If the Judicial Confirmation Process Is Broken, Can a Statute Fix It?

Aaron-Andrew P. Bruhl
William & Mary Law School, apbruhl@wm.edu

Repository Citation
Bruhl, Aaron-Andrew P., "If the Judicial Confirmation Process Is Broken, Can a Statute Fix It?" (2007). Faculty Publications. Paper 1776.
http://scholarship.law.wm.edu/facpubs/1776

Copyright c 2007 by the authors. This article is brought to you by the William & Mary Law School Scholarship Repository.
http://scholarship.law.wm.edu/facpubs
If the Judicial Confirmation Process Is Broken, Can a Statute Fix It?

TABLE OF CONTENTS

I. Introduction ............................................. 960
II. Some Details About the Confirmations Statute ........ 967
   A. Why and How Would Such a Statute Be Enacted?
      Commitment Versus Mere Opportunism ........... 967
   B. Key Components of the Statute .................... 971
   C. Would the Statute Work? ............................. 973
III. Finding the Source of Authority for the Confirmations
     Statute ............................................ 976
     A. Does the Rules of Proceedings Clause Authorize
        Statutes? ......................................... 977
     B. The Appointments Clause as a Surer Alternative .. 980
IV. The Putative Problem of Binding Future Senates ...... 983
    A. The Failure of the Entrenchment Critique ........ 985
    B. The Rules of Proceedings Clause as an Anti-
       Entrenchment Rule? ................................. 989
V. Interfering with Senate Autonomy ......................... 990
    A. How Policy Outcomes Are Not the Issue ........... 991
    B. The Practicalities and Indignities of a Non-
       Autonomous Senate .................................. 993
    C. Cameral Autonomy over Procedure .................. 996
    D. Applying Cameral Autonomy ........................ 1007
VI. How the Statute Could Work in Practice .............. 1011
VII. Conclusion ............................................. 1013

I. INTRODUCTION

The process of confirming federal judges is in large part a political
affair, and so opinions regarding the health of the confirmation pro-
cess tend to differ in predictably partisan ways. With a Republican
president in the White House, Republicans complain about Demo-
cratic obstruction of nominations and urge reforms that would stream-
line what they regard as a broken process. Democrats, in contrast,
point out that the vast majority of President Bush's nominees have
been confirmed and contend that the process is working just fine or, at
least, much more smoothly and fairly than it did for President Clin-
ton's nominees. During the Clinton years, of course, Democrats railed
against alleged Republican abuses and proposed reforms not unlike
those now favored by Republicans.

It may be that all of the turmoil over judicial confirmations is sim-
ply ordinary politics at work. If a Democrat wins the 2008 election,
the roles will reverse once again, there will be recriminations and
counter-recriminations over alleged obstructionism, some nomina-
tions will be held up, but the Republic will surely get along just fine.
The appointments process is to some degree engineered to produce
conflict, and one should be wary of those who contend that things are
uniquely more politicized and turbulent now than they have been in
the past.

All the same, many respectable institutional players with long-
term interests that transcend transient partisan advantage really do
seem to believe that something has gone seriously awry. If one tries
to abstract away from one's own partisan feelings and (at the risk of
quaintness) adopt a good-government, commonweal-regarding per-
spective on the matter, one might well be sympathetic to the idea that
things can be and ought to be better. This Article, however, will re-
main agnostic on the question whether reform is, all things consid-

1. See John Cornyn, Our Broken Judicial Confirmation Process and the Need for

2. For a reminder of the need to maintain some historical perspective on the confir-
mation process, see Michael J. Gerhardt, The Federal Appointments Process,
at xvi-xxix (2003). See also Charles Gardner Geyh, When Courts and Con-
gress Collide 171-222 (2006) (summarizing history of Senate efforts to control
judicial behavior through the confirmation process).

3. For instance, the late Chief Justice Rehnquist repeatedly raised the issue of ex-
cessive judicial vacancies during administrations of both parties, notably in his
02.html; William H. Rehnquist, The 2002 Year-End Report on the Federal Judici-
03ttb/jan03.html. Likewise, the American Bar Association, despite some conten-
tions that it plays the role of a liberal interest group in the appointments process,
passed a resolution urging speedier consideration of President Bush's nominees.
See American Bar Association, Standing Committee on Federal Judicial Improve-
ments, Resolution on Existing Judicial Vacancies (Aug. 2002), http://www.aba
net.org/scfji/resolutions.html#vacancies.
ered, a desirable thing, and it will not delve into the extensive debate over precisely what substantive reforms would be appropriate. This Article aims instead to examine the relatively neglected issue of the vehicle through which reform might take place—that is, the method of implementing whatever reform, if any, is thought desirable.

In particular, this Article will take up the question whether it would be proper to reform the confirmation process not through the vehicles that are most frequently proposed—a constitutional amendment, an amendment to internal Senate rules, an informal "deal" or norm—but instead through the mechanism of a statute. Although statutory reform has not yet been subjected to any significant legal analysis, a growing number of commentators have proposed using the statutory method, and legislation has been introduced in the past. A statute regulating confirmations could take a number of different forms depending upon what particular substantive reforms were thought best (or were capable of winning passage at a given time). The statute could, for instance, bar filibusters of judicial nominees, thus addressing the Republicans' chief complaint of late. It could mandate that committee hearings be held and committee votes be scheduled within a fixed period of time after the president submits a

4. In a recent article, two authors—one a former federal judge whose nomination to the court of appeals was filibustered—propose the codification of confirmation procedures. See Charles W. Pickering, Sr. & Bradley S. Clanton, A Proposal: Codification by Statute of the Judicial Confirmations Process, 14 WM. & MARY BILL RTS. J. 807 (2006). They do not, however, engage in any sustained legal analysis of whether a statutory approach would be permissible. See id. at 816 n.57. Other commentators have mentioned the possibility of a statute addressing certain aspects of the confirmations process but likewise have not explored the constitutional issues such an approach would raise. See, e.g., Sarah A. Binder & Thomas E. Mann, Slaying the Dinosaur: The Case for Reforming the Senate Filibuster, BROOKINGS REV., Summer 1995, at 42 (proposing statutory limits on debate over nominees); Brannon P. Denning, Reforming the New Confirmation Process: Replacing "Despise and Resent" with "Advice and Consent," 53 ADMIN. L. REV. 1, 35 n.147 (2001) (suggesting a statute that would require automatic discharges of nominations if the Judiciary Committee fails to schedule a vote); Calvin R. Massey, Getting There: A Brief History of the Politics of Supreme Court Appointments, 19 HASTINGS CONST. L.Q. 1, 14 (1991) (discussing a proposal for a statute that would require a two-thirds vote to confirm nominees); Glenn Harlan Reynolds, Taking Advice Seriously: An Immodest Proposal for Reforming the Confirmation Process, 65 S. CAL. L. REV. 1577, 1580–81 (1992) (proposing a statute that would give nominees expedited treatment if the president selected the nominee from a list created by the Senate). A related but distinct topic is statutory qualifications for office, such as anti-nepotism statutes. See generally Donald J. Kochan, The Unconstitutionality of Class-Based Statutory Limitations on Presidential Nominations: Can a Man Head the Women's Bureau at the Department of Labor?, 37 LOY. U. CHI. L.J. 43 (2005); Michael E. Solimine, Nepotism in the Federal Judiciary, 71 U. CIN. L. REV. 563 (2002); Richard P. Wulwick & Frank J. Macchiarola, Congressional Interference with the President's Power to Appoint, 24 STETSON L. REV. 625 (1995). Past legislative proposals are discussed infra section II.B.
nomination, thus addressing some of the principal Republican delay tactics during the Clinton presidency. Although the above measures would generally benefit the president, a pro-executive tilt is not a necessary feature of a statutory reform. A more balanced statute could limit the special expedited procedures to cases in which the president picks a nominee from a list provided by the Senate. If a supermajority confirmation rule were thought desirable for policy or political reasons, the statute could set the threshold for cloture at sixty-five (or at fifty-five, or whatever figure one prefers), thus attempting to preserve the supermajoritarian consensus-based process in the face of the so-called “nuclear option.” The statute might apply to Supreme Court vacancies, lower court openings, or both. The important point for this analysis is not what exactly the statute would provide but that the reforms would be set forth in statutory form.

Although proposals for a statute regulating Senate voting rules might at first seem to trespass into the realm of internal Senate prerogatives, this type of statute would not be unprecedented. In fact, similar statutory frameworks governing rules of debate exist in a number of areas, ranging from federal budget mechanisms to the military base closure process. Such statutes have become more prevalent in recent times, and they have also started to draw increased scholarly

5. A statute that attempted to set a supermajority requirement would raise additional constitutional questions beyond those discussed here, namely whether Congress can create supermajority requirements in situations where the Constitution arguably contemplates majority approval.

6. The “nuclear option” (or “constitutional option”) is a method whereby the Senate majority would circumvent the usual burdensome process for changing the Senate's rules by instead seeking and ratifying a ruling from the presiding officer that the filibuster could be eliminated by a simple majority vote.

interest. But while mostly a modern phenomenon, they are assuredly not novel. Their history in this country arguably stretches back to 1789, to the first Congress under the new Constitution. Indeed, the first statute in the Statutes at Large is a statute governing the order of business at the beginning of each new Congress, a matter that could have been (and in fact is) regulated through the internal rules of each chamber. Probably the most familiar of this genre of procedural statutes is the “fast track” framework governing congressional approval of trade agreements. Under fast track, the president submits a bill implementing a newly negotiated trade agreement for congressional approval under special streamlined procedures set forth by statute. A judicial confirmations statute would essentially bring this existing method into a new substantive area.

Is a statute a permissible method of reform in this context? The Constitution provides, in a mostly unappreciated clause, that “[e]ach House may determine the Rules of its Proceedings.” That is, each chamber may act by itself to govern its own proceedings. Using this authority, both chambers have promulgated standing rules through one-house resolutions, and each house typically governs itself free

---


9. Act of June 1, 1789, ch. 1, 1 Stat. 23. In particular, the statute described the procedures through which oaths of office were to be administered to members and officers at the beginning of each new Congress and provided that this should be done “previous to entering on any other business.” Id. §§ 2, 4, 1 Stat. at 23–24. The rules of the House and Senate both currently contain provisions also regulating the taking of oaths at the beginning of each session. Sen. Rule III; H.R. Rule II.1. This statute is better known for the section setting forth oaths for state officials, which generated some controversy. See David P. Currie, The Constitution in Congress: The First Congress and the Structure of Government, 1789–1791, 2 U. Chi. L. Sch. Roundtable 161, 170–71 (1995).

from the control of the other house or any other branch of government. Does the existence of this unilateral power over the rules of proceedings mean that Congress cannot pass a statute that regulates the Senate's parliamentary procedures for considering a nomination? Stated differently, is the Rules of Proceedings Clause not merely a permission to act unilaterally—"[e]ach House may"—but also an implicit command that the chambers not govern their proceedings through a statute, even if the statute is otherwise within Congress' broad Article I legislative powers? If Congress passes rules in statutory form, would each house nonetheless retain the power to nullify portions of the United States Code by abrogating those statutized rules unilaterally? But if so, how could that result be squared with the legislative veto case of INS v. Chadha,11 which seems to teach that only a statute, and not unilateral action, can undo a statute? Statutized rules are rather mysterious, existing on the still-not-completely-charter border between statutes and rules. They govern parliamentary procedure or organization—the stuff of rules—and yet they are statutes enacted into the United States Code. Part of their attraction is that they are something more than "just" rules, and yet legislators have treated them as something less binding than a normal statute. Statutized rules raise fundamental questions regarding separation of powers, entrenchment, and the distinction between statutes and other modes of legislative activity.

Although statutized rules exist in a number of policy areas, and therefore much of what is said in this Article is generally applicable, the confirmation process does have three distinctive features that require a modified analysis.12 First, unlike most subjects for framework laws, the process of confirming judges requires the consent of the Senate alone, not bicameral approval. This means that the analysis of potential defects in the confirmations statute must focus more on cameral autonomy rather than on Congress-versus-executive dynamics (though the latter is still very important). Second, the appointments process described in Article II of the Constitution gives the president "the power to propose," which is a reversal from the usual Article I, Section 7 legislative process under which Congress first proposes a policy and the president can only accept it or veto it. Because the Constitution already gives the president this structural advantage in appointments, it is difficult to condemn a confirmations statute on the grounds that it grants the president too much control over outcomes—a charge that has more traction with regard to statutory regimes that govern the consideration of ordinary legislation. Thus, the analysis of the confirmations statute will highlight the fact that the key difficulty

---

12. For previous research addressing the legal status of framework laws in the ordinary legislative process, see Bruhl, supra note 8.
(if there is one) with statutized rules is not that they change policy outcomes to the president's advantage but that they invite other agents to play a role in a chamber's internal affairs. Third, under current Senate practice, the Senate's rules are already quite difficult to change, which tends to deflate an argument that a confirmations statute impermissibly attempts to tie the hands of future legislators. Indeed, given the ossification of the Senate's rules, using statutes might even be better from the point of view of the anti-entrenchment norm.

The analysis in this Article includes discussion of both the practicalities of a confirmations statute and the legalities of it, and it proceeds as follows. Part II of the Article lays some necessary groundwork for the legal analysis by describing the possible confirmations statute in somewhat greater detail. It also explains why legislators might decide to enact the statute and notes that a statutory reform could be easier to achieve than a change to the Senate's parliamentary rules.

The next three Parts of the Article then consider a series of potential legal problems with a confirmations statute. Many observers, not to mention the House and Senate themselves, regard statutized rules as constitutionally problematic, and we will consider whether that concern is warranted. Part III asks whether Congress even has the authority to pass the statute at all. That is, leaving aside whether the statute is invalid because it conflicts with some constitutional prohibition, what enumerated power or other provision of the Constitution gives Congress the power to pass a statute governing rules of debate in the first place? Part III concludes that Congress does indeed have the prima facie authority to pass such a statute, either as an exercise of the rules power or (less controversially) under the Appointments Clause. Part IV then considers the argument that the statute cannot be binding because it would run afoul of the anti-entrenchment rule, which holds that one legislature cannot bind its successors. Although the anti-entrenchment rule forms the basis for the usual criticism of framework laws, I conclude that the rule does not adequately explain what (if anything) is wrong with a confirmations statute. Therefore, in Part V, I turn to what I believe to be the most satisfying account of the statute's constitutional infirmities. Namely, I argue that the Rules of Proceedings Clause should be read through the lens of a principle of cameral autonomy over procedure, distilled from various textual and structural considerations, that invests the Rules of Proceedings Clause with meaning beyond what its quotidian exterior suggests. This principle of procedural autonomy holds that neither the president nor the other house of Congress can subject either chamber to the indignity of being stripped of control over its internal governance. For this reason a confirmations statute could not be binding.
in the way that statutes characteristically bind, but instead the Senate would retain the power to change its rules unilaterally.

Legally binding force is not the only thing that matters, however. Thus, ending by returning to a more practical note, Part VI explains how a confirmations statute might work in practice even if it is not formally binding, just as many other statutized rules have had quite effective careers. It might therefore have practical and political value to reformers despite its limitations and complications.

II. SOME DETAILS ABOUT THE CONFIRMATIONS STATUTE

While most proposals for reforming the confirmation process do not contemplate statutory solutions, a few commentators have proposed such an approach, and legislators have on several occasions introduced legislation that would regulate judicial confirmations. This Part of the Article lays some groundwork for the legal analysis of such proposals. It begins by briefly addressing how such a statute might come into being—that is, how and why Congress might enact such a statute. This Part then describes the hypothetical judicial confirmations statute in somewhat greater detail, using past proposals for statutes structuring the confirmation process as a point of departure. Assuming for the time being that the statute is constitutionally permissible, this Part next tentatively addresses some practical questions regarding whether and how such a statute would work. Many readers will be inclined to suspect that if Congress passed such a statute, it would be only symbolic and could not actually affect the conduct of future confirmation battles. While deferring a fuller analysis to Part VI, I will suggest that the reality is more complicated. It is unlikely that the statutory regime could be judicially enforceable, but even if not, it could have a great deal of power as a practical and political matter.

A. Why and How Would Such a Statute Be Enacted? Commitment Versus Mere Opportunism

Although the main point of this Article is to explore the legal issues surrounding the validity of a confirmations statute, it is worth briefly considering first whether such a statute would or could ever be enacted. Why would Congress want to pass the statute?

13. See supra note 4.
14. Past legislative proposals are discussed infra section II.B.
15. Readers interested only in the purely legal questions may of course skip ahead to Part III.
16. Professor Garrett, in her effort to provide a general treatment of the purposes of framework laws, has identified five leading purposes: (1) symbolism, (2) providing neutral rules, (3) coordination, (4) entrenchment/precommitment, and (5) shifting the intrabranch balance of power. See Garrett, Purposes, supra note 8.
Here there are two main types of approaches to explaining the motives behind the statute, one rather optimistic and one quite cynical. The more cheery version could be called the "commitment rationale." On this approach, Congress would conclude that the judicial confirmations process has become trapped in a form of long-term prisoner's dilemma. It is generally to the immediate political advantage of the party that does not control the White House to attempt to bog down and block the president's nominees. (This is true whether the opposition party is in the majority in the Senate or in the minority.) When the opposition party eventually takes the White House, the tables will turn and its president will suffer the same obstructions earlier visited upon the other party's president. All sides might rationally believe that things would be better for everyone if neither side engaged in obstruction, giving the president more control over appointments. They might hold such a preference for any number of reasons, such as because they highly value the ability of their president to make strongly partisan appointments that please their political base or simply because they think it is bad for the country when numerous judgeships go unfilled. In any event, the bottom line is that each side would be willing to give up some of its ability to block an opposing president's nominees if that would mean its president would get the same treatment. But, crucially, since there is currently no way to make a credible pledge to abide by such a deal, each side engages in obstruction.

Confirmations reform could be regarded as a solution to this prisoner's dilemma. By preventing each side from engaging in short-term opportunism, it would allow both sides to achieve what they regard as a better outcome. But what advantage does a statute hold in particular? There are several potential benefits. To begin with, statutes are generally perceived (rightly or wrongly) as more forceful and mandatory than parliamentary rules, which are purely creatures of the relevant house and can be changed or ignored at its sole whim. A durable statute would offer neutral and evenhanded benefits inasmuch as the same rules would apply to future vacancies regardless of

As the discussion below will show, a confirmations statute could have multiple motivations and arguably could fit within several of Garrett's categories.

17. For work modeling the current appointments situation in game theoretic terms, see, for example, David S. Law, Appointing Federal Judges: The President, the Senate, and the Prisoner's Dilemma, 26 CARDOZO L. REV. 479 (2005); and David S. Law & Sanford Levinson, Why Nuclear Disarmament May Be Easier to Achieve Than an End to Partisan Conflict Over Judicial Appointments, 39 U. RICH. L. REV. 923 (2005).

the partisan configuration of government.\textsuperscript{19} The neutrality could be enhanced further if the statute's effective date were delayed until after the next presidential election, so that the enacting legislature would not know whom they were benefiting.\textsuperscript{20} Further, a statute rather than a rule would be an appropriate choice if Congress wished or needed to enact the rule changes as part of package with other matters that could only be done through legislation.\textsuperscript{21} A statutory solution may well be regarded as more democratically legitimate than other arrangements, such as the deal under which the fate of the filibuster was put in the hands of fourteen senators who were the sole arbiters of what would constitute "extraordinary circumstances" that would justify a filibuster.\textsuperscript{22} There is perhaps something unseemly about a small, self-selected group of fourteen senators making such consequential decisions about the rules for considering nominations.\textsuperscript{23} The judicial fast track statute, in contrast, would be the product of the normal Article I, Section 7 process, bringing together both houses of Congress and the president to make national policy on a matter of national concern. Finally, strictly from the point of view of political practicalities, the statute might be \textit{easier} to enact than a change to the Senate's ossified standing rules, which are protected by a filibuster rule even more supermajoritarian than the filibuster rules that govern the process of enacting legislation.\textsuperscript{24}

It is hard to say whether, as the commitment rationale supposes, the players really find themselves in a prisoners' dilemma. It is just

\textsuperscript{19} See Pickering & Clanton, \textit{supra} note 4, at 809 (citing this as a benefit of employing a statute). Whether a statute really is, or constitutionally could be, more binding than a rule is of course one of the main questions this Article addresses.

\textsuperscript{20} See \textit{infra} notes 32–33 and accompanying text.

\textsuperscript{21} See Garrett, \textit{Conditions}, \textit{supra} note 8, at 312–17 (listing the need to change parliamentary rules as part of a simultaneous package as a factor leading to framework laws).

\textsuperscript{22} In May 2005, striking a bargain that averted a confrontation over the legality of the filibuster of judicial nominees, a group of seven Democrats and seven Republicans agreed that the Republicans would drop their plan to eliminate the filibuster via the "nuclear option" in exchange for the Democrats' promise to reserve the filibuster for "extraordinary circumstances." \textit{See} Robert Byrd et al., Memorandum of Understanding on Judicial Nominations (May 23, 2005), \textit{available at} http://www.cspan.org/pdf/senatecompromise.pdf; Carl Hulse, \textit{Bipartisan Group in Senate Averts Judge Showdown}, \textit{N.Y. Times}, May 24, 2005, at A1.

\textsuperscript{23} \textit{Cf.} John O. McGinnis & Michael B. Rappaport, \textit{The Judicial Filibuster, the Median Senator, and the Countermajoritarian Difficulty}, 2005 \textit{Sup. Ct. Rev.} 257, 292–93, 292 n.90 (arguing that an open and explicit agreement on a super-majority rule would have greater legitimacy than either the current system of questionable filibusters or the deal reached by the Gang of Fourteen).

\textsuperscript{24} The short explanation is that sixty votes are needed to end debate on ordinary legislation, but ending debate on a proposal to change the rules requires two-thirds of those present and voting. The issue of the relative difficulties of enacting a statute versus changing the Senate rules is taken up in greater detail \textit{infra} section IV.A.
as plausible that, despite their protestations, each side prefers the conflict and turmoil (perhaps because it provides good fodder for fundraising appeals). Or it may be that each side values the ability to block the other side’s truly unacceptable nominees more than it values the ability to push through its own most preferred nominees. It is also certainly possible that preferences differ with regard to different types of appointments: All sides might desire less obstruction for lower court nominees but fear giving the president too free a hand with more consequential Supreme Court appointments. To be sure, any statute that erodes senators’ powers over nominations will face an uphill battle, but given the right proposal and a sufficiently dire assessment of the health of the confirmation process, the good-government impulse to reform could begin to overcome senators’ desires to preserve their privileges, especially as regards lower court judges. Moreover, by using the statutory form, the change to the confirmation procedures could be bundled together with other legislative initiatives in order to maximize the chances of enactment.

In all events, even if the commitment rationale were insufficient to bring about a confirmations statute, there is a second, less principled way the statute could come to pass. It is fairly easy to imagine a confirmations statute being enacted simply on the basis of short-term partisan advantage. For example, a statute streamlining the process could be passed when, as was the case for much of President Bush’s presidency, the White House and the Congress are controlled by the same party. The majority party could introduce a statute abolishing the filibuster for judicial nominees and win passage in both houses on a party-line vote. In the Senate, the minority could threaten to filibuster the confirmations statute, but the filibuster could be made much more costly if the majority bundled the statute with must-pass legislation—for example, under the previous Republican majority, this could have been an Iraq War supplemental spending bill (which the majority would champion with cries of “Support the Troops!”) or the requisite biennial child pornography omnibus crime bill (“Get Tough on Pedophiles!”). Only a few minority senators would need to buckle for cloture to succeed. With the confirmation statute on the books, the president could nominate highly partisan nominees who otherwise would be filibustered, and the Senate majority would rely on the statute as a justification for circumventing the filibuster, whether or not the confirmations statute is really binding. The minority party could return this treatment if they captured the Senate and the presidency, but the party in power might regard that future risk as worth it given the immediate gain, especially if multiple Supreme Court vacancies were at stake.
Having explored these two scenarios for how a confirmations statute could come to be, let us now examine how the statute would function in somewhat greater detail.

B. Key Components of the Statute

As indicated earlier, there are a great many statutized rules scattered about the United States Code, and they have a long history. And although no judicial confirmations statute has been enacted, proposals have been made on several occasions, during both Republican and Democratic administrations. The proposals generally parallel the time-tested fast track procedures governing trade agreements, which allow the president to present a bill implementing a newly negotiated trade agreement for congressional approval under special streamlined procedures that, among other things, provide strict timetables for holding votes and bar filibusters.

Following in the footsteps of the fast track statute and the previous proposals, our theoretical judicial confirmations statute would have two key components. First, to circumvent committee delay, it would provide some time period after which a nomination would automatically come out of the Judiciary Committee onto the full Senate's executive calendar, such as through the fast track statute's "automatic discharge" procedure. Second, it would include a mechanism for ensuring a timely vote by the full Senate. This could take the form of an explicit provision calling for majority cloture, though the same effect could be achieved through a requirement that an up-or-down vote be held after some prescribed time period.

These two features of the judicial confirmations statute would address the key obstacles that reformers have targeted. No longer could the majority party silently kill or delay nominations by refusing to schedule hearings and votes, as the Republicans did in the case of some of President Clinton's nominees. Nor could the minority filibuster, or threaten to filibuster, candidates that enjoyed majority support, as happened to some of President Bush's nominees. Just as

25. See, e.g., S. 1906, 105th Cong. (1998); H.R. 2371, 102d Cong. (1991); S. 910, 102d Cong. (1991); see also 144 Cong. Rec. 10,997 (1998) (describing amendments 3658 and 3659 to S. 2176, which proposed that nominations pending before a committee for more than 150 days be discharged from the committee and deemed reported favorably, and that nominations remaining on the Senate executive calendar for more than 150 days be voted on within five days).


28. See id. § 2191(e) (requiring floor vote on trade agreements within fifteen days of the legislation being reported); id. § 2191(g) (limiting length of floor debate).
important, no more could obstreperous senators of either party single-handedly frustrate nominations through anonymous holds.29

While the features above are the crucial ones for purposes of the legal analysis set forth in this Article, it is worth noting that a judicial fast track statute could certainly add other features as well. Taking a cue from the fast track trade regime, which conditions its expedited procedures on the president’s first having consulted with Congress about the content of the trade agreement,30 the confirmations statute might confer its special expedited timetables only when the president first actively seeks the Senate’s advice on potential nominees.31 Since judicial fast track represents a substantial increase in the president’s ability to have his way, it seems only fair that Congress should exact some compensation in return. By offering benefits to both branches, such proposals might also increase the odds that the statute would pass.

Another embellishment would be to give the new regime a delayed effective date—it would not begin to operate until, say, 2009.32 Postponing the effective date until after the next presidential election would randomize the statute’s benefits. Legislators would in effect be acting from behind a Rawlsian veil of ignorance.33

29. Stated briefly, the anonymous hold allows senators to delay consideration of a nomination while they give it further “study.” See Gerhardt, supra note 2, at 140–43. The related blue-slip procedure permits senators from the nominee’s state to (sometimes) block a nomination altogether. See Brannon P. Denning, The Judicial Confirmation Process and the Blue Slip, 85 Judicature 218 (2002).
32. See Law, supra note 17, at 521 (raising this possibility). This approach was taken in the Line Item Veto Act of 1996, which did not take effect until after the 1996 presidential election. See Elizabeth Garrett, The Story of Clinton v. City of New York: Congress Can Take Care of Itself, in Administrative Law Stories 46 (Peter L. Strauss ed., 2006).
33. On the idea of the veil of ignorance, see John Rawls, A Theory of Justice 136–42 (1971). Adrian Vermeule has discussed delayed effectiveness as one manifestation of the veiling strategy. See Vermeule, supra note 8, at 429; Adrian Vermeule, Veil of Ignorance Rules in Constitutional Law, 111 Yale L.J. 399, 419–20 (2001) (“[D]elay rules take advantage of a preexisting uncertainty—the inherent unpredictability of the decisionmakers’ long-term interests—that would otherwise be overwhelmed by the incentives to focus on short-term considerations.”). To be clear, a confirmations statute would not necessarily have to benefit the president. It could just as easily be designed to make things harder on the president, such as by statutizing the right to filibuster judicial nominees.
Finally, the drafters of a confirmations statute would also likely include in the statute the “disclaimer” language that Congress has usually (though not unfailingly) inserted in its modern statutized rules. This language provides that the statutized procedures are enacted “with full recognition of the constitutional right of either House to change the rules (so far as relating to the procedure of that House) at any time, in the same manner and to the same extent as in the case of any other rule of that House.”\(^3\)\(^4\) Now, this language might come as quite a shock, inasmuch as part of the point of the statute (at least if one accepts the commitment rationale) is that the statute is supposed to do more than a rule! Needless to say, this striking language raises a number of questions about the relationship between statutes and rules, a theme that arises repeatedly in this Article. To foreshadow, it may be that this language simply states what the Constitution requires in any event.

In addition to the questions above, the possible inclusion of the disclaimer also raises quite palpably the question of whether the proscribed statutory procedures would really be followed. We now turn to this topic.

C. Would the Statute Work?

While the main point of this Article is to address whether a judicial fast track would be constitutionally permissible, the inquiry cannot totally ignore the question whether such a statute could actually work in practice. If any such statute would be meaningless apart from its symbolism, that would not necessarily prevent Congress from passing it. But the stakes would certainly be higher, and the enterprise of greater moment, if the statute actually accomplished its goals.

There are at least two different types of questions regarding effectiveness: the narrowly legal question whether the statute could be judicially enforceable and the broader (and probably more important) question whether, regardless of formal enforcement, the statute would be treated as binding as a matter of political practice.

Regarding legal enforceability: For any well-socialized lawyer, a lawsuit trying to compel the Senate to follow certain procedures for considering a judicial nomination naturally and properly brings to mind the political question doctrine.\(^3\)\(^5\) I will not here conduct a full

---

\(^3\) See generally Bruhl, supra note 8, at 363–66 (discussing these disclaimer clauses and citing examples of statutes that lack them).

\(^4\) For discussions of the justiciability of legislative rules, see Josh Chafetz, Democracy’s Privileged Few: Legislative Privilege and Democratic Norms in the British and American Constitutions ch. 2 (2006); John C. Roberts, Are Con-
doctrinal analysis except to point out in brief form that, examining the existing case law, there is at least some small room for debate over justiciability.36

As an initial matter, this is not a situation in which there are simply no "judicially discoverable and manageable standards for resolving" the question,37 as in the classic political question cases such as those asserting violations of the constitutional provision guaranteeing that the states will maintain "a republican form of government."38 On the contrary, the statute here generates questions that are readily manageable and even easy to answer: Did the Senate hold a vote within sixty days as the statute requires or didn't it? Further, while there is a better case to be made that the suit is nonjusticiable because there is "a textually demonstrable constitutional commitment of the issue to a coordinate political department"—which is another prong of the political question test39—there is some authority to the contrary. As the Supreme Court said in United States v. Smith, "[When] the construction to be given to the [Senate] rules affects persons other than members of the Senate, the question presented is of necessity a judicial one."40 Just as in Smith, which concerned the Senate's rules on withdrawing its consent to a nomination, here the affected "outsiders" are the president and a nominee.41 Moreover, even supposing that the courts are not to take cognizance of disputes over parliamentary rules, here Congress has passed a statute that governs these proceedings; it is one thing to say that each house is master and judge of its own rules, but can we so quickly exclude the courts when the

---


38. U.S. Const. art IV, § 4; see New York v. United States, 505 U.S. 144, 183–86 (1992) (explaining that the Guarantee Clause has generally been treated as presenting political questions and citing, among other things, Luther v. Borden, 48 U.S. (7 How.) 1 (1849)).


40. 286 U.S. 6, 33 (1932). See also Yellin v. United States, 374 U.S. 109, 114 (1963) (stating, perhaps too unqualifiedly, that "[i]t has been long settled, of course, that rules of Congress and its committees are judicially cognizable").

41. Smith can certainly be given a narrower reading under which the holding of justiciability arose not just because the Senate's rules "affect[ed]" outsiders but because the Senate's position that it was permitted to reconsider its consent to Smith's nomination would have required action by outsiders (such as the president's rescission of Smith's commission or Smith's resignation). See Chafetz, supra note 35, at 58. As my aim here is not to establish justiciability, there is no need to pin down the precise scope of cases such as Smith and Yellin.
United States Code is involved? That is, statutizing a rule arguably bolsters the case for justiciability.

Likely the most powerful basis for the strongly felt notion that the case must be nonjusticiability is the matter of the remedy. Put simply, if the Senate refuses to hold a hearing or schedule a vote, are federal marshals armed with a court order going to make them do so—corralling the Senators in the lobby, plopping them down in their seats, making them mouth "yea" or "nay"? The image is absurd, though here again the reality is in fact somewhat more complicated. In Powell v. McCormack, the Supreme Court noted an argument that federal courts could not issue injunctions compelling House officers like the speaker to perform specific official acts. As the Court pointed out, however, that same problem did not bar a declaratory judgment, which Powell had also sought and to which the Court deemed him entitled. Courts have also issued judgments against the president declaring that he has a duty to obey a statute. It may be that, in the end, a court would go no further than that to enforce its ruling. But, even so, flouting a judicial decision is not politically costless.

Now, to be sure, the comments above are not meant to demonstrate that the Senate's failure to follow the statute would be justiciable. 

42. Cf. Minn. Chippewa Tribe v. Carlucci, 358 F. Supp. 973, 975–76 (D.D.C. 1973) (requiring the president to follow a statutory directive to appoint members to a commission; "although the President clearly has discretion to choose whom to appoint to the Council, he apparently has no discretion to decide if the Council should or should not be constituted").

43. See Nixon v. United States, 506 U.S. 224, 236 (1993) (citing "the difficulty of fashioning relief" as a factor supporting the conclusion of nonjusticiability).


45. Id. at 517–18, 550.


47. Aside from the political question doctrine, an additional—though probably more easily surmounted—obstacle is the question of who (if anyone) would have standing to sue. As it has done in certain environmental protection statutes, Congress could eliminate all nonconstitutional barriers to standing if it chose. Professors Fisk and Chemerinsky conclude that a nominee who is supported by a majority of senators but is denied a vote because of a filibuster would have Article III standing to challenge the filibuster. Catherine Fisk & Erwin Chemerinsky, The Filibuster, 49 Stan. L. Rev. 181, 233–34 (1997); see also Lee Renzin, Note, Advice, Consent, and Senate Inaction—Is Judicial Resolution Possible?, 73 N.Y.U. L. Rev. 1739, 1774–76 (1998) (agreeing that a nominee denied a vote would have standing). More controversially, they also suggest that a senator might have standing to challenge a filibuster. Fisk & Chemerinsky, supra, at 234–37. That argument is more difficult after Raines v. Byrd, 521 U.S. 811 (1997), which narrowed the District of Columbia Circuit's prior law of congressional standing. Finally, I note that the Constitution's Speech or Debate Clause, U.S. Const. art. I, § 6, would not bar a suit, as the immunity can be defeated by naming the entire legislative body or its nonlegislator officials as defendants. Powell, 395 U.S. at 501–06; Fisk & Chemerinsky, supra, at 238.
betting person would be well advised to put his or her money on a court avoiding ruling on the merits. In fact, as pointed out above, Congress typically includes "disclaimer" language that purportedly allows it to change the statute on its own; thus even if the matter were judicially cognizable, the ruling might be that deviating from the statutory procedures was permissible. The important point, however, is that the very same doubts about enforceability plague fast track and the dozens of other extant regimes of statutized rules, and those statutes have not been pointless exercises. They often work in practice regardless of whether they are legally binding. What the courts would do is almost beside the point.

The question of how and why a confirmations statute would work in practice is an interesting one in its own right, and one that deserves some discussion. In Part VI of this Article, I will explain that the statute might be regarded as practically binding even if not judicially enforceable and even if lacking any legal force at all. First, however, we should turn to the legal analysis and try to pin down the legal status of the statute.

III. FINDING THE SOURCE OF AUTHORITY FOR THE CONFIRMATIONS STATUTE

In moving on to the legal analysis of the permissibility of a judicial confirmations statute, it is useful to distinguish at the outset between two different questions. The first question is whether Congress has the power to enact such a statute in the first place. Ours is a government of enumerated powers, and so every enactment should be anchored in some constitutional grant of authority. The second question is, assuming prima facie power to enact the statute, whether the enactment is nonetheless invalid because it conflicts with some other constitutional provision or principle. For an illustration of the distinction, suppose that Congress is considering passing a law that bans or regulates some type of abortion procedure. The first question—the question of power to legislate—would be whether some portion of the Constitution, such as the Commerce Clause, grants Congress the authority to regulate the subject of abortion at all. The second question would be whether the statute, though within the commerce power, is nonetheless invalid because it conflicts with some other independent reason, such as the rights to privacy, equal protection, and so forth.

We can divide the inquiry into the judicial confirmations statute in the same way. This Part of the Article will consider the first question, that of legislative power. Surely the Senate could adopt internal rules

---

48. McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 405 (1819) ("This government is acknowledged by all, to be one of enumerated powers.").
that reform the confirmations process, but part of the point of a confirmations statute is that it is something more than "just" an internal rule. It is, or at least appears to be, a statute enacted under the Article I, Section 7 legislative process. As explored in the next few pages, there are two potential sources of authority for the statute: the Rules of Proceedings Clause and the Appointments Clause. I conclude that probably the former, and certainly the latter, provides a basis for passing a judicial confirmations statute. Subsequent Parts of the Article then consider whether, despite the apparent availability of these sources of power, such a statute is nonetheless impermissible for independent reasons.

As we begin the legal analysis, a few words on method are perhaps in order. This Article does not purport to say which method of constitutional interpretation is the best or the proper method. My approach will be rather eclectic, employing text, structural inference, practical/policy considerations, judicial precedents, early commentary such as The Federalist, and evidence of early practices. Different readers may well find different facets of the argument more compelling than others, but my hope is that most readers will find enough that is persuasive to them to be satisfied with the argument.

A. Does the Rules of Proceedings Clause Authorize Statutes?

In attempting to identify the font of power for the judicial confirmations statute, we can look first to the Rules of Proceedings Clause. The clause certainly grants each chamber the power to prescribe rules of debate through unilateral means: "Each House may determine the Rules of its Proceedings."\(^49\) Some would argue that the clause cannot serve as the source of authority for any action in statutory form.\(^50\) That is, the clause is a grant of power for rulemaking only by unicameral action. Is that view correct, or could the clause also act as a source of authority for rules set in statutory form?

Relatedly, if the Rules of Proceedings Clause can support a statute, can it do so by itself or only with an assist from the Necessary and Proper Clause? That clause gives Congress the legislative power to enact statutes "necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer

\(^{49}\) U.S. CONST. art. I, § 5, cl. 2.
thereof.” An exacting textualist might contend that “the foregoing Powers” embrace only Section 8’s enumerated legislative powers and that a house of Congress is not a “Department” and obviously not an “Officer.” Pushing further, is a power of one house a power of “the Government of the United States” or merely a power of a part of it? To my mind the more reasonable reading is that the language at issue is a catch-all meant to encompass all conferred powers without limitation as to the holder of the power. But there is more to consider in support of that conclusion than examining the bare text.

First, the argument that the rules power cannot authorize statutes (whether on its own or via the Necessary and Proper Clause) is susceptible to some apparent counterexamples. Consider the following: Does Congress have the power to pass a statute creating and regulating a commission tasked with preparing a book summarizing and analyzing its internal rules, practices, and parliamentary precedents? I am confident that most of us would think it does, but it is hard to see what power would justify such a statute if not the rules power. And looking beyond the rulemaking context, one can imagine examples of many statutes that seem constitutionally unexceptionable (and normatively highly desirable) that can apparently be grounded only on a unilateral grant of power. For example, the Constitution gives “each House” the power to secure members’ attendance, but surely most of us would think it obvious that Congress also has the power to pass a statute that makes it a crime to hinder a member’s attempt to attend a session.

52. See Kesavan, supra note 50, at 1731–35.
53. Accord Larry Alexander & Saikrishna Prakash, Delegation Really Running Riot (Univ. of San Diego Legal Studies, Working Paper No. 07-54, 2006). Another way to arrive at the same result is to ask what powers are vested in “the Government” as a whole as opposed to its parts; if the answer is “none,” then the phrase must be some kind of catch-all referring to the various institutions of the government. See Gary Lawson, Burning Down the House (and Senate): A Presentment Requirement for Legislative Subpoenas Under the Orders, Resolutions, and Votes Clause, 83 Tex. L. Rev. 1373, 1386 (2005).
56. For the examples given in the text, I suppose one could point to the Necessary and Proper Clause conjoined with any congressional power, on the theory that things like procedural manuals and unhindered legislators facilitate the exercise of all congressional powers—interstate commerce, budget authority, and all the rest. Although “necessary” has been treated as a very loose standard, see infra note 67 and accompanying text, this would seem to go to or perhaps beyond the edge of whatever constraint there may be. In any event, the reader is welcome to
Moving beyond those somewhat squishy appeals to intuition, it is important to note that Congress certainly believes that the Rules of Proceedings Clause permits it to act in statutory form. Congress has enacted dozens of statutes regulating parliamentary procedure, and when it does so, it typically (though not unfailingly) includes language stating that the special procedures are "enacted . . . as an exercise of the rulemaking power of the House of Representatives and the Senate." In other words, Congress has repeatedly told us what it thinks provides the authority for these types of enactments, and Congress says it is the Rules of Proceedings Clause. Although the Supreme Court has come to be the predominant and final arbiter of constitutional meaning, members of Congress also take an oath to obey and uphold the Constitution, and their collective views on the matter are at least entitled to some weight.

Adding further support, it appears that early Congresses, for which the ratification of the Constitution was still fresh in memory, must have believed that some of the Constitution's grants of unilateral authority could provide a basis for legislating. As noted above, the very first Congress passed a statute governing the order of business at the beginning of each new Congress. And just as the Constitution provides that "[e]ach House" may determine its rules, it also

---

57. E.g., Law of April 3, 1939, ch. 36, § 21(a), 53 Stat. 561, 564 (1939) (current version at 5 U.S.C. § 901 (2000)); Trade Act of 1974, § 151 (codified at 19 U.S.C. § 2191(a)); see also STANLEY BACH, CONGRESSIONAL RESEARCH SERV., FAST TRACK OR EXPEDITED PROCEDURES: THEIR PURPOSES, ELEMENTS, AND IMPLICATIONS, CRS REPORT No. 98-888 (2001) (stating that statutes regulating rules of debate are enacted pursuant to the rulemaking power); MARTIN B. GOLD, SENATE PROCEDURE AND PRACTICE 1, 4-5 (2004) (same). It is also true that Congress has long believed that the Constitution does not permit one Congress to bind a successor through a procedural statute. See Bruhl, supra note 8, at 366-70; infra Part IV. But that goes to the overall legality of a binding statutized rule, not to the threshold question at issue now, namely whether there is prima facie authority to pass the statute in the first place.


59. The subject of Congress' role as constitutional interpreter, and of extrajudicial constitutional judgment more generally, has generated a large literature. See, e.g., MARK TUSHNET, TAKING THE CONSTITUTION AWAY FROM THE COURTS (2000); Larry Alexander & Frederick Schauer, On Extrajudicial Constitutional Interpretation, 110 HARV. L. REV. 1359 (1997); Michael C. Dorf & Barry Friedman, Shared Constitutional Interpretation, 2000 SUP. CT. REV. 61; Larry Kramer, We the Court, 115 HARV. L. REV. 4 (2001); Sanford Levinson, Could Meese Be Right This Time?, 61 TUL. L. REV. 1071 (1987); Edwin Meese III, The Law of the Constitution, 61 TUL. L. REV. 979 (1987). My purpose here is not to take a position in this debate except to make the (I believe uncontroversial) claim that Congress' views are at least a relevant factor to be considered along with others.

60. See supra note 9 and accompanying text.
provides that "[e]ach House shall be the Judge of the Elections, Returns, and Qualifications of its own Members."61 The method of taking evidence for election contests had evidently presented recurring problems in the early years.62 Thus, the Fifth Congress, in 1798, passed a bill that created a method of securing evidence that could be used in election contests in the House. The statute authorized judges, magistrates, and justices of the peace from the area where the election occurred to issue process and take evidence, prescribed penalties for failure to appear at these local evidentiary hearings, and provided reimbursement for witnesses.63 It is not clear what power this statute could be thought to carry out, unless it is regarded as a means of effectuating each house's authority over election contests—which is, like the rulemaking power, a unilateral power of each chamber. Indeed, it seems a very apt and useful method of effectuating that power. This evidence of early congressional practice provides a strong reason to believe that grants of unilateral powers, such as the Rules of Proceedings Clause, can support statutes.64

B. The Appointments Clause as a Surer Alternative

For those who are not convinced that the Rule of Proceedings Clause could provide the authority to pass a statute—and concededly there is room for debate on that score—I hasten to add that it is not the only source of authority that can be invoked. While framework legislation might be authorized by the rulemaking power, an additional source of authority is the substantive legislative power over the particular legislative topic that the framework governs. Regimes of statutized rules are typically passed precisely in order to regulate and improve Congress' handling of a certain type of recurring legislation—budgets, military base closures, trade agreements, etc. Regulating those substantive areas is indisputably within Congress' authority, and so the framework for considering such bills is permissible so long as it is a "necessary and proper" method of carrying out that underlying authority.

The judicial confirmations statute effectuates the appointments power. The appointments power is not an enumerated Article I power

62. See, e.g., 7 ANNALS OF CONG. 685–86 (Dec. 6, 1797); see also Currie, supra note 9, at 174–76.
63. Law of Jan. 23, 1798, ch. 8, 1 Stat. 537.
but is rather set forth in Article II's description of presidential prerogatives, which states that "[the president] shall nominate, and by and with the Advice and Consent of the Senate, shall appoint" Supreme Court justices and judges of the lower courts. The appointments power falls within the scope of the Necessary and Proper Clause because that clause grants Congress the authority to effectuate the enumerated Article I powers plus "all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof." Thus, Congress can pass legislation effectuating the president's appointments power.

The only remaining question, then, is whether a judicial fast track statute could be considered "necessary and proper" for effectuating the appointments power. As for the "necessary" in "necessary and proper," that term long ago came to mean something more like "useful." Under that lenient standard, a judicial fast track statute is certainly a useful and rational measure, especially given the current state of affairs regarding judicial confirmations, which Congress might rationally view as requiring serious reform.

The requirement that the legislation be "proper" could be thought more difficult. Again putting aside for the moment the question whether the statute is independently "improper" because it violates some other constitutional rule (a possibility that will be explored in following Parts of this Article), let us here consider the argument that any statutized rule is per se "improper" because such matters could and should be done by rule. That is, one could argue that the

65. U.S. Const. art. II, § 2, cl. 2. The Appointments Clause goes on to provide that Congress may vest the appointment of "inferior Officers" elsewhere, such as in the president alone or in the courts. It is agreed that Supreme Court justices are "principal" officers who can be appointed only by the president and Senate acting together, but there is some disagreement over whether judges of lower courts are instead "inferior Officers" that can be appointed through other means if Congress so chose. Compare Weiss v. United States, 510 U.S. 163, 191 n.7 (1994) (Souter, J., concurring), and Steven G. Calabresi & Gary Lawson, Equity and Hierarchy: Reflections on the Harris Execution, 102 Yale L.J. 255, 275 n.103 (1992) (lower court judges not "inferior Officers"), with Tuan Samahon, The Judicial Vesting Option: Opting Out of Nomination and Advice and Consent, 67 Ohio St. L.J. 783, 825-32 (2006) (contrary view). I also note that the list of Congress' enumerated powers in Article I states that Congress can create inferior federal courts, U.S. Const. art. I, § 8, cl. 9. That does not necessarily give Congress plenary authority over modes of confirmation for judges of those courts; rather; Article II's Appointments Clause provides for staffing whatever courts are created under the Article I power.


68. See Gary Lawson & Patricia B. Granger, The "Proper" Scope of Federal Power: A Jurisdictional Interpretation of the Sweeping Clause, 43 Duke L.J. 267 (1993) (giving separate meaning to the words "necessary" and "proper" and treating the former as requiring a means-end fit and the latter as requiring conformity with other constitutional principles).
plain text of the Rules of Proceedings Clause directly bars any statute that sets rules, even if that statute is otherwise within Congress' power to enact. This textual argument would read the clause not only as a power to act unilaterally—"[e]ach House may"—but as a statement that unilateral action is the only way in which rules can be set. The clause would not only be permissive as regards unicameral action but also exclusive. On that view, which is essentially a version of the sometimes reliable canon of *expressio unius*, any statute that purported to set a rule of debate would be void.69

Yet the straightforward textual answer to that argument is that the text simply does not say that. It says that "[e]ach House may determine the Rules of its Proceedings." It does not say, "and such Rules may not be set in any other way even if otherwise within Congress' powers." In order to get to that meaning, one would have to find a reason to invest the Rules of Proceedings Clause with a bit more content than what the bare words themselves provide.70 Elucidating the contextual and structural considerations bearing on statutized rules is one of the goals of Part V.

---

69. The interpretive maxim *expressio*(or *inclusio*) *unius est exclusio alterius* holds that the inclusion of one thing means the exclusion of another. Here, it would mean that the inclusion of the unilateral method of setting rules implicitly bars the use of any other method.

70. There are parallels here to the debate over whether the device of the congressional-executive agreement, which is concluded by the president and then "ratified" through passage of ordinary legislation, can substitute for the formal treaty route described in the Constitution, which requires approval by two-thirds of the Senate. The Treaty Clause does not by its own terms provide that it is the only method for approving international agreements. Some commentators, such as Professors Ackerman and Golove, have therefore argued that it should not be understood as limiting Congress' independent Article I legislative power to pass any law (including laws that implement international agreements) that is otherwise necessary and proper for carrying out Congress' relevant enumerated powers, such as the powers of regulating commerce, declaring war, and raising armies. See Bruce Ackerman & David Golove, *Is NAFTA Constitutional?*, 108 *Harv. L. Rev.* 801, 811, 913-14, 919–20 (1995); see also David M. Golove, *Against Free-Form Formalism*, 73 *NYU L. Rev.* 1791 (1998) (further defending the nonexclusive reading of the Treaty Clause). Professor Tribe, their main antagonist in the debate, contends that the Treaty Clause is meant to set forth the uniquely proper method for concluding major international agreements, despite the clause's lack of the word "only." See Laurence H. Tribe, *Taking Text and Structure Seriously: Reflections on Free-Form Method in Constitutional Interpretation*, 108 *Harv. L. Rev.* 1221, 1240–45, 1249–78 (1995). Whichever side is correct as a matter of constitutional theory, the two methods of approving international agreements have as a practical matter come to be viewed as mostly interchangeable, with political considerations typically playing the predominant role in selecting one form rather than the other. See 1 RONALD D. ROTUNDA & JOHN E. NOWAK, TREATISE ON CONSTITUTIONAL LAW: SUBSTANCE AND PROCEDURE § 6.7 (3d ed. 1999); RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 303 cmt. e (1987).
This Part has focused on whether some part of the Constitution provides a font of prima facie authority for a judicial confirmations statute, leaving aside the question whether the statute is otherwise forbidden. The answer, I have argued, is that such a statute is authorized, either by the Rules of Proceedings Clause itself or (less controversially) by the Appointments Clause. The next step, then, is whether there is some independent defect, some external impediment to regulating the appointments process through statutes.

IV. THE PUTATIVE PROBLEM OF BINDING FUTURE SENATES

The next avenue for challenging the confirmations statute arises quite naturally as soon as one considers why one might want such a statute. The statute purports to say that future nominations shall be handled in a particular way. Presumably part of the point of enacting such a statute is to provide clear ground rules to be applied neutrally to future confirmations, regardless of the future partisan configurations of the Senate and presidency.\(^7^1\) This commitment dynamic is characteristic of, and indeed central to, many regimes of statutized rules. For example, Congress passed the Electoral Count Act to try to prevent partisan opportunism in hotly contested election disputes, and Congress requires proposals for closing military bases to be considered in an indivisible package because it realizes that otherwise every legislator could try to exempt bases in his or her own district, with the result that no unneeded installations would ever close.\(^7^2\) These are sensible approaches for Congress to employ.

Although statutized rules have a long history stretching back to the earliest days of the Republic, Congress also has nearly as long a history of questioning whether it is truly bound to follow them. The 1789 statute governing the order of business at the beginning of a new Congress came into dispute in 1860 when a congressman, pointing to the old statute, objected that it was out of order for the House to adopt standing rules before swearing in the clerk, because the 1789 statute provided that the clerk should take his oath before the House entered onto any other business. The Speaker overruled the point of order, and a number of other parliamentary precedents from the 1800s like-

---

71. See supra section II.A.
72. On the commitment dynamics of the Electoral Count Act, see, for example, Samuel Issacharoff et al., When Elections Go Bad: The Law of Democracy and The Presidential Election of 2000, at 97 (2001); and Garrett, Purposes, supra note 8, at 737–41. On the commitment dynamics of base closures, see, for example, Dalton v. Specter, 511 U.S. 462, 481–82 (1994) (Souter, J., concurring in part); Garrett, Purposes, supra note 8, at 760.
wise deem similar statutory procedural directives nonbinding.73 Perhaps in recognition of those precedents, today Congress almost always inserts disclaimer clauses providing that the statutized rules can be changed “at any time, in the same manner and to the same extent” as any internal rule.74 It may believe that such clauses merely reflect what is necessarily true as a matter of constitutional law.75

On those occasions when one house of Congress decides that it may properly deviate from a statutized rule, one can legitimately wonder whether legislators’ objections are really based on constitutional principle or are instead simply a reflection of the opportunism the statute was probably intended to curtail, mixed with the thought that they can probably get away with it. But if there is a principled objection, a real legal problem with letting statutized rules bind the way statutes do, what would it be? This Part of the Article considers the possibility that the legal defect in a judicial confirmations statute is entrenchment, the attempt by one legislature to pass a measure that purports to govern later legislatures. After all, if part of the point of a judicial fast track is to try to bind senators to behave a certain way in future confirmation proceedings, the natural challenge is that this violates the venerable anti-entrenchment norm under which one period’s legislators are not supposed to be able to bind their successors. Indeed, with regard to other regimes of statutized rules, critics have leveled exactly that charge.76

In previous work I have argued that the entrenchment challenge is misguided or at least incomplete: While doubtless having some intuitive appeal, the anti-entrenchment rule fails to capture the real problem (if any) with statutized rules.77 The judicial confirmations statute at issue in this Article requires a modified analysis, because only the Senate votes on nominees, and the Senate has some peculiar features

73. On the 1860 incident, see 1 ASHER C. HINDS, HINDS' PRECEDENTS OF THE HOUSE OF REPRESENTATIVES § 245 (1907). For a fuller description of this and similar episodes, see Bruhl, supra note 8, at 366–69.
74. See supra note 34 and accompanying text.
76. See, e.g., Paul W. Kahn, Gramm-Rudman and the Capacity of Congress to Control the Future, 13 HASTINGS CONST. L.Q. 185, 225–27 (1986); Kesavan, supra note 50, at 1779–81. But see Eric A. Posner & Adrian Vermeule, Legislative Entrenchment: A Reappraisal, 111 YALE L.J. 1665, 1699–700 (2002) (suggesting a separation of powers challenge); Vermeule, supra note 8, at 430 (same). Also relevant here is Solimine, supra note 4, at 568–82, which discusses entrenchment and separation of powers issues concerning statutory restrictions on nepotistic appointments.
77. See generally Bruhl, supra note 8, at 376–82.
that bear on the entrenchment analysis. As explained below, that difference makes the entrenchment critique even less satisfying here than it is with regard to other regimes of statutized rules.

A. The Failure of the Entrenchment Critique

The anti-entrenchment norm, as it is generally stated, holds that one legislature cannot pass a measure that purports to be immune from amendment or repeal by future legislative action of the same form.\(^7\) Thus, to pick a paradigmatic example, Congress cannot pass a statute that purports to establish tax rates that can never be repealed. Similarly, a statute that purports to establish that it could be amended in the future only with the concurrence of a four-fifths supermajority would likewise be impermissibly entrenching. Although it is not clear exactly which portion of the Constitution forbids entrenchment, there is broad agreement that it is unconstitutional.\(^8\)

Other types of measures besides statutes can be subject to attempts at entrenchment: Executive orders, constitutional provisions, or parliamentary rules could all purport to restrict or outright forbid their own repeal. Indeed, the Constitution contains two provisions that purport to be entrenched in different ways. Namely, Article V provides that no amendment relating to the slave trade or head taxes could be passed until 1808 and that no amendment can deprive a state of equal representation in the Senate without its consent.\(^9\)

While the judicial fast track statute certainly has a feel of entrenchment about it inasmuch as it attempts to prescribe how the Senate will in the future consider nominees, it is clearly not a legislative entrenchment in the ordinary sense. The fast track statute itself


\(^9\) U.S. CONST. art. V.
would not purport to be irrepealable. Unlike the statute that attempts to set tax rates that can never be changed, this statute does not purport to be binding against subsequent legislative action of the same form. It could be amended as any other statute. To be sure, as a practical matter, repealing a statute is no easy matter, given our veto-gate-studded legislative process.81 And beyond the usual inertia, it is possible that a judicial confirmations statute might come to acquire an institutional status and legitimacy that insulates it from ordinary politics, especially if it were viewed as the considered, tranquilizing settlement of a deep and long-running political divide.82 But none of these practical impediments amount to entrenchment. Social Security and the Sherman Act would be hard to repeal for practical political reasons, but they are not entrenched.

Since the confirmations statute is not entrenched in the ordinary way, what is the source of the feeling of impropriety that surrounds statutized rules? One might be tempted to say that the legislature has engaged in "rules entrenchment." Applying the anti-entrenchment norm to the domain of parliamentary rules, the principle would be that a legislative body should not be allowed to adopt a rule of debate that cannot be repealed, or can be repealed only through a burdensome process.83 Continuing along this line of argument, one could contend that the legislature has by means of the confirmations statute adopted a procedural rule with the peculiar and burdensome feature that it can be amended only if both houses (and the president) go through the Article I, Section 7 legislative process—an impermissible attempt at entrenching the rule against change. The argument would thus conclude that a binding confirmations statute is illegal.84

While there may be some sense to the foregoing line of argument, it clearly sets out on completely the wrong foot. Congress simply has not adopted a queer and hard-to-change parliamentary rule; it has en-

83. It is not entirely clear that the case against legislative entrenchment applies with equal force to rules entrenchment. See Bruhl, supra note 8, at 379–80; Virginia A. Seitz & Joseph R. Guerra, A Constitutional Defense of "Entrenched" Senate Rules Governing Debate, 20 J.L. & Pol. 1, 22–32 (2004). Nonetheless, the argument in the text will assume that rules entrenchment is just as bad as statutory entrenchment.
84. As noted earlier, Congress usually includes disclaimer language stating that either house may deviate from the statutized rules, and it may believe that such a result is mandated as a matter of constitutional law. See supra text accompanying notes 74–75. Here we are attempting to determine if Congress' view is correct and, if so, what principle makes it is correct.
acted a formally unexceptionable statute. The problem (if there is one) is that the legislature has used a statute instead of an internal rule. It has done something by one method that is usually done by another method. This substitution may well be a problem, but is it really an entrenchment problem?

It is not. There are two separate reasons why entrenchment is not the real problem here. To see the first reason, let us (for now) accede to the apparent assumption that there would be an entrenchment problem if the statute were harder to change than a parliamentary rule. That is, let us assume that the important thing is the relative difficulty of change under the two different vehicles. The trouble is that, purely as a practical empirical matter, it is not at all clear that enacting procedures by the statutory route makes them harder to change than if they were done through the Senate's internal rules process. In fact, from the point of view of the practicalities and probabilities, the statute might be an improvement in terms of mutability. Why? Because the Senate's rules provide that the rules remain in effect from one Congress to the next unless they are affirmatively changed.\(^5\) The Senate's rules further provide that ending debate on a motion to change the rules requires the assent of two-thirds of those present and voting, even more than the sixty required to close debate on legislation.\(^6\) Thus, the Senate's rules are hard to amend, if one obeys them. Senator Frist's threatened "nuclear option" would have changed all of that, of course, and it could be threatened again in the future by either party. But the status quo is that the Senate's rules are hard to change, and it is a status quo that the Senate has repeatedly reaffirmed and which has proven highly resistant to efforts at change.\(^7\)

Which is more difficult, then: using the Senate's rules process (which requires a two-thirds vote of the Senate) or repealing ordinary

\(^5\) Sen. Rule V.2 ("The rules of the Senate shall continue from one Congress to the next Congress unless they are changed as provided in these rules."). The House of Representatives, in contrast, reenacts its internal rules at the beginning of each new Congress. It is usually said that the reason for this difference is that the Senate, but not the House, is a "continuing body." 1 George Haynes, The Senate of the United States 540–41 (1938); Floyd M. Riddick & Alan S. Frumin, Riddick's Senate Procedure, S. Doc. No. 101-28, at 1220 (1992). This notion of the Senate as a continuing body is frequently stated but has not received much sustained scrutiny and may provide a fruitful avenue for further research. Accord Seth Barrett Tillman, Noncontemporaneous Lawmaking: Can the 110th Senate Enact a Bill Passed by the 109th House?, 17 Cornell J.L. & Pub. Pol'y (forthcoming 2007) (agreeing that the idea is problematic and warrants further scrutiny).

\(^6\) Sen. Rule XXII.2.

\(^7\) See Seitz & Guerra, supra note 83, at 12–15 (discussing past attempts to change the rules); Catherine Fisk & Erwin Chemerinsky, In Defense of Filibustering Judicial Nominations, 26 Cardozo L. Rev. 331, 348–51 (2005) (same).
legislation (which requires majorities in both houses and, if filibustered, requires sixty votes in the Senate)? The answer to that question is highly contingent and depends on factors such as the partisan makeup of each chamber, which party controls the presidency, and the nature of the proposed change. It is perhaps illuminating that in the roughly similar context of the Treaty Clause (under which ratification of treaties requires two-thirds of the Senate), it is generally thought that implementing international agreements through the ordinary legislative process is easier. In any case, the fact that the answer may differ from situation to situation shows that the relative practical difficulty of acting through one vehicle rather than the other cannot be the touchstone here.

That observation leads to the second and more important reason that the entrenchment idiom cannot express the real problem with setting rules by statute: The entrenchment critique is wrong to assume that the key question is whether one route is harder than the other. For example, suppose Congress wishes to eliminate the estate tax, and it is considering two different ways it might go about doing so. First, it could pass an ordinary statute eliminating the tax, which statute does not purport to be irrepealable. Second, it could by two-thirds vote of both houses pass a resolution proposing a constitutional amendment for ratification by the states. If the measure is successfully done as a constitutional amendment, Congress will no longer be able to change policy in this area by the relatively simpler expedient of passing a statute. Changing policy would instead require a burdensome process that requires a supermajority vote and participation of entities outside of the legislature. Yet, all the same, nobody could properly accuse Congress of violating the anti-entrenchment rule if it used a constitutional amendment. (One could say that the amendment was unwise for hamstringing future fiscal policy, but that is a different matter.) There is no entrenchment problem because, while Congress went with the more onerous method and locked the policy in (namely by bringing the states into the matter), either route was certainly permissible; that is, elimination of the estate tax is an accept-

---

88. One might think that two-thirds of each house would always be required to amend a statute governing the confirmation process, because any such amendment would have to overcome a veto. But that assumes that the attempted change would go against the president, which it need not. And a change to the statute could be packaged with other legislation in an effort to frustrate the president’s veto.

89. See Ackerman & Golove, supra note 70, at 861-66; Peter J. Spiro, Treaties, Executive Agreements, and Constitutional Method, 79 Tex. L. Rev. 961, 1004 (2001) (“Historical experience—and indeed the origins of the congressional-executive agreement—would seem to indicate that the Senate route presents the higher hurdle.”).
able subject for either legislation or a constitutional amendment. Congress had a choice of vehicles, and it chose the more durable one.

The same is true of a confirmations statute. Assume that changing the statute is more difficult than changing internal rules, in particular because it requires participation of outsiders. That added increment of difficulty is legally irrelevant if it is permissible to use the statutory form to regulate such matters. We saw in Part III above that statutes regulating internal rules are within the prima facie Article I legislative power. If statutes can properly regulate such matters, it is irrelevant whether the statute is harder to change than a rule: Congress had a choice of vehicles, and it chose the more durable one. In the end, then, the entrenchment critique basically begs the question. What is needed is an independent account of why it is wrong for statutes to govern such matters, which the anti-entrenchment norm itself cannot provide.

B. The Rules of Proceedings Clause as an Anti-Entrenchment Rule?

Before leaving the general topic of anti-entrenchment, we should briefly consider a specific entrenchment-tinged argument that derives from the text of the Rules of Proceedings Clause. The clause states that “[e]ach House may determine the Rules of its Proceedings.” One could argue that this language should be taken to mean that rules can be considered afresh by each new House or Senate (i.e., the 109th, the 110th, and so on). In other words, this line of reasoning would mean that each chamber always has text-derived plenary authority to start anew at least every two years, regardless of any old rule or even statute.

This anti-entrenchment version of the Rules of Proceedings Clause will not work. The clause’s drafting history indicates that the reference to “[e]ach House” does not carry a temporal connotation. That is, the language does not convey that each new house must be allowed to determine its rules from scratch every two years, regardless of what has happened before. The language just means that the House and Senate may act independently. This is clear because, among other reasons, an earlier draft of the Constitution had two separate clauses conferring rulemaking power on each chamber separately, but the clauses were later consolidated in the course of stylistic redrafting into a single clause referring to “[e]ach House.” Further, it does not follow from the Rules of Proceedings Clause itself that a chamber could not entrench its rules. If the Senate enacted an irrepealable rule, it

---

90. See 2 The Records of the Federal Convention of 1787, at 140, 142 (Max Farrand ed. 1966) [hereinafter Records]; see also Posner & Vermeule, supra note 76, at 1683 (also adopting this interpretation).
would still be the Senate that was determining its rules of proceed-
ings, not some other entity. Of course, one might be inclined to object
that it would be a “different” Senate that is later saddled with the
irrepealable rule. That objection, however, would encounter a diffi-
culty in the form of the widely accepted but somewhat mysterious no-
tion that the Senate is a continuing body, such that it makes no sense
to speak of a “different” Senate.91

In sum, the anti-entrenchment rule—whether by itself or read
through the lens of the Rules of Proceedings Clause—cannot tell us
what, if anything, is wrong with a confirmations statute.

V. INTERFERING WITH SENATE AUTONOMY

Briefly summarizing the argument so far, recall that Part III con-
cluded that, leaving aside whether there is some independent basis for
faulting a confirmations statute, the statute is otherwise within Con-
gress’ delegated powers to enact. Part IV began the search for inde-
pendent defects by considering whether a statute governing
confirmation procedures offends the anti-entrenchment norm, and it
also considered whether the plain text of the Rules of Proceedings
Clause itself expresses an anti-entrenchment rule. Those approaches
were found unsatisfactory to explain what, if anything, is problematic
about the statute.

This Part of the Article considers whether the answer can be found
in deeper principles that are inherent in the Constitution’s overall
structure of divided powers. I contend that the answer can be found in
such structural considerations, in particular in a principle of cameral
autonomy over procedure that is tied to—but goes beyond and informs
the meaning of—the Rules of Proceedings Clause. Because of this
principle, no confirmations statute could purport to govern the Sen-
ate’s procedures against the Senate’s own will, for that result would
give the president and the House a veto over the Senate’s internal
procedures.

In explaining this principle, it is perhaps most helpful to begin by
explaining what it is not. In particular, although a confirmations stat-
ute could well be written so as to greatly increase the president’s
power over nominations, the cameral autonomy principle is not a prin-
ciple about the president getting his way too much, as the next section
explains. Thus, even if the substance of the statute enhanced the Sen-
ate’s power at the president’s expense, it would still be problematic
because it regulates the Senate’s rules through statutory means. By
doing so, the statute chips away at one important aspect of the cham-
ber’s autonomy.

91. See supra note 85 and accompanying text.
A. How Policy Outcomes Are Not the Issue

Consider fast track regimes in other policy areas. As the reader will recall, a key element of the typical fast track arrangement for considering legislation is that it forbids the legislature from amending the president's proposed bill. Thus, the president can make a take-it-or-leave-it proposition and Congress must simply vote up or down. In contrast, under the usual procedure of Article I, Section 7, it is the Congress that formulates a bill and has the power to present the president with a take-it-or-leave-it proposition. Because of this reversal, policy under fast track will be set substantially closer to the president's ideal point than it would be under Article I, Section 7. But the fast track regime for considering legislation represents more than just a quantitative shift in policy outcomes. It is also a qualitative reversal of the Constitution's structure for decisionmaking. Fast track is troubling because, under Article I, Section 7, the legislature is supposed to occupy the dominant role in the legislative process through its power to propose. Thus, I have argued, fast track represents a worrying departure from the Constitution's vision of the proper lawmaking process.

But plainly that particular problem is not present with a judicial fast track statute. Judicial appointments are one of the rare cases in which the Constitution provides the president with the power to propose take-it-or-leave-it choices. In other words, the appointments process presents the mirror image of the usual legislative process, and thus the president enjoys a structural advantage in this realm. This

92. Scholars who have studied the strategic effect of amendment rules have shown that a system of closed rules (that is, rules barring amendment) systematically advantages the person proposing a measure, allowing the proposal-maker to set policy closer to his preferred outcome than he could under a system of open rules. See David P. Baron, A Sequential Choice Theory Perspective on Legislative Organization, in Positive Theories of Congressional Institutions 71, 84–85 (Kenneth A. Shepsle & Barry R. Weingast eds., 1995); David P. Baron & John A. Ferejohn, Bargaining in Legislatures, 83 Am. Pol. Sci. Rev. 1181, 1188, 1197–98, 1200 (1989). Fast track is essentially a regime of closed rules with the president as proposal-maker. Likewise, research on referenda—which, like fast track, present the voters with unamendable, take-it-or-leave-it choices—has demonstrated that the entity that has the procedural power to make the proposal enjoys a tremendous advantage over those who vote on it. See Thomas Romer & Howard Rosenthal, Bureaucrats Versus Voters: On the Political Economy of Resource Allocation by Direct Democracy, 93 Q.J. Econ. 563, 564 (1979); Thomas Romer & Howard Rosenthal, Political Resource Allocation, Controlled Agendas, and the Status Quo, 33 Pub. Choice 27, 27–28, 35–36 (1978); see generally David P. Baron & John Ferejohn, The Power to Propose, in Models of Strategic Choice in Politics 343 (Peter C. Ordeshook ed. 1989).

93. Bruhl, supra note 8, at 400–02.

94. See Michael J. Gerhardt, Toward a Comprehensive Understanding of the Federal Appointments Process, 21 Harv. J.L. & Pub. Pol'y 467, 481 (1997) (noting this reversal and the president's resulting advantage); David S. Law & Lawrence B.
is one important difference between a judicial fast track and other fast track regimes, and it eliminates one obvious ground for condemning the confirmations statute.

That is not to say that the judicial fast track would not bring about any change in outcomes, for certainly it would. Under the current regime where filibusters of nominees are possible, the president has to submit a nominee that is minimally palatable to sixty senators—that is, one who is not so distasteful that forty senators would be willing to filibuster the nominee in addition to voting against him or her. If no filibuster were possible, then the president need only submit a nominee that is acceptable to a bare majority.95 This is an especially important difference when the Senate is roughly evenly divided between the parties. In such a Senate, getting a nominee past sixty senators will always require at least some (perhaps small) degree of bipartisan support. But if the president and the Senate majority are of the same party, then a confirmations statute that eliminated the filibuster would permit approval of nominees that receive no support from the minority party. This represents a substantial increase in the president's ability to choose nominees that are closer to his ideal point, which would be a big change.

But however large, this shift would not be a problem, constitutionally speaking. While there is a vigorous dispute over whether the filibuster is constitutionally permissible,96 nobody believes that it is constitutionally required. A statute barring filibusters of judicial nominations therefore cannot be condemned on the ground that it lets the president have too much power to select nominees that fit his preferences. (And, of course, that charge would also be irrelevant if made against a more evenhanded or even pro-Senate statute.)

If we want to find structural grounds on which to condemn the judicial fast track, I would suggest that we look to changes that are subtler than those just described. A useful way to get there is with an example of how a president might use a binding confirmations statute. The example will help us see that the problem here is not substantive

---


95. For simple but illuminating formal models that show the impact of the filibuster on the president's ability to shape the judiciary, see Law & Solum, supra note 94; and McGinnis & Rappaport, supra note 23.

policy outcomes so much as interference with legislative dignity and autonomy.

B. The Practicalities and Indignities of a Non-Autonomous Senate

Following the model of other fast track statutes, our contemplated judicial fast track statute contains provisions requiring committee action within a fixed number of days (with automatic reporting to the floor if the committee fails to act) and requiring a prompt vote by the full Senate.

While this might not seem like a serious imposition at first glance—surely it is not too much to ask of the Senate that it simply hold a timely vote—to view it as a matter of “mere” scheduling is to miscomprehend the workings of the legislature. As an institution, Congress has a limited agenda and can consider only a small number of significant proposals at any given time. Oftentimes crucial bills will languish for months, finally passing only in a final flurry of dealmaking and voting that precedes adjournment. In part this is a result of the difficult and time-consuming nature of legislating in the modern Congress. But much of it comes from carefully orchestrated political maneuvering between the majority and the minority, the leadership and backbenchers, and the White House and Congress. As all of these political actors recognize, the “mere” timing of a vote can mean nearly everything.

The confirmations statute would grant the president powerful prerogatives. Most obviously, it would allow the president to time a vote in order to maximize the nominee’s chances of success, which might mean lining up a vote right after an incident that was embarrassing to opponents in Congress or timing the vote to coincide with a public campaign in support of the nominee (such as Republicans’ “Justice Sunday” events in recent years). The president could force senators to take a stand on a nominee at a time of his choosing, surely calculated for optimal presidential leverage, rather than at a time chosen by the Senate itself. Compounding that effect, the fixed timetables for considering the nomination could, among other things, prevent the Senate from fully investigating a potential problem with the nominee or head off the formation of an effective opposition campaign.97

97. For discussion and data on the importance of the timing of hearings and confirmation votes, see LEE EPSTEIN & JEFFREY A. SEGAL, ADVICE AND CONSENT: THE POLITICS OF JUDICIAL APPOINTMENTS 89–92 (2005); Sarah A. Binder & Forrest Maltzman, Senatorial Delay in Confirming Federal Judges, 1947–1998, 46 AM. J. POL. SCI. 190, 195–96 (2002); and Charles R. Shiptan & Megan L. Shannon, Delaying Justice(s): A Duration Analysis of Supreme Court Confirmations, 47 AM. J. POL. SCI. 654, 656–57 (2003). Providing anecdotal support are the comments of Nixon staffer Bud Krogh, who urged Nixon to “deny[] [opponents] the time neces-
More ominously, the president could use the nomination process to interfere with other business on the legislative agenda. A Supreme Court nomination will draw massive media coverage and will be a highly salient vote to interest groups and many ordinary citizens, and it is likely to crowd out many other issues during the statutory confirmation period. Currently the president can control only the timing of his announcement, but with a binding confirmations statute he could also initiate a statutory period of (say) thirty or sixty days during which the Senate (and the media) would have to focus significant energy on considering his nominee. Especially when the Senate is controlled by the opposing party, the president could thus use the statute to attempt to derail legislation with which he disagrees, for example, or to deflate calls for a congressional investigation of administration malfeasance. (Suppose, for instance, that the Judiciary Committee were poised to investigate NSA wiretapping or the vice president's role in outing a CIA agent, conceivable possibilities now that the Democrats control the Senate.) These opportunities for manipulation are not just the imaginings of paranoid legislators. A concrete example of such timing occurred in the summer of 2005 when President Bush evidently advanced his Supreme Court nomination announcements in order to divert attention from recent developments concerning advisors' involvement in the Plame affair.  

One could ask why the Senate would not simply change its rules to prevent presidential manipulation, but that of course is the problem with statutizing a rule: if taken seriously, the statute would mean that the Senate had surrendered its power to govern its proceedings solely of its own accord. There is something intuitively troubling about the prospect of a legislative body that is unable to exercise control over its own rules and the flow of its own debates. Exactly why it is troubling may be hard to articulate, but it may be that the crispest
and most concise way to capture what is wrong is simply this: It is humiliating to the legislative body. A legislature without the power to govern its own internal affairs has an air of servility about it. History gives us examples of assemblies who took their daily agendas from the executive (typically a monarch), but it seems beneath the dignity of the House and Senate given their roles as the equal of the executive. Schoolchildren might have to ask permission to use the restroom, but a legislative body should not.

To express institutional relations in the idiom of dignity and humiliation might seem out of place, but viscerally perceived indignities can sometimes signal that something is amiss in the constitutional order. As some scholars have pointed out, concepts such as dignity figure prominently in recent federalism and state sovereign immunity decisions. Indeed, a vague sense of indignity may be the best way to explain the Supreme Court's "anti-commandeering" cases, which forbid the federal government from requiring state legislatures or executive officials to carry out federal policy. In such cases, the Court candidly recognizes that Congress has the power to regulate the particular subjects itself, preempting and nullifying the state's own regulations; further, Congress can persuade a state into regulating in a particular way by attaching strings to federal funds.

What then could be so bad about the federal government simply requiring state officials to carry out federal policy? The Court's answer in Printz takes a decidedly dignitary turn: The states are "reduc[ed] . . . to puppets of a ventriloquist Congress"; it is incompatible with their "autonomy" to have their officers "dragooned" or "impressed" into federal service.

So, too, in Alden v. Maine, a state immunity decision, which deemed it an unacceptable affront to the state's "dignity" to "press a State's own courts into federal service" or to "commandeer the entire political machinery of the State against its will." Similarly, state "dignity" bars the federal government from telling a state where to put its capital. States can be preempted and pressured, but their organs of government cannot be occupied and inhabited by a federal puppetmaster pulling the strings.

100. As noted below, the British monarchs held this power over Parliament until several hundred years ago. See infra notes 112–14 and accompanying text.
The "dignity" possessed by each house of Congress has not been as often remarked, but it also sometimes fills in lacunae in the constitutional text. For example, the Constitution provides that each house can discipline its own members, but it does not speak to its ability to discipline outsiders. Nonetheless, in 1821 the Supreme Court held that Congress has the inherent authority to punish nonmembers for contempt. Otherwise, the Court said, Congress would have no power of self-preservation and it would be "exposed to every indignity." In light of these structural dignity cases, might there also be an impermissible affront to legislative dignity if a president commandeers Congress' rules and uses their own procedures against them?

I do not mean to carry the dignity theme too far. The notion of an affront to congressional dignity can provide a hint that something may be amiss, but it is of course no answer. It is too vague and generalized to offer real guidance. But just as states' dignity is concretized and operationalized into the more specific anti-commandeering principle in cases like Printz, so, too, can we identify more particular principles into which the concept of legislative dignity crystallizes. There may be a variety of such principles, but the one that I will present and defend here is a structural principle of cameral autonomy over procedure. Or, somewhat more colorfully, it is the principle that Congress, and each chamber of Congress, is to be "master in [its] own house." This principle is tied to the Rules of Proceedings Clause but goes beyond it and informs its proper reading. It prevents the president, or even the other house of Congress, from interfering with a chamber's internal governance. The next section will build up this principle in a more systematic fashion.

C. Cameral Autonomy over Procedure

One starting place for discovering the import of an obscure part of the Constitution is in the debates accompanying its drafting and ratification. As it happens, however, the Rules of Proceedings Clause did not generate any substantive debate at the Philadelphia Convention or in the states. That is perhaps to be expected given that some members of the founding generation, including Thomas Jefferson, believed that the clause simply reflected a general right to self-govern-

108. The phrase was used in passing in Humphrey's Executor v. United States, 295 U.S. 602, 630 (1935), which involved the president's power to remove a member of the Federal Trade Commission. The phrase "cameral autonomy" is used in Vermeule, supra note 8.
ment derived from natural law.\textsuperscript{110} Even if the clause did not exist, he evidently thought, the power would inhere in each body nonetheless. To similar effect, Story later wrote:

If the [rules] power did not exist, it would be utterly impracticable to transact the business of the nation, either at all, or at least with decency, deliberation, and order. The humblest assembly of men is understood to possess this power; and it would be absurd to deprive the councils of the nation of a like authority.\textsuperscript{111}

But while the power to govern one's own proceedings may seem natural or even obvious, it should not be taken as a given. The power to govern its own debates was in fact a right that Parliament had to wrest from the crown over the course of hundreds of years. At least through the reign of Elizabeth I, which ended in 1603, the monarch frequently controlled the order of business in the House of Commons.\textsuperscript{112} Queen Elizabeth repeatedly prevented the House from discussing topics or considering legislation she disfavored, and members who persisted in pressing such matters were on occasion sent to the Tower of London.\textsuperscript{113} Indeed, highlighting the dignitary dimension of control over the order of proceedings, she is said to have remarked that "[no monarch] fit for his state will suffer such absurdities" as a Parliament that would discuss topics of its own choosing.\textsuperscript{114} In sum, the crown was the agenda-setter. None of this is to suggest that Elizabethan times, rather than later events, were foremost in the mind of the founding generation. The point is simply that the decision represented by the Rules of Proceedings Clause is in no sense the obvious and only possible arrangement, as shown by the contrast with not-too-ancient British practice.

To appreciate the significance of the rulemaking power, we must view it in conjunction with a group of other parts of Article I that keep similarly low profiles but that together support an important principle of cameral autonomy.\textsuperscript{115} In relying on various portions of the Constitution to argue for a structural principle, there is of course always the

\textsuperscript{110} See 17 THE PAPERS OF THOMAS JEFFERSON 195 (Julian P. Boyd ed. 1950).

\textsuperscript{111} 2 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 835 (Boston, Hilliard, Gray & Co. 1833).

\textsuperscript{112} 4 WILLIAM HOLDSWORTH, A HISTORY OF ENGLISH LAW 97–98, 176 (3d ed. 1945).

\textsuperscript{113} Id. at 89–90, 178–79.

\textsuperscript{114} Id. at 90.

\textsuperscript{115} In British constitutional law and history, many of the topics discussed in this portion of the Article—a house's control over its proceedings and elections, its power to protect itself from interference and intimidation, etc.—would fall under the convenient organizing label of parliamentary privilege. In this country, the concept of legislative privilege is less familiar as an organizing label, even though the Constitution in fact incorporates many of the traditional privileges of Parliament. For a recent attempt to provide a unified comparative treatment of the British and American law of legislative privilege, see CHAFETZ, supra note 35.
risk that one will let a totalizing theoretical construct overwhelm what the Constitution actually does and says. The Constitution is a practical document, so one should not expect it to display the theoretical purity of a theology treatise. The Constitution is in large part the result of compromise between delegates from large and small states and between those with different views of how democratic the new government should be and which branch of it should predominate. Thus, it should not come as a surprise that cameral autonomy is not absolute. The Constitution itself lays down certain immutable procedural rules (regarding quorum requirements, for example) and requires the houses to take certain actions, rather than leaving those matters to the free choice of the legislature itself. Further, there are circumstances in which each house must interact with the other and with the president even in matters touching on legislative procedure, such as the president’s power (discussed below) to summon the legislature on extraordinary occasions and, if the houses cannot agree on when to adjourn, to adjourn them. Nor, as a normative matter, is autonomy an unalloyed good to be maximized at all costs, as it carries with it the risk of self-dealing; as Adrian Vermeule has explained, the question of the degree of autonomy versus dependence to grant to various institutions is a serious question of constitutional design with considerations on both sides.

Nonetheless, although there are ways in which the separate branches of government must act together, and although there are perils of self-dealing, various portions of the Constitution do generate a general background rule that the executive (and the courts, for that matter) are not to have control over the legislature’s internal doings. This principle invests the Rules of Proceedings Clause with constitu-
tional heft that one might not otherwise glean from its quotidian exterior. In particular, it explains why the clause, which on its face acts as a permission to set rules unilaterally—"[e]ach House may"—should be read as a command that no other agency have a veto over a chamber's rules.

Cameral autonomy is closely related to the separation of powers. It is of course well known that the Framers believed that a free government must be one in which power was diffused rather than concentrated in one person or body. But the great insight of their political theory was that one could not prevent dangerous combinations of power merely through the verbal fiat of vesting distinct governmental powers in different agencies and declaring that no branch should exercise the power of another. Such "parchment barriers" would soon be overrun unless the government was designed so that each department "had a will of its own" that would impel it to repel attempted encroachments. Thus the key was institutional psychology—each branch has incentives, motives, and a will that must remain its own rather than being corrupted by the influence of others. "If it be essential to the preservation of liberty that the Legislative, Executive & Judicial powers be separate," Madison said, "it is essential to a maintenance of the separation, that they should be independent of each other." "Independent" here does not mean simply "apart from" but rather means not controlled by another, not beholden to another, not dependent upon another. In other words, autonomous—separate and self-directing.

Perhaps the single best illustration of the Framers' desire to preserve institutional independence was the insistence on preventing, to the extent practicable, members of one branch from being beholden to another for their continuation in office. The topic of whether members of some parts of the government should be elected by other parts was one of the most frequent topics of debate at Philadelphia and in The Federalist and was perceived as absolutely crucial. Notably, there arose the question whether the president should be elected by the legislature. As Madison explained at the Convention:

The Executive could not be independent of the Legislature [sic], if dependent on the pleasure of that branch for a re-appointment. Why was it determined that

118. The Federalist No. 51, at 315 (James Madison) (Bantam Dell 2003). As Professors Levinson and Pildes point out in an important recent article, the Madisonian vision of strong institutional allegiances has been much eroded by the growth of strong political parties. Daryl J. Levinson & Richard H. Pildes, Separation of Parties, Not Powers, 119 Harv. L. Rev. 2311, 2312 (2006).

119. 2 Records, supra note 90, at 34 (emphasis added).

120. See Victoria Nourse, Toward a "Due Foundation" for the Separation of Powers: The Federalist Papers as Political Narrative, 74 Tex. L. Rev. 447, 472–77, 511–21 (1996) (highlighting the centrality of matters such as appointment, tenure, and salary).
the Judges should not hold their places by such a tenure? Because they might be tempted to cultivate the Legislature, by an undue complaisance, and thus render the Legislature the virtual expositor, as well the maker of the laws. In like manner a dependence of the Executive on the Legislature, would render it the Executor as well as the maker of laws; & then according to the observation of Montesquieu, tyrannical laws may be made that they may be executed in a tyrannical manner.\textsuperscript{121}

A president whose reelection was in the legislature's hands would be, in a palpable sense, beholden to that body. Officials are dependent on those who determine their continuation in office. And this servile dependence, Madison thought, was the path to the tyranny of consolidated authority that the separation of powers hoped to avoid. Therefore, to ensure that each branch maintained "a will of its own," it was essential that each "have as little agency as possible in the appointment of the members of the others."\textsuperscript{122}

The Madisonian worry that the legislature could dominate a president it elected was just one manifestation of the Framers' concern over interbranch dependence. These people were, after all, well familiar with the abuses perpetrated by domineering executive monarchs and royal governors. The Constitution accordingly takes numerous steps to protect legislators' institutional allegiances from executive corruption, as reflected in a series of otherwise unremarkable pieces of the text. For example, the Incompatibility Clause forbids members of Congress from holding positions in other branches.\textsuperscript{123} The rule was largely a response to the practice of the British monarchs, as well as of royal governors in the colonies, of holding out highly remunerative offices, pensions, and titles to members of the legislature.\textsuperscript{124} Under these corrupting influences, the favored legislators could reliably be counted upon to rubberstamp the king's proposals. The incompatibility rule sought to prevent legislators from becoming dependent on the executive in this way, as \textit{The Federalist} explained.\textsuperscript{125}

Likewise designed to insulate legislators from domination by the executive is the Speech or Debate Clause.\textsuperscript{126} This provision, which results from a history in Britain of monarchs prosecuting opposition members of Parliament for critical floor speeches, gives legislators

\begin{enumerate}
\item \textsuperscript{121} 2 Records, supra note 90, at 34.
\item \textsuperscript{122} The Federalist No. 51 (James Madison), supra note 118, at 315.
\item \textsuperscript{123} U.S. Const. art. I, § 6, cl. 2 ("[N]o Person holding any Office under the United States, shall be a Member of either House during his Continuance in Office.").
\item \textsuperscript{125} The Federalist No. 76, at 458-59 (Alexander Hamilton) (Bantam Dell 2003).
\item \textsuperscript{126} U.S. Const. art. I, § 6, cl. 1 (providing that "for any Speech or Debate in either House, [Senators and Representatives] shall not be questioned in any other Place").
\end{enumerate}
protection from "intimidation by the executive and accountability before a possibly hostile judiciary." Members are accountable to their colleagues and to their constituents for what they say in debate, but the other branches cannot be the master of what happens within the chamber. Instead, the legislators themselves are empowered and expected to punish or expel members for bad conduct.

The above bulwarks against executive domination of the legislature fall rather neatly under the separation of powers label. If legislators were beholden to the president—whether through the desire for remunerative offices or the fear of political prosecutions—Congress would lose its ability to counterbalance the president and eventually would cease to operate as a truly separate branch of government. In the plan of the Constitution, Congress truly is the most autonomous branch. That gets us part of the way to cameral autonomy. The next step is to see that the principle of non-beholdenness also applies to the two houses of Congress as separate entities. Whether it is considered formally part of the separation of powers or not, cameral autonomy is likewise a critical structural feature of our plan of government.

The choice between a bicameral and a unicameral legislature implicates several institutional considerations. These include the prospect of more deliberative lawmaking, the goal of protecting minority interests, and the Madisonian notion that dividing the Congress into two houses provides a barrier against corruption and faction, as two bodies are less likely simultaneously to succumb to such forces than would one. Beyond the general considerations favoring bicamer-

127. United States v. Johnson, 383 U.S. 169, 181–82 (1966). Quoting Madison's remarks in The Federalist, the Johnson court explains that "[t]he legislative privilege, protecting against possible prosecution by an unfriendly executive and conviction by a hostile judiciary, is one manifestation of the 'practical security' for ensuring the independence of the legislature." Id. at 179. For a discussion of the British background of the debate privilege, see Chafetz, supra note 35, ch. 3.
129. See United States v. Munoz-Flores, 495 U.S. 385, 395 (1990) ("Provisions for the separation of powers within the Legislative Branch are thus not different in kind from provisions concerning relations between the branches; both sets of provisions safeguard liberty."); see also James E. Castello, Comment, The Limits of Popular Sovereignty: Using the Initiative Power to Control Legislative Procedure, 74 Cal. L. Rev. 491, 533–47 (1986) (discussing relationship between legislative procedure and separation of powers).
130. See, e.g., The Federalist No. 51 (James Madison), supra note 118, at 316–18; The Federalist Nos. 62, 79, at 378–79 (James Madison) (Bantam Dell 2003); No. 64 (John Jay), No. 73 (Alexander Hamilton). Here I should reiterate my earlier comments, supra text accompanying notes 115–17, to the effect that much in the Constitution is explained by practical compromise rather than by theoretical ideals. Bicameralism in particular is partly the result of small states' insistence that the states play an important role in the new government. But the bicameral arrangement that was chosen nonetheless reflects and embodies various other political values, apart from the motives of any particular participant. I note that the Senate initially represented the states through their state legislatures and
lism, the Senate was intended to have a special role and character. With longer terms in office, senators could be expected to take a longer-term view of things than could members of the House.\textsuperscript{131}

But of course to maintain bicameralism it was not enough to divide through parchment barriers. As before, the key to separateness was independence—that is, non-beholdenness. If the House elected the Senate, the two bodies would remain formally separate, but the Senate would lose most of its autonomy.\textsuperscript{132} The Virginia Plan presented at the Constitutional Convention had originally proposed such an arrangement,\textsuperscript{133} but delegates rejected it. As more than one explained, "it would make [the senators] too dependent, and thereby destroy the end for which the Senate ought to be appointed."\textsuperscript{134} Autonomy is not just separateness but also practical self-governance. Consistent with Madison's view that each department of government should have an independent "will of its own," he also believed that each house of Congress should be "as little connected with each other as the nature of their common functions and their common dependence on the society will admit."\textsuperscript{135}

Given that goal, it is therefore unsurprising that the Constitution contains repeated affirmations of each chamber's sovereignty over its own internal affairs. It provides that each house shall be "the Judge of the Elections, Returns and Qualifications of its own Members."\textsuperscript{136} This decision obviously creates a risk of self-dealing and partisan opportunism,\textsuperscript{137} but evidently that risk was thought better than the alternatives of vesting the power elsewhere; indeed, the British Commons had for the preceding several centuries been fighting to keep the king and his courts out of such disputes.\textsuperscript{138} Commenting on the clause, Joseph Story pointed out the dangerous consequences of putting the power outside the legislature: "If [the powers were] lodged in any other [body] than the legislative body itself, its independence, its purity, and even its existence and action may be destroyed, or put into imminent danger. No other body, but itself, can have the same motives to preserve and perpetuate these attributes..."\textsuperscript{139} For similar reasons, members of Congress are not subject to impeachment by

\textsuperscript{131} THE FEDERALIST NO. 64, at 391–92 (John Jay) (Bantam Dell 2003).
\textsuperscript{133} See 1 RECORDS, supra note 90, at 20.
\textsuperscript{134} 1 id. at 59 (remarks of Roger Sherman); see also 1 id. (remarks of George Mason); 1 id. at 52 (remarks of James Wilson).
\textsuperscript{135} THE FEDERALIST NO. 51 (James Madison), supra note 118, at 316.
\textsuperscript{136} U.S. CONST. art I, § 5, cl. 1.
\textsuperscript{137} See Vermeule, supra note 8, at 393–94.
\textsuperscript{138} 1 HAYNES, supra note 85, at 121; CHAFETZ, supra note 35, at 69–70.
\textsuperscript{139} 2 STORY, supra note 111, § 831.
the House with trial in the Senate; rather, each chamber disciplines and expels its own members.\textsuperscript{140} Further illustrating each chamber's powers of self-government, each house is empowered to compel attendance of absent members to ensure a functioning quorum.\textsuperscript{141} And as discussed earlier, each chamber has also been held to possess the inherent authority to protect itself through the contempt power. Cameral autonomy is the common theme of all of these bits of text.\textsuperscript{142}

As noted above, there are some portions of the Constitution that deviate from a rule of strict cameral independence. Neither house can adjourn for more than three days without the consent of the other, the president can adjourn them when they cannot agree on a time to adjourn, and he can convene either or both houses "on extraordinary occasions."\textsuperscript{143} To some extent such rules simply reflect necessity; proper operation of a bicameral body requires some method for coordination between the two houses regarding calendars; if the legislature was not expected to be in session year-round, then exigent circumstances might require the president to summon it; and so on.\textsuperscript{144} Importantly, compared to British practice, the Constitution's rules represent a strong repudiation of executive control. The president lacks the monarch's unilateral power to prorogue or dissolve the legislature against its will,\textsuperscript{145} and, apart from the president's aforementioned "tiebreaker" opportunity (the need for which has never arisen), decisions regarding adjournment are specifically exempted from present-

\textsuperscript{140} U.S. Const. art I, § 5, cl. 2. I recognize that the proposition that members of Congress are not subject to impeachment has not always been completely free from doubt. Early in the nation's history the House impeached Senator William Blount, but the Senate dismissed the articles of impeachment. Although the Senate's action did not necessarily reflect the view that legislators are not impeachable officers, the incident has come to stand for that view (which is, I believe, also the best textual position). See Michael J. Gerhardt, The Federal Impeachment Process 47–50 (2d ed. 2000); 2 Story, supra note 111, § 791. See generally Buckner F. Melton, Jr., The First Impeachment: The Constitution's Framers and the Case of Senator William Blount (1998).

\textsuperscript{141} U.S. Const. art I, § 5, cl. 1.

\textsuperscript{142} I note that starting with the early Congresses and for many years thereafter, the two houses followed joint rules governing certain matters of procedure touching upon both of them. This is no precedent against cameral autonomy, however, as long as the joint rules existed only with the consent of both houses. The joint rules were in fact abrogated unilaterally in 1876. Jefferson's Manual, supra note 7, at 28; Hinds, supra note 73, § 6782.

\textsuperscript{143} U.S. Const. art. 1, § 5, cl. 4; id. art. 2, § 3.

\textsuperscript{144} On the perceived necessity of such deviations from strict cameral autonomy, see, for example, 3 Records, supra note 90, at 312; Amar, supra note 124, at 132.

\textsuperscript{145} On the Crown's authority in this regard, see, for example, Jefferson's Manual, supra note 7, § 588, at 306; William Blackstone, Commentaries 179–80; cf. The Federalist No. 69, at 419 (Alexander Hamilton) (contrasting the president's and the monarch's power).
ment to the president. Cameral autonomy remains the background rule, even if it is not absolute.

Even less a real and substantial departure from autonomy is the fact that although the Senate chooses its other officers itself, the Constitution designates the vice president the Senate's presiding officer. Some delegates at the Philadelphia Convention feared that this would give the executive branch too much power over the Senate. But others explained that this fear was misplaced because, given the Constitution's method of separately selecting the president and vice president, the two officers would be expected to be rivals. In any event, although the officers have today become allied in light of party-ticket selection, the Senate has not allowed the vice president to control its proceedings.

The portions of the Constitution discussed in this section provide a backdrop for understanding the structural role of the Rules of Proceedings Clause. At the risk of overstating matters, the history shows that the clause has a bit of republican spark to it. It responds to palpable risks of executive overreaching, no less than does the Speech or Debate Clause. It is not just a housekeeping measure but rather is part and parcel of an emergent principle of cameral self-government that, while nowhere set out in so many words, nonetheless permeates Article I. Together with the other aspects of cameral autonomy canvassed above, it is constitutive of each chamber's independence. And that independence, we have seen, was in the Framers' eyes indispensible to the separateness that was to prevent tyrannical agglomerations of power and preserve the people's freedom.

* * *


147. U.S. Const. art. I, § 3, cls. 4-5.

148. See 2 Records, supra note 90, at 537 (remarks of G. Morris to the effect that the objection assumed that "[t]he vice president then will be the first heir apparent that ever loved his father"); see also Akhil Reed Amar, On Impeaching Presidents, 28 Hofstra L. Rev. 291, 312 (1999) (making the same point in explaining why the chief justice, and not the vice president, presides over impeachment trials of the president).

149. One notable power of the vice president is to make parliamentary rulings when sitting as the chair; however, such rulings are appealable to the whole Senate and are overruled unless supported by a majority. Riddick & Frumin, supra note 85, at 145, 148; see also id. at 1026 (stating that the vice president must follow Senate rules and "has no rulemaking power over the Senate").
Finally, it should be noted that one could concede the importance of cameral autonomy as a general matter but contend that the Senate's procedural autonomy is necessarily impaired in the particular case of appointments.\textsuperscript{150} There, the president has powers and interests at stake as well. Indeed, the Senate's rules and practices have long distinguished between executive business (that is, treaties and appointments) and ordinary legislative business.\textsuperscript{151} The different rules date back to the First Congress, during which the Senate appointed a committee to consult with the president on what procedures to employ when the Senate considered nominations and treaties.\textsuperscript{152} President Washington seems to have been somewhat unsure how to respond to the Senate's inquiry. His papers reflect that on August 8, 1789, he told the committee that he thought that treaties probably required oral, in-person communications (but that he was unsure where the president and Senate should meet to confer) and that appointments could best be handled solely through writing.\textsuperscript{153} In connection with the latter, he observed:

\begin{quote}
[I]t could be no pleasing thing I conceive, for the President, on the one hand to be present and hear the propriety of his nominations questioned — nor for the Senate on the other hand to be under the smallest restraint by his presence from the fullest and freest enquiry into the Character of the Person nominated.\textsuperscript{154}
\end{quote}

Two days later he set forth a somewhat more aggressive view that analogized the Senate's role to that of the British monarch's Privy Council, stating that "[t]he Senate when [executive] powers are exercised, is evidently a Council only to the President" and that the time, place, and manner of consultation should be up to the president as he may prefer on any given occasion.\textsuperscript{155} Regarding appointments in particular, he believed that "the agency of the Senate is purely executive, and they may be summoned to the President."\textsuperscript{156} The Senate soon passed a resolution providing that the president's nominations could be tendered to the Senate either in writing or in person and, if in person, the Senate would meet with the president either in the Senate chamber or in other locations; the rules also laid out several procedural formalities to be followed in executive sessions.\textsuperscript{157} The possibility that the president might summon the Senate for an executive session naturally raises the question whether the Senate can be "master in its

\begin{footnotesize}
\begin{itemize}
\item\textsuperscript{150} I thank Larry Solum for bringing this objection to my attention.
\item\textsuperscript{151} See, e.g., Riddick & Frumin, supra note 85, at 832–34. The current provisions of the Senate rules governing executive sessions are Sen. Rules XXIX–XXXI.
\item\textsuperscript{152} See 1 Haynes, supra note 85, at 52–68.
\item\textsuperscript{153} 3 Papers of George Washington: Presidential Series 400–01 (W.W. Abbot & Dorothy Twohig eds. 1989).
\item\textsuperscript{154} Id. at 401.
\item\textsuperscript{155} Id. at 408–09.
\item\textsuperscript{156} Id. at 409.
\item\textsuperscript{157} Id. at 402–03; S. Exec. J. 19 (Aug. 21, 1789).
\end{itemize}
\end{footnotesize}
own house" in matters of procedure when it may be meeting, quite literally, in the president's house.

What are we to make of this August 1789 discussion of the procedure for appointments? Its import is contestable, because it is not clear to what degree each side should be read as making, and responding to, assertions of constitutional right rather than seeking to accommodate the other.158 But there is other historical context that is relevant here, and it tends not to support diminished senatorial autonomy. President Washington never actually met the Senate in person or summoned them to his residence to present and seek consent on a nomination, but he instead submitted nominations in writing, which the Senate then took up in due course when it deemed it proper.159 Moreover, even the power to convene a personal meeting with the Senate does not equate to a power to dictate the manner and timing of giving advice and consent. This point is illustrated by the one occasion on which Washington personally visited the Senate to discuss a proposed treaty.160 The Senate was read certain papers concerning the treaty and then several questions were put to it for a vote, Washington evidently expecting that the Senate would give him its answer then and there. Several senators objected to this method, and the Senate resolved to turn the treaty over to a committee to consider the matter more fully—this despite the argument of one senator that a body acting as an executive council could not refer matters to committees. Washington then departed, apparently in a state of some agitation at the Senate's conduct, and thereafter communicated exclusively in writing regarding treaties.161 While nothing like a full-fledged constitutional debate over who controls procedure, this clash does present

158. For further discussion of the meaning of this episode, see Posting of Lawrence Solum to the Legal Theory Blog, http://lsolum.typepad.com/legaltheory/2003/11/the_presidents_.html (Nov. 17, 2003, 07:16 PDT); Posting of Michael Rappaport to the Right Coast, http://therightcoast.blogspot.com/2003/11/formalism-and-senates-power-not-to.html (Nov. 17, 2003, 12:56 EDT); and previous posts cited therein. Professor Currie believes that the lesson of the First Congress' promulgation of the rules governing nominations shows that "the Senators insisted on asserting their independence: if the president elected to seek their advice in person, they were determined not to lose control of the proceeding." Currie, supra note 9, at 182. I note that a modern reader might overestimate the extent to which the Senate's willingness to go to the president signals subordination to the executive. The eighteenth-century parliamentary mind could still recall Charles I's notorious incursion into the House of Commons and similar events involving colonial governors. See Mary Patterson Clarke, Parliamentary Privilege in the American Colonies 227–28 (1943). Some legislators might have preferred waiting upon the president to having him enter the chamber.

159. 1 Haynes, supra note 85, at 56.

160. See 1 id. at 62–68 (describing this incident); The Journal of William Maclay 124–30 (Frederick Ungar Publishing Co. 1965) (1890) (same).

161. 1 Haynes, supra note 85, at 67–69.
powerful evidence that the president does not today possess a dormant power to control the Senate’s proceedings in executive session.

In sum, while action on executive business was generally (though not always) much quicker in past ages than it is today,\textsuperscript{162} it seems that the Senate has, at least as a matter of fact, consistently exercised control over the timing and parliamentary rules under which it would give its consent. Thus, despite a reasonable argument for diminished cameral autonomy in the case of executive business, historical practice—not to mention the practical and structural argument offered earlier—on balance supports Senate control over procedure. (And, in any event, a presidential role in confirmation procedure could not validate statutized procedures, which bring in the House as well.)

D. Applying Cameral Autonomy

Now that the Rules of Proceedings Clause has been invested with some structural content, it is time to step back from theory and see how we can apply these insights to the analysis of the judicial confirmations statute.

If the judicial confirmations statute were binding as a normal statute usually is, it could be changed only by amending the statute through the same Article I, Section 7 process that created it. The Senate would be unable to change its rules by itself. The key feature of the judicial confirmations statute, then, is that it gives the president, and the House of Representatives, a say over the Senate’s rules of proceedings. That is a subject that, under the cameral autonomy principle that emerges from the various bits of constitutional text discussed above, these two entities have no legitimate business controlling. We have found, then, the reason why the confirmations statute cannot bind the houses of Congress

The Senate’s inability to control its own proceedings is not just damaging to its autonomy in some metaphysical sense but would have important real-world consequences. As noted above in section V.B., the president’s control over the Senate’s business would allow him to upset the Senate’s consideration of other legislative priorities. Speaking in more general terms, it would transfer away a measure of the Senate’s agenda power. Common sense and political research tell us that matters such as the timing and circumstances under which a legislature considers proposals can have profound impacts on legislative

\textsuperscript{162} Senate rules have for well over a hundred years contained provisions governing what is to happen to nominations that the Senate has neither accepted nor rejected by the end of a session, and so delay in considering nominations is not new. See S. J. 345 (Mar. 25, 1868); see also Gerhardt, supra note 96, at 459 (“Just as the Constitution does not dictate how fast the president must act in making nominations, it does not direct how quickly the Senate must act in approving or disapproving presidential nominations.”).
outcomes. Indeed, key findings from the positive theory of political institutions confirm that apparent trivialities such as the sequence of consideration can be outcome determinative—not just in theory but under circumstances that are likely to be present in actual legislatures. The Rules of Proceedings Clause stands for the proposition that this crucial agenda power rests with each chamber.

The upshot of the structurally infused reading of the Rules of Proceedings Clause is that a judicial confirmations statute could not bind in the way statutes characteristically do. The statute may be within Congress' Article I powers to enact—and the Senate could certainly choose to follow the procedures if it liked—but if the Senate later wished to depart from the statutized rules unilaterally, it would have the power to do so. Any other result would confer on the president (and the House) a portion of the Senate's agenda power. The rulemaking power is of a piece with neighboring constitutional clauses that together constitute the chamber's independence, and this cession of authority is no more legitimate than letting the president judge senators' elections or expel them from their seats.

How far does this principle of cameral autonomy reach, and how much legislation would it touch? Leaving aside legislation that actually regulates the rules of debate (like the judicial confirmations statute would), there are other types of legislation that also relate to unicameral powers. Not all of it is problematic. The Supreme Court case of Burton v. United States provides a good illustration of the type of inquiry that is required. Recall that the same sentence in the Constitution that contains the Rules of Proceedings Clause also provides that "[e]ach House" may punish and expel members. In Burton, the Court considered a senator's constitutional challenge to a statute making it a crime for government officers, including senators, to receive payment for representing an individual before a government agency. Certainly the Senate could pass an internal rule prohibiting senators from engaging in such representation. The Court agreed with Senator Burton that the Constitution would countenance no interference with the Senate's powers over its members, but it nonetheless affirmed Congress' power to pass the statute:


164. 202 U.S. 344 (1906).

While the framers of the Constitution intended that each Department should keep within its appointed sphere of public action, it was never contemplated that the authority of the Senate to admit to a seat in its body one who had been duly elected as a Senator, or its power to expel him after being admitted, should, in any degree, limit or restrict the authority of Congress to enact such statutes, not forbidden by the Constitution, as the public interests required for carrying into effect the powers granted to it.\textsuperscript{166}

Thus, in the \textit{Burton} Court's view, each chamber's unilateral authority to police its membership does not mean that Congress cannot pass criminal statutes that also regulate its members' conduct.\textsuperscript{167} The key to the Court's holding that the statute did not interfere with the Senate's unilateral powers, however, was its conclusion that (despite some suggestion in the text of the statute) the criminal conviction "did not operate, \textit{ipso facto}, to vacate the seat of the convicted Senator, nor compel the Senate to expel him or to regard him as expelled by force alone of the judgment."\textsuperscript{168} In other words, the statute did not itself expel Burton upon conviction—something that can be accomplished only by a two-thirds vote of the Senate. If the statute had purported to have that effect, there is every reason to think it would have been struck down. As a result, \textit{Burton} affirms the power to pass statutes that touch matters that could be regulated by rule, but it also shows that such statutes must not be allowed to actually interfere with a chamber's prerogatives. So here also, the vice is not the statute regarding unilateral powers per se; instead, the problem is the interference with autonomy that \textit{some} such statutes in some circumstances create.

A final example, from early in our nation's history, marks out a similar boundary. As alluded to above, election contests had been a source of recurring troubles in the early years and they of course presented ripe opportunities for partisan opportunism. In 1797, Representative Robert Harper introduced a simple resolution (not a bill) establishing procedures to govern future election contests. The resolution required disappointed challengers to give timely notice that they planned to contest an election, provided methods by which the party bringing the contest could secure testimony before courts in the district where the election occurred, and stated that the House would not entertain evidence taken in any other way.\textsuperscript{169} Representative Samuel Sitgreaves objected that no House could purport to pass a rule that applied in a later Congress; a statute would be required to achieve

\textsuperscript{166.} \textit{Burton}, 202 U.S. at 367–68.
\textsuperscript{167.} Likewise, though each house has the unilateral power to punish outsiders for contempts, Congress may also create a statute that makes contempt a crime punishable in the courts through criminal prosecution, for the statute does not prevent each house from using the unilateral power. See \textit{In re Chapman}, 166 U.S. 661, 671–72 (1897).
\textsuperscript{168.} \textit{Burton}, 202 U.S. at 367.
\textsuperscript{169.} 7 \textit{ANNALS OF CONG.} 682–83 (1797).
that enduring effect, he believed. But, he continued, such a statute would be objectionable—not because of the anti-entrenchment norm, notably, but because the statute "would give to the President and Senate a power over the rules for governing [the House's] proceedings, which, by the Constitution, they were alone the judges of."170 What he described, of course, is the principle of cameral autonomy described above.

Harper then agreed with Sitgreaves that "it would be unconstitutional for the President or Senate to interfere with [the House's] rules or elections."171 Apparently modifying his original proposal, he then contended that there could be no objection to a statute that merely created compulsory process for gathering evidence, for that statute would not bear upon the House's judging of the evidence.172 The matter was referred to a committee for further consideration,173 and eventually the committee produced a bill that lacked the problematic features of the original proposal; the bill passed. Notably, the resulting statute did not provide deadlines for giving notice of election contests, nor did it purport to limit the types of evidence the House could consider—both of which could rightly be thought to trench upon the House's rights to govern its own proceedings and be the judge of its own members' elections. Instead, the statute merely created a method of locally securing evidence that could be used in an election contest in the House, namely by authorizing judges within the district to issue process and take evidence, prescribing penalties for failure to appear at such hearings, and providing reimbursement for witnesses.174 Even though these matters relate to the unilateral power over election contests, such provisions cannot be thought to interfere with each house's unilateral prerogatives. Rather, the resulting statute seems like an excellent example of the kind of statute that is an appropriate method of exercising that power.

In sum, the Constitution does not forbid Congress from passing statutes that bear on matters of internal governance. No such statute, however, can be permitted to interfere with each chamber's unilateral powers, such as by giving the president or the other chamber a veto over changing parliamentary rules. Thus, as a matter of constitutional law, the Senate would retain unilateral control over its confirmation procedures regardless of what any statute may say.

While this is the end of the legal analysis, it is not the end of the story. Having seen why the statute cannot bind, we will now conclude on a more practical note by seeing how it might work nonetheless.

170. Id. at 683–84.
171. Id. at 684.
172. Id.
173. Id. at 687.
VI. HOW THE STATUTE COULD WORK IN PRACTICE

The analysis presented above shows that a confirmations statute could not, as a matter of constitutional law, be legally binding. But it would be a serious mistake to overlook (as lawyers sometimes do) the fact that legal mandates are not the only things that matter, or even necessarily the most important things. Despite all of the above, the confirmations statute could have a practical effect whether or not it would be enforceable in a court and even whether or not it legally binds the Senate. It could be politically binding even if not legally binding.175

The confirmations statute resembles certain other statutory regimes in this regard. Comments by former Speaker of the House Thomas Reed are instructive here. In 1890, discussing statutes governing election contests, Reed said:

We could not divest ourselves of our right to be the judges of elections even if we would, nor would any statute enacted by both houses serve the purpose. The election laws which we now have do not bind us except by our own consent. Yet in practice they do bind us . . . .176

Over time, the statutory confirmation procedure could come to possess legitimacy as a fair, prearranged method for handling nominations. And even if it had not attained that amount of acceptance among legislators, a vote to violate the confirmations statute would be a politically salient event, and flouting the norm clearly spelled out in the United States Code could be politically costly. The president can be counted upon to harangue legislators for breaking their own commitments and changing the rules of the game if they ignore the statute.177 At the same time, the existence of the statutory norm would also provide political cover for legislators who, for political reasons, could not admit that they agree with the result the statute would

175. Cf. Elizabeth Garrett, Enhancing the Political Safeguards of Federalism? The Unfunded Mandates Reform Act of 1995, 45 KAN. L. REV. 1113, 1163-68, 1173-74 (1997) (arguing that the Unfunded Mandates Reform Act's procedural requirements can have a significant political effect even though they are legally waivable); James G. Wilson, American Constitutional Conventions: The Judicially Unenforceable Rules that Combine with Judicial Doctrine and Public Opinion to Regulate Political Behavior, 40 BUFF. L. REV. 645 (1992).
176. T.B. Reed, Contested Elections, N. Am. REV., July 1890, at 112-20, quoted in 1 HAYNES, supra note 85, at 122 n.2.
177. See Akhil Reed Amar, Presidents, Vice Presidents, and Death: Closing the Constitution's Succession Gap, 48 ARK. L. REV. 215, 227 (1995) (making similar point in connection with statutes governing congressional counting of electoral votes); see also Garrett, Purposes, supra note 8, at 750-53 (discussing political costs of violating framework laws); Frederick Schauer, Legislators as Rule-Followers, in THE LEAST EXAMINED BRANCH, supra note 8, at 468 (describing internal enforcement devices for legislative norms and rules).
There are thus multiple mechanisms by which the Senate might comply with the statutory procedures.

Since Congress has passed a number of similar statutes in other policy areas in the past, it has a track record that one can examine. Congress has on a number of occasions expressed its view that it is entitled to ignore statutized rules, and it has in fact sometimes done so. But those may well be exceptions rather than the rule. One of the most important regimes of statutized rules, the fast track system for trade agreements, in fact has a strong record of compliance. As Congress proudly stated when it reauthorized fast track several years ago, "neither House has ever acted unilaterally to withdraw application of fast track procedures." It has followed the fast track procedures despite its awareness of the disclaimer clause that explicitly allows either house to abolish those special procedures. In the most recent big test of fast track, the vote on the Central American Free Trade Agreement (CAFTA), the Senate did not filibuster the implementing bill even though the vote was close and some senators fiercely opposed passage. Likewise, some statutized rules in the budget process have also proven quite powerful; indeed, President Bush's massive 2001 tax cut, a highly controversial measure supported by only the barest majority of senators, probably would not have passed in anything like its actual form had the Senate not adhered to special streamlined procedures. While there is no way to know for sure that the statutized rules made the difference in these cases, both pieces of legislation certainly look like the types of high-stakes, contentious measures that in the modern Congress can usually succeed only with supermajority support.

Finally, one should not overlook the role of simple partisan advantage in bringing about compliance. The minority's ability to prolong debate is always, in the end, a product of the majority's sufferance; if push really comes to shove, the majority can work its will. If there is a statute purporting to eliminate the filibuster for judicial nominations,

---

178. In the trade context, imagine for instance a Democrat from a Rust Belt state who is a free-trader at heart but dare not say that to her constituents. Interested constituents demand that she filibuster or amend a trade pact, but the legislator responds that, while she deeply wants to do so, the fast track statute unfortunately has tied her hands. A similar dynamic could be at play for a quietly pro-life Democrat under pressure to filibuster a judge that opposes Roe v. Wade, who could then cite the statute as a basis for not doing so. Such an explanation might succeed quite apart from whether the statute really is binding as a legal matter.

179. See Bruhl, supra note 8, at 366–70.


181. See Tiefer, supra note 8, at 427 (stating that "regular procedures, which require a Senate consensus rather than a bare majority for controversial measures, would have compelled the tax bill to undergo major changes, if not a complete overhaul, in order to garner the votes necessary to pass the Senate"); see also id. at 433–41; Roberts, supra note 35, at 518–19.
that would certainly stiffen the majority's resolve to close debate, and the statute would also provide a legal justification for doing so. This factor is especially important in situations where the president's party enjoys a slim, non-filibuster-proof majority in the Senate. For example, if there existed such a statute during the contentious period from 2003 to 2005, there is a very good chance that Republicans would have stood upon the statute and used it as grounds for quashing any attempted Democratic filibusters of the Republican president's nominees. (And, moreover, some Democratic senators not inclined to filibuster could cynically cite the statute in deflecting constituents' calls for a more aggressive posture.) In that way, the statute would most certainly "work" even if nobody did or could go to court to enforce it—and even if the statute were not really binding.

VII. CONCLUSION

This Article has considered whether a statute is a proper method for addressing what some perceive as a broken confirmation process. Such a statute would have a number of attractions for reformers, but its virtues end up being its vice: The statutory form, just by virtue of being statutory, holds out the possibility of greater durability, clarity, and legitimacy than the current status quo, but the statutory form also gives the president and the House a say over Senate procedures. As explained in Part V, an intrusion into the Senate's rules power is impermissible even though the president already plays a predominant role in the appointments process. The problem is not that the statute makes it easier for the president to nominate and secure confirmation of candidates that match the president's preferences. Unlike other fast track regimes, which concern types of legislation rather than the special context of appointments, the judicial fast track would not rearrange the steps in the constitutional decisionmaking process. In fact, although much of this Article has discussed statutes that would streamline the confirmation process and benefit the executive, the statutory form is itself content neutral and could also establish procedures that are unfriendly to the president—such as a requirement that sixty-five votes are needed for cloture. But that president-unfriendly statute would still offend the principle of cameral autonomy. Thus, the analysis of the confirmations statute set forth in this Article serves to emphasize that the problem lies not with any shift in policy outcomes but instead lies with the statutory method itself.

None of this should be taken to mean that reformers should write off a judicial confirmations statute altogether. This Article has explained why the statute could not be binding as a matter of constitutional law. But as discussed above, Congress has passed dozens of framework laws and other statutized rules, and these statutes typically contain language—plain as day, laid bare for all to see—admit-
ting that each house reserves the right to change those statutized rules just like any other rule. As I have explained, that disclaimer language states what is the case as a matter of constitutional law, and the principle of cameral autonomy is the reason why the statute cannot prevent the Senate from governing its own procedures. Thus, if the statute were passed and the Senate later refused to follow the procedures, it would be within its constitutional rights in doing so. (And, even if the Senate’s refusal were illegal, it may well be able to succeed without any judicial interference.)

Yet presumably there is some reason why Congress bothers to enact such laws and why presidents sign them. And, of course, there is: They mostly work. They are symbolic, true, but they are not only symbolic. Even if they can be changed unilaterally or even just ignored, the statutized procedure serves as a focal point. In the hands of those who would benefit from following the special statutory procedures, the statute is a cudgel with which to batter or shame opponents into following the prearranged ground rules. It also provides legislators with a justification for following procedures they otherwise might not be able to publicly embrace. These are certainly important effects, and in practice they may be determinative. But if we are to have such a statute, we should at least be clear that to the extent it is treated as binding, it is only because the Senate wills it to be so.

182. See supra note 34 and accompanying text.