In order to ensure the authenticity

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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 quotation marks omitted).

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

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.

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.

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.”<sup>303</sup> Such judicial review does not interfere with the exercise of the sovereign’s will; it is a necessary condition for effectuating this will.<sup>304</sup> 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?”<sup>305</sup> 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.<sup>306</sup> This view was aptly summarized by Professor Heuston:

(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) . . . .<sup>307</sup>

The English courts have long preferred the orthodox view of parliamentary sovereignty,<sup>308</sup> although some judges in the House of Lords have recently demonstrated some receptiveness to the “new view.”<sup>309</sup> 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.<sup>310</sup> The Israeli example is also interesting because, until the 1980s, Israeli courts followed the orthodox English view of parliamentary sovereignty quite closely.<sup>311</sup> Just like in England,

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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.

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

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

309. Elliott, *supra* note 291, 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).

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*

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.<sup>312</sup> 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.<sup>313</sup> 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.<sup>314</sup> 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 process.<sup>315</sup> 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.<sup>316</sup>

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.”<sup>317</sup> 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.<sup>318</sup> As part of their post-World-War-II transition into constitutional democracies, however,

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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).

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.].

these countries rejected the view of Parliament as supreme, or as sovereign, in favor of constitutional supremacy and “constrained parliamentarianism.”<sup>319</sup> 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.<sup>320</sup> 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.<sup>321</sup> Recognizing the judicial duty to ensure the legislature’s adherence to the constitution, courts in Spain, Germany, and other constitutional democracies gradually but dramatically expanded their review of the legislative process.<sup>322</sup> 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.”<sup>323</sup>

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.

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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); see 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 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.

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.

## 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 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.<sup>324</sup> This doctrine has properly been characterized as “a prophylactic rule, which blocks all inquiry into the alleged procedural flaws in a bill's adoption”<sup>325</sup> or as “insulating legislative enactments from challenges based on faulty enactment procedures.”<sup>326</sup> 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.”<sup>327</sup> 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 lawmaking.<sup>328</sup> 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.<sup>329</sup> 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.”<sup>330</sup> This permits habitual and flagrant disregard of the constitutional requirements in the legislative process.<sup>331</sup> 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

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324. Roberts, *supra* note 208, at 527, 531; Roberts & Chemerinsky, *supra* note 127, at 1789–90.

325. Roberts, *supra* note 208, at 531.

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

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

328. *See D & W Auto Supply v. Dep't of Revenue*, 602 S.W.2d 420, 422–24 (Ky. 1980); *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.

become a dead letter.”<sup>332</sup>

To be sure, critics of “court-centered” constitutional law argue that “it is a mistake to assume that constitutional prohibitions are somehow unreal unless backed up by judicial review.”<sup>333</sup> 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.<sup>334</sup> 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.<sup>335</sup> 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,<sup>336</sup> as well as further empirical research,<sup>337</sup> 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.

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

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; members of Congress who are truly motivated by their 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”).

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.

### 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.<sup>338</sup> 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.”<sup>339</sup> 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 that is prior and superior to the powers of the legislature.<sup>340</sup> *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 of the Constitution.<sup>341</sup> 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.<sup>342</sup>

In treating lawmaking as a sovereign prerogative and the legislative process as a sphere of unfettered power immune from judicial review, EBD deviates

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

339. BRUCE ACKERMAN, *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, § 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.

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.”).

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.<sup>343</sup>

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 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.<sup>344</sup> 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.<sup>345</sup> 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 lawmaking provisions, their text, and their original understanding. As the Court noted in

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

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).

*INS v. Chadha*, the Constitution “defines [the legislative] powers and . . . sets out just how those powers are to be exercised.”<sup>346</sup> 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.”<sup>347</sup> 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.”<sup>348</sup> 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.’”<sup>349</sup> 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.<sup>350</sup> This conclusion, moreover, is buttressed by the lawmaking provisions’ underlying purposes and history. 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.<sup>351</sup>

Thus, EBD “is difficult to square with the . . . text and other sources of constitutional meaning” of Article I, Section 7.<sup>352</sup>

Nor is EBD required by any other constitutional provision.<sup>353</sup> 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.”<sup>354</sup> Even they conceded, however, that this requires an expansive interpretation of this Clause that is “not easily

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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, 535–36 (1998) (Scalia, J., concurring); *Bowsher v. Synar*, 478 U.S. 714, 737 (1986) (Stevens, J., concurring).

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 208, at 527–28, 530.

apprehended from the words alone”<sup>355</sup> and apparently has no support in sources about original intent and understanding.<sup>356</sup> 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.<sup>357</sup> 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.<sup>358</sup> 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.

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.<sup>359</sup> On the contrary, it stressed that the Constitution itself does not resolve the issue “either expressly or by necessary implication.”<sup>360</sup> Instead, it concluded that prudential considerations—most notably, the respect due to a coequal branch—require EBD.<sup>361</sup>

#### VII. RESPECT DUE TO A COEQUAL BRANCH AS PROXY FOR 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 conclusive-

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

356. Roberts, *supra* note 208, 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)).

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

360. *Id.*

361. *Id.* at 671–72.

ness of the Parliamentary Roll . . . are judicial products of that carefully observed mutual respect which has long existed between the legislature and the courts.”<sup>362</sup> In the American justification of the doctrine, legislative supremacy disappears, but the argument remains that “[m]utual regard between the coordinate branches”<sup>363</sup> or “[t]he respect due to coequal and independent departments” (and other prudential considerations) require EBD.<sup>364</sup> 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 for the legislature and respect for the Constitution. Section VII.B challenges the assumption that judicial review of the legislative process manifests disrespect for the legislature.

#### A. RESPECT FOR THE LEGISLATURE AND RESPECT FOR THE CONSTITUTION

The English courts based EBD on the fact that they “sit . . . as servants of the Queen and the [supreme] legislature”<sup>365</sup> 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.”<sup>366</sup> 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 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 for 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 for the legislature and disrespect for 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.

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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).

364. *Field*, 143 U.S. at 672.

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

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

... 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.<sup>367</sup>

Other state supreme courts have similarly rejected “the premise that the equality of the various branches of government requires that we shut our eyes to constitutional failings . . . of our coparceners in government.”<sup>368</sup> 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.<sup>369</sup> 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.”<sup>370</sup> 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,”<sup>371</sup> and that courts, in turn, may not abdicate their “duty to see that the Constitution is not infringed and to preserve it inviolate.”<sup>372</sup>

Hence, due deference to a coequal legislature in a constitutional system cannot amount to the same degree of deference due to a supreme sovereign legislature; it cannot amount to absolutism and unfettered legislative power.<sup>373</sup> 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.”<sup>374</sup>

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367. *Consumer Party of Pa. v. Commonwealth*, 507 A.2d 323, 332–33 (Pa. 1986) (internal citations omitted), *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).

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.

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

374. *Grant, supra* note 70, at 368.

## 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 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.<sup>375</sup> Hence, it concluded that “[t]he respect due to coequal and independent departments requires the judicial department to act upon that assurance.”<sup>376</sup> 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.”<sup>377</sup> 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.”<sup>378</sup> 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”<sup>379</sup>—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.”<sup>380</sup> 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 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 bills 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.”<sup>381</sup> 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

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

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.

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

elevating clerical error over constitutional law.”<sup>382</sup> “To hold otherwise” stated the Supreme Court of Texas, “would raise form over substance, fiction over fact, and amount to government by clerical error.”<sup>383</sup>

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 federal courts on occasion interpret the Constitution in a manner at variance with the construction given the document by another branch.”<sup>384</sup> 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.<sup>385</sup> 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.”<sup>386</sup> 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 impermissible”<sup>387</sup> 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.”<sup>388</sup> 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.’”<sup>389</sup> Some even asked, “why assume . . . that judicial review does not often—or perhaps

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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.

384. *Munoz-Flores*, 495 U.S. at 391 (majority opinion) (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.

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. 186, 217 (1962)).

even always—express ‘lack of respect’ for the other branches of government”<sup>390</sup> or argued that this argument has “the potential for swallowing judicial review entirely.”<sup>391</sup>

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.<sup>392</sup> Justice Scalia, for example, assumed that compliance with the constitutional requirements for lawmaking constitutes a “matter[] of internal process.”<sup>393</sup> 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.”<sup>394</sup>

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.<sup>395</sup> This is also the well-established rule in the jurisprudence of the Rulemaking Clause:<sup>396</sup> 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.<sup>397</sup> 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.<sup>398</sup> Indeed, “citizens are constitutionally entitled to a certain process in the enactment of

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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).

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. U.S. CONST. art. I, § 5, cl. 2.

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

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

statutes.”<sup>399</sup> 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,<sup>400</sup> or against judges creating and imposing on Congress lawmaking requirements beyond those mandated by the Constitution.<sup>401</sup> Judicial review of the legislative process can be limited, however, to an inquiry, exercised after the enactment is complete, into 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.<sup>402</sup> 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.”<sup>403</sup> Moreover, unlike the American “strong-form” version of substantive judicial review, in which the courts’ constitutional judgments are considered final and unreviewable,<sup>404</sup> 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.”<sup>405</sup>

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

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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.”).

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.

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) and *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.

hands of these two individuals.<sup>406</sup> 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.<sup>407</sup>

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.<sup>408</sup> Judicial review of the legislative process, in contrast, manifests respect for Congress and for 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 for 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,”<sup>409</sup> and “would certainly result” in the “evils” EBD aims to avoid.<sup>410</sup> Consequently, it favored these prudential considerations over judicial “fidelity to the Constitution.”<sup>411</sup> 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

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406. See *supra* Part V.

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

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).

410. *Id.* at 673.

411. *Id.* at 670.

flexibility for prudence and greater attention to the legitimacy of judicial action in the circumstances of every case.<sup>412</sup> 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.<sup>413</sup> 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,” which permits consideration of any authoritative source of information.<sup>414</sup> 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.<sup>415</sup> Kentucky, for example, requires “clear, satisfactory and convincing evidence” in order to overcome the prima facie presumption that an enrolled bill is valid,<sup>416</sup> and New Jersey follows a similar rule.<sup>417</sup>

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 to the principles of standing.”<sup>418</sup> “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.<sup>419</sup> The current federal standing

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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.

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 (N.J. 1943) (requiring “clear and convincing evidence”) (internal quotation marks omitted); see also Grant, *supra* note 103, at 410–11.

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.

requirements, especially where legislators are concerned, seem to be demanding enough to alleviate these concerns.<sup>420</sup>

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.<sup>421</sup> Instead of 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.<sup>422</sup> This limitation is aimed at alleviating *Field's* concerns about certainty and stability of the law and reliance interests.<sup>423</sup> Timing limitations can also alleviate concerns about excessive judicial intervention in the legislative process by limiting judicial review to the post-enactment stage.<sup>424</sup> 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.”<sup>425</sup> 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.”<sup>426</sup> One example is the doctrine of “relative voidability,” which instead of treating any unconstitutional law as 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.<sup>427</sup> 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

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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 to 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.

422. N.J. STAT. ANN. §§ 1:7-1 to 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.

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

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.<sup>428</sup>

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);<sup>429</sup> the court's authority to grant its decisions only prospective application;<sup>430</sup> or to give suspended declarations of invalidity.<sup>431</sup> The latter is particularly fitting for judicial review of the legislative process that is in its nature a remand to the 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.<sup>432</sup> 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.<sup>433</sup> 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.<sup>434</sup>

Finally, prudence and self-restraint can also be incorporated in judgments on the merits.<sup>435</sup> 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 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

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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).

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

433. *Id.* at 5–10.

434. See *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).

for “immaterial trivialities.”<sup>436</sup> 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.”<sup>437</sup> 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,<sup>438</sup> and the Israeli Supreme Court will intervene only when a “defect that goes to the heart of the process” occurred in the legislative process.<sup>439</sup>

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,<sup>440</sup> or distinguishing between mandatory and directory provisions in the Constitution).<sup>441</sup>

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.<sup>442</sup> From 1873 to 2005, there were apparently only sixteen reported procedural challenges, and only four of them were successful.<sup>443</sup> 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-restraint.”<sup>444</sup> Moreover, evidence from several other states also seems to suggest that even without the constraint of EBD, state courts generally exercise self-restraint and

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. Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court] Dec. 18, 2002, 2 BvF 1/02 (para. 176) (F.R.G.) (JJ. Osterloh & Lübke-Wolff, dissenting), English translation available at [http://www.bverfg.de/entscheidungen/fs20021218\\_2bvff000102en.html](http://www.bverfg.de/entscheidungen/fs20021218_2bvff000102en.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 . . . .

*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.

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

only rarely invalidate legislation based on defects in the lawmaking process.<sup>445</sup> 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.<sup>446</sup> 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].”<sup>447</sup> 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.<sup>448</sup> 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 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.”<sup>449</sup>

#### 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.<sup>450</sup>

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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 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. HCJ 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.

449. CARDOZO, *supra* note 1, at 98.

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