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Interpreting by the Rules

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A promising new school of statutory interpretation has emerged that tries to wed the work of Congress with that of the courts by tying interpretation to congressional process. The primary challenge to this process-based interpretive approach is the difficulty in reconstructing the legislative process. Scholars have proposed leveraging Congress's procedural frameworks and rules as reliable heuristics to that end. This Article starts from that premise but will add wrinkles to it. The complications stem from the fact that each rule is adopted for distinct reasons and is applied differently across contexts. As investigation into these particularities proceeds, it becomes apparent that the complications are also rooted in something deeper—that Congress's procedures are often hollow, even fraudulent. Congress, it turns out, breaks its own rules with impunity.

Which brings us to a deeper riddle: What is the significance of the rules to an interpreter when Congress routinely flouts them? If one's goal is to accurately depict the lawmaking process in hopes of deriving rules of construction that have democratic roots, then surely the interpreter must discard the rules as hopelessly unreliable guideposts. Then again, if the interpreter's ultimate aim is to serve democratic ends, then shouldn't we strive toward rule of law values, ensuring that Congress acts in an honorable way? Ultimately, I resolve the question by first asking what the rules are meant to do. Only then can we understand what it means to interpret by them. Through examination of many procedural contexts, I set forth an innocuous account of congressional defiance of the rules. Rather than a symptom of branch dysfunction, we should see the rules as guidelines that attempt to order congressional business but that ultimately must give way to politics. Nonetheless, some rules can help the interpreter paint a more faithful picture of congressional procedure in spite of their not being followed. More broadly, I conclude that interpretive presumptions deriving from the general efficacy of legislative rules, rather than their precise enforcement, are more successful in mirroring congressional reality.

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Introduction

In a sense, we students and scholars of statutory interpretation are all formalists. We strive to arrive at some ordered set of principles from which we can derive meaning from a statute. To this end, a promising new school of statutory interpretation has emerged that tries to wed the work of Congress

with that of the courts.[1] It does so by linking rules of interpretation to Congress. The payoff is twofold. If those who write the laws and those who interpret them get on the same page, we can finally achieve a coordinating system of efficient and objective rules. Better yet, the link to Congress ensures that this particular brand of formalism has democratic legitimacy.

This new "process-based"[2] school of interpretation has already influenced federal judges, who have begun to adapt their interpretive approaches to reflect new empirical work on the congressional process.[3] This empirical work offers a response to textualists who have long argued that Congress is simply too irrational and too complex for judges to understand. Armed with research, it *is*, in fact, possible to understand how Congress works. All that is needed is careful study of it.

The process-based scholars have, for instance, studied modern developments in congressional process. Legislative paths like the reconciliation process complicate the traditional story of how a bill becomes a law. The rushed manner in which Congress passes reconciliation bills, they argue, should lead us to posit that Congress is not drafting with precision in that context.[4] A judge must take this into account in deciding how much

1. *E.g.*, Abbe R. Gluck, *Congress, Statutory Interpretation, and the Failure of Formalism: The CBO Canon and Other Ways That Courts Can Improve on What They Are Already Trying to Do*, 84 U. CHI. L. REV. 177 (2017); Abbe R. Gluck & Lisa Schultz Bressman, *Statutory Interpretation from the Inside—An Empirical Study of Congressional Drafting, Delegation, and the Canons: Part I*, 65 STAN. L. REV. 901 (2013) [hereinafter Gluck & Bressman I]; Lisa Schultz Bressman & Abbe R. Gluck, *Statutory Interpretation from the Inside—An Empirical Study of Congressional Drafting, Delegation, and the Canons: Part II*, 66 STAN. L. REV. 725 (2014) [hereinafter Bressman & Gluck II]; Victoria F. Nourse, *A Decision Theory of Statutory Interpretation: Legislative History by the Rules*, 122 YALE L.J. 70 (2012); Rebecca M. Kysar, *Penalty Default Interpretive Canons*, 76 BROOK. L. REV. 953 (2011); Rebecca M. Kysar, *Listening to Congress: Earmark Rules and Statutory Interpretation*, 94 CORNELL L. REV. 519 (2009) [hereinafter Kysar, *Listening to Congress*].

2. *See* Amy Coney Barrett, *Congressional Insiders and Outsiders*, 84 U. CHI. L. REV. 2193, 2193 (2017) (using the term). Justice Barrett clarifies that the term "process-based approach" is distinct from the Legal Process method promulgated by Henry Hart and Albert Sacks. *Id.* at 2196 n.7. Whereas Legal Process invites judges to unearth the shared purposes of legislators in enacting the law in question, the process-based approach instead "attempt[s] to calibrate interpretation to the details of the legislative process." *Id.*; *see also* HENRY M. HART JR. & ALBERT M. SACKS, THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW 1378 (Foundation 1994) (William N. Eskridge Jr. & Philip P. Frickey eds., 1994) (instructing judges to imagine themselves "in the position of the legislature which enacted the measure").

3. Gluck, *supra* note 1, at 190–91, 196, 198 (citing opinions and writings from Chief Justice John Roberts, Justice Elena Kagan, Justice Brett Kavanaugh, Judge Karen LeCraft Henderson, and Judge Robert Katzmann).

4. *See, e.g.*, Abbe R. Gluck, *Imperfect Statutes, Imperfect Courts: Understanding Congress's Plan in the Era of Unorthodox Lawmaking*, 129 HARV. L. REV. 62, 79 (2015) (exploring the Court's role in this regard).

interpretive slack to give to Congress when it enacts "unorthodox" legislation.[5]

Surveys of staffers have turned up inconsistencies between old canons of construction and legislative reality. Because congressional committees are siloed, for instance, the consistent usage canon should have no bearing in interpreting omnibus legislation, the parts of which have originated in different committees.[6] And because staffers do not use dictionaries when drafting statutes, an interpreter's reliance upon them is misguided.[7]

These scholars have also developed canons of construction that derive from Congress's procedural frameworks, a strain of the literature that is the primary focus of this Article.[8] In early work, I myself argued that courts have the unique ability to leverage congressional transparency by interpreting legislation in accordance with legislative rules that are aimed at unearthing hidden special interest deals.[9] Later scholars have gone further to use legislative rules more generally in the interpretive process.[10]

This rules-based strain holds particular promise to process-based interpretation. If the primary challenge to this interpretive approach is the difficulty in reconstructing congressional process, then discovering reliable heuristics to that end may broaden the new school's reach. The prescription seems simple enough. If we look to ways in which Congress governs itself, paying particular attention to its enumerated rules, we can better understand the congressional process and hence its output.

This Article starts from that premise but will add wrinkles to it—so many, in fact, that the interpreter may at times be left only with a sow's ear. The complications stem from the fact that each rule is adopted for distinct reasons and is applied differently across contexts. It may, for example, be prudent to assume Congress's transparency rules are working as intended; other rules may cause us more trouble.

As our investigation into these particularities proceeds, we will begin to see that the complications are also rooted in something deeper—that

5. Chief Justice Roberts embraced this approach in depicting the Affordable Care Act as born out of a process that "does not reflect the type of care and deliberation one might expect" in drafting. King v. Burwell, 576 U.S. 473, 492 (2015).

6. *See* Gluck & Bressman I, *supra* note 1, at 936 (reporting that "most major statutes" are "conglomerations of multiple committees' separate work").

7. Gluck & Bressman I, *supra* note 1, at 938 (finding that "[m]ore than 50%" of congressional staffers surveyed said that "dictionaries are never or rarely used" when drafting).

8. *See, e.g.*, Nourse, *supra* note 1, at 73–74 (advancing a view that an interpreter can use Congress's rules to identify central sources of legislative history and text); Bressman & Gluck II, *supra* note 1, at 763–65 (noting the primacy of the budget rules in lawmaking and exploring a Congressional Budget Office canon of construction that responds to this); Gluck, *supra* note 1, at 182 (same).

9. Kysar, *Listening to Congress*, *supra* note 1, at 563.

10. *E.g.*, Gluck, *supra* note 1, at 181; Nourse, *supra* note 1, at 73–74.

Congress's procedures are often hollow, even fraudulent. Congress, it turns out, breaks its own rules with impunity.

Which brings us to a deeper riddle: What is the significance of the rules to an interpreter when Congress routinely flouts them? If one's goal is to accurately depict the lawmaking process in hopes of deriving rules of construction that have democratic roots, then surely the interpreter must discard the rules as hopelessly unreliable guideposts.

Then again, if the interpreter's ultimate aim is to serve democratic ends, then shouldn't we strive toward rule of law values, ensuring that Congress acts in an honorable way? If so, then ignoring Congress's deliberate violation of its rules in the interpretive process creates a mechanism to punish Congress when it does so. The counterfactual assumption may serve to help repair the "broken branch."

This interpretive conundrum defies traditional separation of powers analysis by forcing us to confront many overlapping inquiries and feedback loops. Ultimately, I resolve the question by first asking what the rules are meant to do. Only then can we understand what it means to interpret by them. Through examination of many procedural contexts, I set forth an innocuous account of congressional defiance of the rules. Rather than a symptom of branch dysfunction, we should see the rules as guidelines that attempt to order congressional business but that ultimately must give way to politics. The rules, in other words, are made to be broken.

The judiciary, of course, must generally defer to politics if separation of powers is to mean anything. The Rulemaking Clause in the Constitution contemplates this arrangement, which prohibits the judiciary from enforcing legislative rules against Congress.[11] So fundamental is the legislative power over its rules that it could be argued the Clause is superfluous; that generally accepted separation of powers principles would force us to arrive at the same result.[12]

Having discarded the normative argument that the judiciary should improve congressional process by taking seriously congressional rules, does that mean the interpreter should abandon them altogether? To this, we must return to the descriptive and ask if they ever bring us closer to understanding congressional reality. The answer depends on the legislative rule and context in question. At times the rules may bear fruit; other times they may not. Some

11. U.S. CONST. art. 1, § 5, cl. 2 ("Each House may determine the Rules of its Proceedings . . . ."); *see also* Rebecca M. Kysar, *The 'Shell Bill' Game: Avoidance and the Origination Clause*, 91 WASH. U. L. REV. 659, 699–703 (2014) (exploring the foundations of the Rulemaking Clause).

12. *See* John C. Roberts, *Are Congressional Committees Constitutional?: Radical Textualism, Separation of Powers, and the Enactment Process*, 52 CASE W. RES. L. REV. 489, 528 (2001) (discussing the lack of such a clause in the Articles of Confederation and the legislative body's creation of legislative rules nonetheless).

rules can help paint a more faithful picture of congressional procedure in spite of their not being followed. Ultimately, I conclude that interpretive presumptions deriving from the *efficacy* of legislative rules, rather than their precise enforcement, are more successful in mirroring congressional reality.

A deep dive into the weeds of congressional procedure is necessary to begin to understand what the rules can tell us. In so doing, I aim to lay the groundwork for an interpretive endeavor that serves to refine the process-based approach by crafting a more nuanced picture of congressional reality.

Such an approach preserves the ability of judges to rely confidently on fundamental aspects of the legislative process that are unlikely to change. Two of the process-based school's leading lights, Abbe Gluck and Lisa Bressman, have noted that "[a]ny empirically grounded theory of interpretation will face th[e] problem of keeping up with changing circumstances."[13] This danger is not as prevalent with essential features of the legislative process, such as the prioritization of committee reports and the fast and loose nature of the reconciliation process, since those attributes are unlikely to change. Congressional adherence to legislative rules, however, is constantly evolving due to their nature as endogenous devices. Although at any given time, the congressional process may appear to be heavily influenced by a rule, this will change under different circumstances. The interpreter must be attuned to this dynamic.

Others have critiqued the new interpretive school by invoking traditional textualist arguments.[14] This Article contributes to the literature by instead assessing process-based interpretation, which is predicated on judicial understanding of the legislative process, *on its own terms*. It is my view that the process-based school creates a mechanism that sheds light on legislative priorities. For the judiciary to ignore the realities of the increasingly complex legislative atmosphere risks burying those priorities. But through examination of the many twists and turns the legislative process can take, we can see just how complex it is. Interpretation based on strict adherence to rules or some other simplistic proxy may very well lead the interpreter astray. Instead, the judiciary should pursue a more contextualized approach to process-based interpretation that better reflects legislative realities. So into the weeds we must go.

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Part I of this Article provides background on the new process-based school of interpretation, as well as critiques that have been lodged against it. Part II discusses features of the legislative process, particularly those relating to legislative rules, and the ways in which they depart from the assumptions

13. Bressman & Gluck II, *supra* note 1, at 783.

14. Barrett, *supra* note 2, at 2193–94; John F. Manning, *Inside Congress's Mind*, 115 COLUM. L. REV. 1911, 1916 (2015).

underlying some of the new school's recommendations. Part III argues that normative considerations mitigate against wholesale importation of Congress's rules into the interpretive project. Part IV offers a view of what process-based interpretation should look like, in light of the above concerns and observations.

I. Background

The rise of the process-based school of interpretation has been steep over the past decade, but it has roots in earlier scholarly work. This Part traces that trajectory before turning to modern critiques of the school.

A. The New Process-Based School of Interpretation

A number of scholars have attempted to improve the interpretive endeavor by introducing insight into the legislative process. The early scholars focused largely on how lawmakers used legislative history. Chancellor Nicholas Zeppos recommended that judges engage in a fact-finding model of statutory interpretation, examining for instance the degree of exposure that a piece of legislative history had among lawmakers.[15] Professors Daniel Rodriguez and Barry Weingast leveraged positive political theory to identify pivotal lawmakers and the legislative history generated by them as particularly important in the interpretive process.[16]

In an early example of the empirical turn in the literature, Professors Victoria Nourse and Jane Schacter conducted a case study of legislative drafting in the Senate Judiciary Committee.[17] Their findings illustrated that drafters do not systematically comport with judicial views of statutory interpretation.[18] For instance, despite Scalia's powerful critique of legislative history, the committee continued to write congressional understandings of the legislation.[19] The Nourse/Schacter study also explored other issues, such as the lack of influence of canons upon the drafting process,[20] the influential role of lobbyists in drafting the text of bills,[21] and the heterogenous nature of drafting practices.[22]

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15. Nicholas S. Zeppos, *Legislative History and the Interpretation of Statutes: Toward a Fact-Finding Model of Statutory Interpretation*, 76 VA. L. REV. 1295, 1359–60 (1990).

16. Daniel B. Rodriguez & Barry R. Weingast, *The Positive Political Theory of Legislative History: New Perspectives on the 1964 Civil Rights Act and Its Interpretation*, 151 U. PA. L. REV. 1417, 1450 (2003).

17. Victoria F. Nourse & Jane S. Schacter, *The Politics of Legislative Drafting: A Congressional Case Study*, 77 N.Y.U. L. REV. 575, 576 (2002).

18. *Id.* at 578.

19. *Id.* at 583.

20. *Id.* at 600–02.

21. *Id.* at 610–13.

22. *Id.* at 583–93.

More recently, Victoria Nourse has argued that interpretation of statutes should hinge on congressional rules.[23] Nourse reasons that legislative history can only be understood against the backdrop of legislative rules. In her view, the rules can be used to separate the "wheat from the chaff of legislative history."[24] For textualists, the rules can identify which texts are central in cases of conflict.[25]

Nourse argues for a presumption that Congress not only knows but also *follows* its legislative rules.[26] For example, Nourse argues that *Public Citizen v. U.S. Department of Justice*,[27] a notoriously difficult statutory interpretation case, could have been easily resolved by following the legislative rule that conference committees do not have authority over matters where the House and Senate are in agreement.[28] Similarly, Nourse contends that the Supreme Court's opinion in *TVA v. Hill*[29] overlooked congressional rules that forbid legislative text on appropriations.[30]

Most notable among scholars representing the modern process-based school of interpretation, Professors Gluck and Bressman surveyed 137 staffers involved in legislative drafting, posing 171 questions that seek to explore the interpretive responsibilities of courts and agencies and detailing their findings in two articles.[31] In undertaking this ambitious project, Gluck and Bressman seek to corroborate or discredit the assumptions about drafting that undergird the theories and practice of statutory interpretation.[32] For instance, they suggest certain items in the textualist's arsenal are not supported by congressional reality.

Most relevant for our purposes, in response to their survey, many staff highlighted the importance of the Congressional Budget Office (CBO) score in drafting the statute.[33] Specifically, staff revise legislation in response to CBO's comments on draft bills so that budget targets are met. From this,

23. Nourse, *supra* note 1, at 73.

24. *Id.* at 75.

25. *Id.*

26. *Id.* at 91–92.

27. 491 U.S. 440 (1989).

28. Nourse, *supra* note 1, at 94 ("*Conference committees cannot—repeat, cannot—change the text of a bill where both houses have agreed to the same language.*" (emphasis in original)).

29. 437 U.S. 153 (1978).

30. Nourse, *supra* note 1, at 132.

31. Gluck & Bressman I, *supra* note 1, at 906.

32. *Id.* at 907.

33. Bressman & Gluck II, *supra* note 1, at 763.

Gluck and Bressman recommended a CBO canon,[34] which Gluck developed in other work.[35]

Finally, in a recent book, Judge Robert Katzmann forcefully argues that judges must understand the institutional dynamics of Congress in their interpretation of statutes. In Katzmann's view, "understanding [the legislative] process is essential if it is to construe statutes in a manner faithful to legislative meaning."[36] Katzmann draws upon the work of Nourse and Schacter, as well as Gluck and Bressman, in painting a picture of the legislative process that may be surprising to most textualist judges. He emphasizes the heterogeneity of drafting practices, that legislation is drafted by staff, not members, and done so in alignment with the members' policy preferences, and the heavy reliance by members on committee reports.[37] He also notes the findings of others that canons are of little use to drafters, that they do not use dictionaries, nor do they seek coherence within or across statutes.[38] Stemming out of these observations, Katzmann recommends that judges deemphasize some canons and use legislative history to the extent the legislators gave it priority.[39]

B. Critiques of the Process-Based School

The rise of the process-based school has not gone unchallenged. Notable critiques have come from Professor John Manning and Justice Amy Barrett, both grounding their views in textualism. I discuss their views below.

1. Intent Skepticism

Professor Manning's account of the process-based school is that it simply has nothing to offer to those interpretive theories that are skeptical of legislative intent. He posits that although Gluck and Bressman do not explicitly align themselves with intentionalism, they rely upon the subjective intent of the drafters in criticizing prior interpretive methods and justifying new ones.[40] Yet in Manning's view, the authors' findings do not undermine

34. *Id.* at 782.

35. *See* Gluck, *supra* note 1, at 187–89 (arguing for judges to interpret ambiguous statutes in accordance with the CBO's assumptions in calculating statutes' budgetary impacts); Abbe R. Gluck, Anne Joseph O'Connell & Rosa Po, *Unorthodox Lawmaking, Unorthodox Rulemaking*, 115 COLUM. L. REV. 1789, 1851–52 (2015) (same); Abbe Gluck, *The "CBO Canon" and the Debate Over Tax Credits on Federally Operated Health Insurance Exchanges*, BALKINIZATION (July 10, 2012, 8:55 PM), https://balkin.blogspot.com/2012/07/cbo-canon-and-debate-over-tax-credits.html [https://perma.cc/T3RG-SLX8] (same).

36. ROBERT A. KATZMANN, JUDGING STATUTES 8–9 (2014).

37. *Id.* at 11–22.

38. *Id.* at 43, 49, 52–53.

39. *Id.* at 52.

40. Manning, *supra* note 14, at 1935.

the inherent indeterminacy of legislative intent nor do they obviate the need for a normative frame of reference in making sense of such intent.[41]

To illustrate, Manning canvasses various approaches to statutory interpretation and how they manifest what he labels "intent skepticism." Textualists, for instance, argue that social choice theory illustrates that lawmakers may "cycle endlessly" their intransitive preferences and that "intent" of the majority therefore depends on arbitrary factors such as the order upon which policies were voted.[42] Another of their claims is that the legislative process is simply too complex for judges to replicate.[43]

But the intent skepticism is not just confined to textualists, according to Manning. Legal realists assert that judges engage in policymaking when deciding cases and will not attempt to unearth the intentions of hundreds of legislators.[44] Pragmatists also express doubt about discerning legislative intent, given the number of actors involved and the limitations of the historical record, instead prescribing pragmatic reasoning to decide statutory cases.[45] Dworkinians would posit that vexing questions over whose intention should count and the need for aggregating intent make the whole endeavor arbitrary.[46] Finally, according to Manning, even Legal Process scholars are intent skeptics who urge a pursuit of a reasonable purpose rather than actual legislative intent.[47] In Manning's view, these theories leave room for inserting normative views about the system of government into the interpreting process, having freed the interpreter from making a factual inquiry into congressional intent.[48]

Having discussed the older theories of statutory interpretation, Manning then turns to the process-based scholars, who have in various ways proposed methods of discovering Congress's actual decision-making through gathering evidence about how Congress works. Manning argues that these new scholars align themselves with classic intentionalists but that their findings do not obviate the arguments of the intent skeptics.[49] No matter how well we know the minds of lawmakers, Manning contends, we still must make value judgments in making attributions to Congress.[50]

Manning argues that even though staff may be unaware of common tools of statutory interpretation, this does not render them objectionable. Such

41. *Id.* at 1936–37.
42. *Id.* at 1918.
43. *Id.* at 1918–19.
44. *Id.* at 1919–20.
45. *Id.* at 1920.
46. *Id.* at 1921.
47. *Id.* at 1922.
48. *Id.* at 1924.
49. *Id.* at 1935–37.
50. *Id.* at 1937.

"off-the-rack rules" may enable Congress to express itself, regardless of whether the drafters intentionally have followed them.[51] As Gluck and Bressman point out, today's Congress legislates through unorthodox lawmaking that involves multiple committees, thus rendering consistent-usage canons like the whole act rule suspect.[52] And today's staffers do not consult dictionaries when they are drafting statutes.[53] In Manning's view, these findings only reinforce the notion that Congress does not resolve interpretive questions at a granular level. Instead, we must look to conceptions of legislative supremacy or faithful agency to fill in the gaps.[54]

Gluck and Bressman also rely on their survey to question textualist objections to legislative history. In Manning's view, this is also problematic because whether legislative history constitutes legislative intent is a normative question.[55] Why, after all, should we defer to the technical product of unelected Legislative Counsel rather than the product upon which Congress itself chooses to vote?[56] In other words, Gluck and Bressman's empirical work "force[s] us to reckon with the fact that there is no way to derive legislative intent from the brute facts of the legislative process,"[57] thereby confirming intent skepticism rather than quelling it.

2. Congressional "Insiders" Versus "Outsiders"

Justice Barrett argues that the new process-based statutory interpretation scholars incorrectly assume that statutory interpretation theorists endeavor to reflect the actual practices of the drafters.[58] Barrett contends instead that this misses the mission of textualism entirely. Whereas the process-based scholars are focused on "congressional insiders" or hypothetical legislators in their approach to language, textualists emphasize the importance of "congressional outsiders" or the ordinary readers of statutory text.[59]

Barrett contends that this divide can be explained by different conceptions of faithful agency. Textualists, in her view, are agents of the people, whereas the process-based scholars are agents of Congress. Textualists are therefore bound to the most ordinary meaning of the statute since that is how their principal interprets them.[60]

51. *Id.* at 1943.
52. Gluck & Bressman I, *supra* note 1, at 936.
53. *Id.* at 938.
54. Manning, *supra* note 14, at 1942.
55. *Id.* at 1945.
56. *Id.* at 1946.
57. *Id.* at 1952.
58. Barrett, *supra* note 2, at 2193–94.
59. *Id.* at 2194.
60. *Id.* at 2195.

Barrett emphasizes that the process-based theorists themselves rely on statutory text above all else and thus are influenced by textualists. And, unlike Manning, she takes Gluck and Bressman at their word—that they are also intent skeptics.[61] It is at this point, however, that the textualists and process-based theorists diverge. If both discard actual legislative intent, the textualist constructs objective intent based on an ordinary reader. A process-based theorist bases objective intent on the experience of a hypothetical lawmaker.[62]

Using this view of faithful agency, Barrett contends that the textualists' predilection for dictionaries and canons is not undermined by evidence that Congress rejects them but would only be thwarted by evidence that the canons do not track common usage.[63] Barrett extends this reasoning to legislative history. Professor Nourse proposes that courts should interpret in accordance with legislative rules because this is how a typical lawmaker would have understood the language.[64] A textualist, according to Barrett, would reject this endeavor as failing to reflect how an ordinary person would read the statute—congressional practice be damned.[65]

3. The Conversation Model of Interpretation

In a vein similar to Professor Barrett's, Professor Doerfler argues that insights from the philosophy of language necessitate viewing the law as a conversation between lawmakers and administers of the law (courts and agencies) or lawmakers and objects of the law (citizens).[66] In contrast, a process-based model of interpretation erroneously treats the law as being written for lawmakers by other lawmakers. This is because it focuses on the legislative process, of which lawmakers are acutely aware but citizens are deeply ignorant.[67] In Doerfler's view, it is wholly irrelevant that committee reports are more salient to staffers than floor statements since ordinary citizens do not understand the distinction between the two.[68]

4. Situating the Project

On the following pages, I will complicate understandings of the legislative process upon which some of the process-based scholars'

61. *Id.* at 2200.
62. *Id.* at 2200–01.
63. *Id.* at 2204.
64. Nourse, *supra* note 1, at 73–75.
65. Barrett, *supra* note 2, at 2207.
66. Ryan D. Doerfler, *Who Cares How Congress Really Works?*, 66 DUKE L.J. 979 (2017).
67. *Id.* at 1031, 1034.
68. *Id.* at 1034.

recommendations are based. In doing so, I do not seek to undermine their endeavor but rather to elevate it through refinement, on its own terms of congressional understanding. Some of my conclusions may be taken to further the view of the textualists and others that the legislative process is simply too messy for judicial understanding.[69] That is not my intention. I have greater faith in a judge's ability to accompany me in the weeds, as I will later discuss.

II. Congressional Rules and Reality

A. Legislative Rules

1. Background

Before exploring the ways in which Congress deviates from its rules, it is helpful to understand their constitutional status and Congress's general mode of enforcement. Each house enacts its own set of legislative rules, primarily through its standing rules. The House adopts its standing rules at the beginning of each Congress, largely adhering to the prior rules with some amendments.[70] The standing rules of the Senate are in force until they are revised because the Senate has traditionally been viewed as a "continuing body," meaning it continues to exist after an election cycle because only one third of its members face reelection each cycle (in contrast to the House, where all of its members are up for reelection every two years).[71]

Some legislative rules are adopted outside the standing rules. For instance, rules governing the budget process are sometimes set forth in the budget resolution.[72] Others are even codified in statutes.[73] Despite the fact that they are not formally incorporated into the standing rules, these rules are not different in kind.

In addition to the rules, each house also collects a rich body of precedential rulings, which have varying, and sometimes mysterious, degrees

69. *See, e.g.*, Frank H. Easterbrook, *Statutes' Domains*, 50 U. CHI. L. REV. 533, 548 (1983) (describing the complexities of the legislative process and the challenges it poses for statutory interpretation).

70. Stanley Bach, *Legislating: Floor and Conference Procedures in Congress*, *in* 2 ENCYCLOPEDIA OF THE AMERICAN LEGISLATIVE SYSTEM 701–02 (Joel H. Silbey ed., 1994).

71. *See* Aaron-Andrew P. Bruhl, *Burying the "Continuing Body" Theory of the Senate*, 95 IOWA L. REV. 1401, 1404 (2010) (criticizing the traditional view).

72. *See, e.g.*, S. Con. Res. 3, 115th Cong. §§ 4002–03 (2017) (setting forth modifications to existing budget rules).

73. Aaron-Andrew P. Bruhl, *Using Statutes to Set Legislative Rules: Entrenchment, Separation of Powers, and the Rules of Proceedings Clause*, 19 J.L. & POL. 345, 346 (2003).

of authority.[74] In the Senate, for instance, the most forceful precedents are those that the entire Senate body has weighed in on.[75] Some precedents may even take priority over the standing rules.[76]

The Constitution generally imposes few restraints upon the legislative process. Article I, Section Five, Clause Two authorizes each house to "determine the Rules of its Proceedings."[77] In addition to creating its rules, as a constitutional matter, each house may change them without action by the other house.[78] This is almost certainly the case even when Congress enacts internal rules through statutes. Although statutes require passage by the other house, as well as the President's signature to become law, the Rulemaking Clause likely requires that they be voidable by one chamber.[79]

Importantly for our purposes, the hallmark of legislative rules is flexibility. Each house can make, amend, repeal, suspend, ignore, or waive their legislative rules.[80] Each can also choose from several different procedural frameworks in passing laws.[81]

This flexibility also extends towards the rules' enforcement, which is wholly internal to Congress. A member of Congress can only enforce a rule violation by making a point of order.[82] In the House, the Speaker and the Chairman of the Committee rule on all points of order, which can be overruled by the body on appeal, usually by a two-thirds vote.[83] Senators who have submitted points of order may demand a Senate vote.[84] Rules can be

74. I DESCHLER'S PRECEDENTS, at vii (1994) (analogizing legislative rule precedents to the common law in terms of precedential value).

75. *See* Stanley Bach, *The Nature of Congressional Rules*, 5 J.L. & POL. 725, 734 (explaining that the "most compelling Senate precedents" are those created by the entire Senate "vot[ing] on a question of procedure").

76. *See id.* at 733 (describing precedents in both houses that "effectively supplant" standing rules).

77. U.S. CONST. art. I, § 5, cl. 2.

78. Bach, *supra* note 70, at 702.

79. Bruhl, *supra* note 73, at 386–90. A more controversial reading of the Clause is that it bars rulemaking through statutes. Adrian Vermeule, *The Constitutional Law of Congressional Procedure*, 71 U. CHI. L. REV. 361, 430 (2004) (contending that the unconstitutionality of statutory internal rules is likely not "good constitutional design").

80. Roberts, *supra* note 12, at 525; *see also* Rebecca M. Kysar, *Lasting Legislation*, 159 U. PA. L. REV. 1007, 1021–25 (2011) [hereinafter Kysar, *Lasting Legislation*] (discussing the endogeneity of legislative rules in the budgetary context).

81. The Senate, for instance, can expedite consideration of a bill by invoking cloture. STANDING RULES OF THE SENATE, S. DOC. NO. 110-9, r. XXII, at 15 (2007). The House generally has five procedural frameworks in which it can legislate. Michael B. Miller, Comment, *The Justiciability of Legislative Rules and the "Political" Political Question Doctrine*, 78 CALIF. L. REV. 1341, 1345 (1990).

82. CHARLES TIEFER, CONGRESSIONAL PRACTICE AND PROCEDURE: A REFERENCE, RESEARCH, AND LEGISLATIVE GUIDE 24 (1989) (noting that questions of congressional procedure are decided by points of order, which may be appealed to the full chamber).

83. Bach, *supra* note 75, at 734, 745.

84. *Id.* at 740–41.

waived or suspended in the Senate, however, by unanimous consent agreements.[85]

Congressional power over the internal rules stems from not only the Rulemaking Clause but Congress's inherent lawmaking authority as well. Justice Story described this inherent authority as follows:

> No person can doubt the propriety of the provision authorizing each house to determine the rules of its own proceedings. If the 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.[86]

The legislature's control over its internal processes can be traced to the British theory of legislative sovereignty, which was erected to counter the monarchy.[87] Perhaps because of its strong historical roots, the Framers adopted the Rulemaking Clause without any deliberation.[88]

Separation of powers principles thus suggest the Clause may, in fact, be superfluous. This conclusion receives support from the fact that the Constitution's predecessor, the Articles of Confederation, had no such clause and yet the Continental Congress had purview over its legislative rules.[89] To be sure, the Constitution does place some limitations on the lawmaking process, which the judiciary can enforce. For instance, Article I prescribes rules for legislative assembly, selection of officers, discipline of members, and voting and quorum rules, among others. Article I, Section Seven also prescribes the "single, finely wrought and exhaustively considered, procedure" for enacting or repealing law.[90]

Even still, Article I, Section Seven leaves most of the process details to Congress, apart from bicameralism and presentment.[91] For instance, the Constitution is silent as to whether an identical bill must be passed by each

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85. JUDY SCHNEIDER, CONG. RESEARCH SERV., RL30945, HOUSE AND SENATE RULES OF PROCEDURE: A COMPARISON 4 (2008).

86. *See* 3 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES 298 (reprinted 1987) (1833); *see also* Kysar, *Listening to Congress*, *supra* note 1, at 568–69 (noting that it may be "inherent within legislative powers" to have "control over legislative rules").

87. Stephen Raher, *Judicial Review of Legislative Procedure: Determining Who Determines the Rules of Proceedings* 36 (Aug. 2008) (unpublished manuscript) (presented at the Midwest Political Science Association Spring Conference, 2009), http://works.bepress.com/stephen_raher/1/download [https://perma.cc/44H5-WWCE].

88. *See* Bruhl, *supra* note 73, at 385 (noting that after an amendment by James Madison, the section was approved "without further debate or controversy").

89. *See* Roberts, *supra* note 12, at 528 (observing that the Continental Congress adopted legislative rules "as a matter of course" despite the lack of authorization in the Articles of Confederation).

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

91. Kysar, *Listening to Congress*, *supra* note 1, at 530 n.52.

house, instead leaving Congress to designate how to agree on a bill that is presented to the President.[92] The Constitution is also silent on the manner of passage. Under current legislative rules, a bill can pass with only one member of the majority present, and there is no requirement that a legislator know the contents of the bill before a vote.[93]

2. Examples of Rules and Deviations

The above framework illustrates that legislative rules are endogenous to Congress and Congress may do with them what they wish. They can be ignored, waived, amended, etc. The rest of this section will explore a few examples of legislative rules, how they have been used in the case law, and how Congress actually interprets, enforces, and deviates from them.

a. The Prohibition Against Lawmaking Through Appropriations.—Two types of legislation are: authorizing legislation, which creates or modifies a government activity or program; and appropriations, which provides funding for the activity or program.[94] Longstanding congressional rules and practice erected this distinction.[95] In the 1800s, appropriations began to be delayed because of debates over substantive legislation. In 1837, the House addressed this problem by adopting a rule that prohibited appropriations from being reported on authorizing legislation if not previously authorized.[96] Other legislative rules maintain the separation between the categories, although, as will be discussed, the distinction is increasingly blurred. Current House Rule XXI(2) and Senate Rule XVI(4) prohibit appropriations from changing

92. Roberts, *supra* note 12, at 523–24.

93. *Id.* at 524. Although the Supreme Court has ruled there are certain contexts in which Congress must make findings when it passes a law, there is no general rationality requirement. *Id.*; *see also* Bd. of Trs. of the Univ. of Ala. v. Garrett, 531 U.S. 356, 374 (2001) (invalidating an antidiscrimination law on the grounds of lack of congressional findings); United States v. Morrison, 529 U.S. 598, 614 (2000) (striking down a provision allowing victims of gender-motivated violence to sue in federal court in spite of congressional findings regarding the impact of such victims and their families); United States v. Lopez, 514 U.S. 549, 563 (1995) (striking down congressional regulations of guns because of Congress's failure to make sufficient findings). For critiques of this case law, see Philip P. Frickey & Steven S. Smith, *Judicial Review, the Congressional Process, and the Federalism Cases: An Interdisciplinary Critique*, 111 YALE L.J. 1707, 1708 (2002) and Ruth Colker & James J. Brudney, *Dissing Congress*, 100 MICH. L. REV. 80, 83 (2001).

94. CONG. RESEARCH SERV., R44736, THE HOLMAN RULE (HOUSE RULE XXI, CLAUSE 2(B)) 1 (2019).

95. *Id.*

96. ASHER C. HINDS, HINDS' PRECEDENTS OF THE HOUSE OF REPRESENTATIVES OF THE UNITED STATES , v. IV, ch. XCV, § 3578, at 382–83 (1907).

existing law.[97] The principle embodied by these rules is sometimes invoked by courts in the course of interpreting statues.

In an 1886 case, *U.S. v. Langston*,[98] for instance, the Supreme Court deployed the rule against changes to substantive law via the appropriations process in construing whether a statute prescribing the salary of a public officer could be modified or repealed by subsequent appropriations of a lesser amount.[99] Although the Supreme Court did not explicitly rely on an underlying legislative rule prohibiting substantive changes via appropriations, it may have been inspired by congressional practice.

The Court was explicit in its reliance on the rules in a well-known 1978 statutory interpretation case, *TVA v. Hill*, when it considered whether subsequent appropriations measures that funded the construction of a dam violated the Endangered Species Act.[100] The Court held that the appropriations could not be used for an otherwise unlawful purpose, in part reasoning that congressional rules supported this result.[101] The Court specifically cited to House Rule XXI(2) and Senate Rule XVI(4) and noted that an opposite ruling would "assume that Congress meant to repeal [a part of the Endangered Species Act] by means of a procedure expressly prohibited under the rules of Congress."[102] Other lower courts have adopted an interpretive rule against changes to substantive law via the appropriations process without explicitly relying upon the relevant legislative rules.[103]

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97. *See* CONSTITUTION, JEFFERSON'S MANUAL, AND RULES OF THE HOUSE OF REPRESENTATIVES, H.R. DOC. NO. 115-177, r. XXI(2)(a)(1), at 871 (2019) ("An appropriation may not be reported in a general appropriation bill, and may not be in order as an amendment thereto, for an expenditure not previously authorized by law. . . ."); *id.* at r. XXI(2)(c), at 872 ("An amendment to a general appropriation bill shall not be in order if changing existing law . . . ."); STANDING RULES OF THE SENATE, S. DOC. NO. 113-1, r. XVI(2), at 11 (2014) ("The Committee on Appropriations shall not report an appropriation bill containing amendments to such bill proposing new or general legislation . . . ."); *id.* at r. XVI(4), at 15 ("On a point of order made by any Senator, no amendment . . . which proposes general legislation shall be received to any general appropriation bill . . . and any such amendment or restriction to a general appropriation bill may be laid on the table without prejudice to the bill."); *id.* at r. XVI(6), at 15 ("When a point of order is made against any restriction on the expenditure of funds appropriated in a general appropriation bill on the ground that the restriction violates this rule, the rule shall be construed strictly and, in case of doubt, in favor of the point of order.").

98. 118 U.S. 389 (1886).

99. *Id.* at 394.

100. TVA v. Hill, 437 U.S. 153, 156 (1978).

101. *Id.* at 191.

102. *Id.*

103. *See, e.g.*, Calloway v. District of Columbia, 216 F.3d 1, 9 (D.C. Cir. 2000) (acknowledging the "established rule" that courts must "construe[] narrowly" appropriations measures that "arguably conflict with the underlying authorizing legislation"); Donovan v. Carolina Stalite Co., 734 F.2d 1547, 1558 (D.C. Cir. 1984) (same); EEOC v. Allstate Ins. Co., 570 F. Supp. 1224, 1234 (S.D. Miss. 1983) (holding an appropriations provision allowing the EEOC to enforce the Equal Pay Act unconstitutional because Congress had "done nothing to directly enact" substantive legislation on the issue).

Both the Supreme Court and lower courts, however, have decided not to follow this rule when the amendment or repeal of the substantive law is clear.[104] One of these cases is worth discussing in detail. In *Roe v. Casey*,[105] the Third Circuit held that the Hyde Amendment in an appropriations bill modified a Medicaid statute requiring participating states to fund abortions that receive federal reimbursement.[106] The court noted that the House of Representatives waived all points of order raised against the Hyde Amendment for failure to comply with House Rule XXI(2).[107] The court rejected the lower court's invocation of *TVA v. Hill*, stating that "it is not our duty to prescribe optimal methods of legislation" but "[r]ather it is simply our duty to interpret statutes in accordance with the intent of the legislature."[108]

Roe v. Casey is significant because the court recognized that each house enforces its rules. The court was thus right to look at the legislative record to see if, in fact, the houses waived the rule against legislating through appropriations. Should courts, however, necessarily assume that Congress has followed its rules if no waiver appears? Not necessarily.

Appropriations bills often contain authorizations through a number of different paths, in addition to formal waiver by the body.[109] Congress, for instance, can simply choose to not enforce its rules. A member must affirmatively raise a point of order in order to strike an authorization from the appropriations bill because legislative rules are not self-enforcing. If the

104. *See, e.g.*, United States v. Dickerson, 310 U.S. 554, 555 (1940) (noting that when Congress desires to suspend or repeal a statute, "[t]here can be no doubt that . . . it could accomplish its purpose by an amendment to an appropriation bill, or otherwise"); Roe v. Casey, 623 F.2d 829, 836 (3rd Cir. 1980) (holding that states are not required to provide abortions that the federal government will not fund because "the legislative history makes it evident that the Congress intended the Hyde Amendment to have substantive impact"); Friends of the Earth v. Armstrong, 485 F.2d 1, 9 (10th Cir. 1973) ("Appropriation acts are just as effective a way to legislate as are ordinary bills relating to a particular subject. An appropriation act may be used to suspend or to modify prior Acts of Congress."); *see also* Robertson v. Seattle Audubon Soc., 503 U.S. 429, 440 (1992) ("Congress . . . may amend substantive law in an appropriations statute, as long as it does so clearly."); United States v. Will, 449 U.S. 200, 222 (1980) (noting that although legislative rules prohibit changing substantive law through appropriations manners, Congress nonetheless has the ability to do so); City of Chicago v. U.S. Dep't of Treasury, Bureau of Alcohol, Tobacco and Firearms, 423 F.3d 777, 782 (7th Cir. 2005) ("[W]e cannot ignore clear expressions of Congressional intent, regardless of whether the end product is an appropriations rider or a statute that has proceeded through the more typical avenues of deliberation."); Preterm, Inc. v. Dukakis, 591 F.2d 121, 133–34 (1st Cir. 1979) (acknowledging Congress's clear intent and prerogative to legislate by an appropriations bill).

105. 623 F.2d 829 (3rd Cir. 1980).

106. *Id.* at 831.

107. *Id.* at 836.

108. *Id.*

109. *See, e.g.*, Sandra Beth Zellmer, *Sacrificing Legislative Integrity at the Altar of Appropriations Riders: A Constitutional Crisis*, 21 HARV. ENVTL. L. REV. 457, 506 (1997) (explaining that the House Committee on Rules "often does waive or suspend rules" when addressing appropriations bills).

members do not do so, perhaps because they support the bill's substance or sense enough support to override a point of order, then the offending language remains.[110] Members may also fail to object to relatively minor provisions.[111]

In addition to the typical procedures available to waive legislative rules discussed above,[112] the House frequently creates a "special rule" for appropriations bills, which effectively allows such bills to avoid points of order under House Rule XXI.[113] Congress also often enacts continuing resolutions, rather than appropriations bills, which temporarily fund the government. Because these resolutions are not considered general appropriations bills, they are not subject to the rules forbidding authorization on appropriations.[114] In fact, this may partially account for the increasing use of continuing resolutions as the means to fund the government.[115]

Congress sometimes slips authorizations into omnibus appropriations. Traditionally, the appropriation bills were passed in thirteen separate measures. Omnibus bills bundle two or more of these bills. Like continuing resolutions, they fund a vast array of government programs and activities, but they are subject to House Rule XXI and Senate Rule XVI since they are considered general appropriations bills.[116] That being said, Congress often legislates in such bills, avoiding points of order since these are typically "must pass" measures politically speaking.[117]

These numerous paths by which each house may circumvent the prohibition on legislating in appropriations bills call into question whether courts should rely on these rules in the interpretive process. One option would be for a court, like the one in *Roe v. Casey*, to search the legislative record to see if Congress has waived the rules. But even this would not be sufficient. Since the rules are not self-enforcing, they are inherently politicized. Not following them may simply reflect support for the underlying legislation.

Returning to arguments in favor of using the rules in interpretation, Professor Nourse contends that courts who fail to see the influence of the rules upon the bill's text and structure are likely to misunderstand the

110. Mark Champoux & Dan Sullivan, *Authorizations and Appropriations: A Distinction Without a Difference?* 17 (Harvard Law Sch. Fed. Budget Policy Seminar, Briefing Paper No. 15, 2006), http://www.law.harvard.edu/faculty/hjackson/auth_appro_15.pdf [https://perma.cc/8L4V-ZMLP].

111. *Id.*

112. *See supra* notes 80–85 and accompanying text.

113. WILLIAM HOLMES BROWN & CHARLES W. JOHNSON, HOUSE PRACTICE: A GUIDE TO THE RULES, PRECEDENTS, AND PROCEDURES OF THE HOUSE 857, 868 (2003).

114. Champoux & Sullivan, *supra* note 110, at 17–18.

115. *Id.* at 18.

116. *See id.* at 18–19 (explaining that omnibus acts differ from continuing resolutions "because they are considered general appropriations bills").

117. *Id.* at 19.

legislation.[118] She specifically references *TVA v. Hill* for support of her view.[119] As discussed above, the *TVA v. Hill* Court relied on legislative rules to argue that the appropriations could not have been for a project that violated the Act since Congress lacked the power to amend law via appropriations.[120] Despite this notable occurrence of judicial invocation of legislative rules, which would seem to support Nourse's agenda, she takes a different approach than the Court.

Under Nourse's view, the relevant rules prevent an authorizing committee from amending the bill with language contrary to the appropriations, which means that "appropriations trump authorizations."[121] Nourse contends that Congress could not have amended the appropriations bill to make clear its intent to override the Act since doing so would have violated the rules. Thus, the Court's application of the judicial canon against "repeal by implication" was inappropriate.[122] In her view, there was a repeal by implication precisely because Congress could not have explicitly repealed the relevant language in the Endangered Species Act even if it wanted to.[123] This understanding, however, overlooks the various methods in which Congress *can* circumvent its own rules.

The contradictory positions of the Court and Nourse also nicely illustrate another problem with relying on the rules in the interpretive endeavor. Even if we can prove Congress followed a rule precisely, it is difficult to ascribe a single meaning to that. The *TVA v. Hill* Court assumed Congress followed the rule against legislating in appropriations bills and came to the conclusion that Congress did not repeal the relevant part of the Endangered Species Act through the appropriation for the dam.[124] Nourse assumed the same yet concluded that Congress *did* effectuate the repeal. The quandary created by the rules gets the interpreter nowhere in this instance. It is equally plausible that Congress followed the rules by avoiding a repeal altogether and that it followed the rules by enacting a repeal by implication. It is also equally plausible that Congress meant to not follow the rules at all.

b. The Prohibition Against Inserting New Matter at Conference.—Turning to another legislative rule, before a bill becomes law, the House and Senate

118. Nourse, *supra* note 1, at 128–29.
119. *Id.* at 130.
120. *See supra* notes 100–03 and accompanying text.
121. Nourse, *supra* note 1, at 131.
122. *Id.* at 133.
123. *Id.*
124. TVA v. Hill, 437 U.S. 153, 189 (1978).

must pass the exact same measure with identical text.[125] Legislative differences between the two houses must thus be sorted out. One means to do so is the conference committee whereby several representatives from each house attempt to iron out the differences between the two positions in a conference bill.[126] Typically, this method is used for major bills.[127]

In theory, the rules of each house significantly restrict the scope of the conference. In practice, conferees have developed tactics to avoid such strictures. Senate Rule XXVIII(3) prevents conferees from "insert[ing] in their report matter not committed to them by either House" and from "strik[ing] from the bill matter agreed to by both Houses."[128] In other words, the conference bill must only resolve differences between the House and Senate bills and cannot remove language that is the same in both bills. Doing so subjects the report to a point of order, which can be waived by three-fifths of the Senate.[129] House Rule XXII(9) has similar requirements for conference bills. Under this rule, conferees may only consider a "germane modification of the matter in disagreement," which does not include "language presenting specific additional matter not committed to the conference committee by either House."[130] As in the Senate, nongermane matters are enforced by points of order.[131]

This limitation on conferees is not as simple to interpret as it may seem. The conferees are limited to addressing the scope of differences between the House and Senate bills on a particular matter. The scope of differences includes the House position, the Senate position, and somewhere in between the two positions.[132] The range of permissible options may be easy to ascertain when the differences are quantitative.[133] For instance, if the House proposed a corporate tax rate of 20% and the Senate proposed 28%, then the permissible scope would be 20–28%. Anything higher or lower than that range would be nongermane.

If, on the other hand, the differences are more qualitative, then the permissible range may be far less easy to entertain, thus making enforcement

125. ELIZABETH RYBICKI, CONG. RESEARCH SERV., 98-696, RESOLVING LEGISLATIVE DIFFERENCES IN CONGRESS: CONFERENCE COMMITTEES AND AMENDMENTS BETWEEN THE HOUSES 1 (2019).

126. *Id.* at 4. The other method is to reconcile the two versions through amendments between the houses. *Id.*

127. *Id.*

128. STANDING RULES OF THE SENATE, S. DOC. NO. 113-18, r. XXVIII(3), at 40 (2013).

129. *Id.* r. XXVIII(5)–(6), at 40–41.

130. CONSTITUTION, JEFFERSON'S MANUAL, AND RULES OF THE HOUSE OF REPRESENTATIVES, H.R. DOC. NO. 115-177, r. XXII(9), at 944 (2019).

131. *Id.* r. XXII(10), at 948.

132. RYBICKI, *supra* note 125, at 15.

133. *Id.*

of the rule difficult.[134] An example may help illustrate the conundrum. Under current federal income tax law, there is a top 21% rate on corporations and a top 20% rate on most dividends received from corporations. This structure is referred to as the "corporate double tax." Suppose, for instance, the House passed a bill that eliminated the double taxation on corporate income (a reform referred to by tax experts as "corporate tax integration"[135]) by excluding dividend income in the hands of shareholders but also raised the corporate rate to 23%. The Senate bill, on the other hand, keeps the corporate double tax rate structure as is, including the corporate rate of 21%.

Would a conference agreement proposing an *increase* in the corporate rate from the current rate of 21% be considered nongermane? Perhaps, since the House bill's plan to integrate the corporate tax could be seen as an overall reduction in the corporate double tax. On the other hand, just taking the corporate tax rate in isolation, the permissible range for conferees to consider could be 21–23%. The difference in kind between the two proposals complicates the germaneness inquiry. Accordingly, we can expect some slippage between the letter of the rules and how they are followed.

A primary way in which the restrictions on conferees are circumvented is when the second chamber passes an amendment in the nature of a substitute. Such an amendment replaces the entire text of the bill passed by the first chamber.[136] In such cases, the second chamber submits only one amendment to conference, even though the substitute bill could encompass many differences between the House and Senate versions. This makes it very difficult to identify the point of disagreement and the scope of the differences.[137] In such cases, the entire text of the bill is in play and policy differences may be acute.[138] This may mean that a conference substitute emerges that deviates from either approach. Although the rules intend to prevent this, assessing whether matter is "new" is often impractical.[139]

In general, points of order are rarely made against conference reports.[140] In the House, a two-thirds vote can suspend the rules, thus barring points of order, or a simple majority in the House can approve a special rule waiving points of order against a conference report.[141] If a member senses that waiver may be readily achieved, she may not bother making a point of order.

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134. *Id.*

135. *See, e.g.*, JANE C. GRAVELLE, CONG. RESEARCH SERV., R44638, CORPORATE TAX INTEGRATION AND TAX REFORM 1 (2016) (referring to corporate tax integration as the "elimination or reduction of additional taxes" arising from "corporate income['s being] taxed twice").

136. RYBICKI, *supra* note 125, at 15.

137. *Id.* at 16.

138. *Id.*

139. *Id.*

140. *Id.*

141. *Id.*

The threshold for waiver in the Senate is higher, requiring sixty votes, but the Senate has historically interpreted the conference rule generously. According to *Riddick's Senate Procedure*, a conference report must simply avoid new "matter entirely irrelevant to the subject matter" in the prior bills.[142] The latitude is even greater with conference substitutes, which face "little limitation on their discretion, except as to germaneness,"[143] a requirement that has been interpreted in a "commonsense" manner.[144]

With all of this in mind, let us explore the risks of relying upon the conference rule in the interpretive process, which the Court has done on at least one occasion. In *Union Electric Co. v. EPA*,[145] the Court addressed the question of whether an operator of an electric company could raise the claim that it was infeasible to comply with a state implementation plan under the Clean Air Act.[146] The Court relied on the fact that both House and Senate bills contained language expressly providing that the states could submit plans that were stricter than the national standards.[147] The Conference Committee had deleted this language. But rather than taking that deletion to mean that the conferees intended to prohibit the states' submission of stricter plans, the Court invoked the Senate and House rules to conclude that the deleted language was just superfluous. Since the conferees had no authority to change the agreed upon language, the remainder of the bill must have already reached the result of the deleted language.[148] Troublingly, the Court's reasoning overlooked the possibility that lawmakers chose not to follow the rules and instead decided to change course as a policy matter.

Nourse invokes *Public Citizen v. U.S. Department of Justice*,[149] which addressed whether the American Bar Association (ABA) had to comply with the Federal Advisory Committee Act (FACA), which required that governmental entities "established or utilized" by the President meet certain procedural requirements.[150] The majority concluded that the ABA did not have to do so, arguing that if "utilize" took on its ordinary meaning of "use," almost everyone who met with the President would be subject to the FACA

142. FLOYD M. RIDDICK & ALAN S. FRUMIN, RIDDICK'S SENATE PROCEDURE: PRECEDENTS AND PRACTICES, S. DOC. NO. 101–28, at 484 (Alan S. Frumin ed., 1992).

143. *Id.* at 463.

144. RYBICKI, *supra* note 125, at 17.

145. 427 U.S. 246 (1976).

146. *Id.* at 249.

147. *Id* at 262.

148. *See id.* at 262–63 (reasoning that the Conference Report's silence "offers no suggestion that the Conference bill" intended to prohibit stricter plans).

149. 491 U.S. 440 (1989).

150. Nourse, *supra* note 1, at 92–97; *see also* Pub. Citizen v. U.S. Dep't of Justice, 491 U.S. 440, 443 (1989) (questioning whether FACA applies to the ABA's advice regarding potential nominees for federal judgeships).

requirements, leading to absurd results.[151] Instead, the majority, in a somewhat tortured fashion, interpreted "utilized" to mean "established."[152]

Nourse carefully examines legislative history to show that, in light of congressional rules, "utilize" indeed is best read in the technical sense to mean "established." In *Public Citizen*, the Senate bill covered entities "established or organized" by the President and the House bill used the term "established."[153] According to Nourse, since "[*c*]*onference committees cannot—repeat, cannot—change the text of a bill where both houses have agreed to the same language*," the term that was inserted at conference—"utilize"—should be read to conform to the language in the underlying bills.[154] In this case, utilize should be read to mean "established." Reliance on the rules, according to Nourse, reaches the same result as the *Public Citizen* majority, but in a straightforward manner that avoids the controversial absurd-results canon.[155]

But is it so simple? Although both bills used the same "established" verbiage, the bills contained other differences in their definitions of advisory committees. The House definition of "advisory committees" applied to entities that were:

> established or organized under a statute, an Executive order, or by other means, to advise and make recommendations to an officer or agency of the executive branch of the Federal Government or to the Congress, or both, but such term excludes standing or special committees of the Congress, any local civic group whose primary function is that of rendering a public service in relation to a Federal program, as well as any State or local committee, council, board, commission, or similar group established to advise or make recommendations to State or local officials or agencies.[156]

The Senate definition, in contrast, created two separate subcategories of "advisory committees," first defining "agency advisory committees" as entities that were:

> established or organized under any statute or by the President or any officer of the Government for the purpose of furnishing advice, recommendations, or information to any officer or agency, or to any such officer or agency and to the Congress, and which is not composed wholly of officers or employees of the Government.[157]

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151. *Pub. Citizen*, 491 U.S. at 452–53.

152. *Id.* at 462–63.

153. *Id.* at 459, 461.

154. Nourse, *supra* note 1, at 94–95.

155. *Id.* at 96–97.

156. Federal Advisory Committee Standards Act, H.R. 4383, 92d Cong.§ 3(2) (as introduced in House, Feb. 17, 1971).

157. Federal Advisory Committee Act, S. 3529, 92d Cong. § 3(1) (1972).

The Senate definition also applied to "presidential advisory committees" that were "established or organized under any statute or by the President for the purpose of furnishing advice, recommendations, or information to the President or the Vice President, or to the President or the Vice President and the Congress, and which is not composed wholly of officers or employees of the Government."[158]

There are several things to note here. For one, although the Senate and House bills contained the same "established" language, the definitions more generally were divergent. Under the conference rules, the houses cannot consider new matters or matters on which they agree. Since the definitions themselves differed, they would have been up for grabs in the conference. This is because the relevant rules do not apply to words or phrases, but to "matters."[159] Generally, this rule is applied on a provision-by-provision basis.[160]

Furthermore, as the *Public Citizen* Court noted, the Senate bill was an amendment by substitute that struck out the entire text of the House bill.[161] As a substitute version, it would have conferred on the conferees "wider latitude or wider scope for compromise in dealing with the matters in dispute,"[162] than in the case of amendments to various sections. The conferees would have had discretion to make modifications so long as these were germane to the underlying bills.[163] Although the conference report cannot introduce new matter, germaneness has been liberally interpreted in the case of substitute bills.[164]

But even if the definition of "advisory committees" was not in dispute, can we be confident that the legislative rules sufficiently cabined Congress such that the enacted "utilized" language had to have been construed as the agreed upon "established" language? Certainly not if the houses had waived the rules, as is often the case in the House at least.[165] And in the Senate, precedents have bestowed "considerable latitude" on conferees.[166] Intuiting where precisely such latitude ends would be difficult for a court to do. To

158. *Id.*

159. *See* ELIZABETH RYBICKI, CONG. RESEARCH SERV., RS22733, SENATE RULES RESTRICTING THE CONTENT OF CONFERENCE REPORTS 1 (2017), https://fas.org/sgp/crs/misc/RS22733.pdf [https://perma.cc/HYU9-UYZZ] (describing the Senate's practice of allowing inclusion of new matter so long as it is "reasonably related to the matter sent to conference").

160. *See* STANDING RULES OF THE SENATE, S. DOC. NO. 113-18, r. XXVIII, at 40 (2013) (allowing senators to raise points of order against "provisions" of a conference report).

161. Pub. Citizen v. U.S. Dep't of Justice, 491 U.S. 440, 461–62 (1989).

162. RIDDICK'S SENATE PROCEDURE: PRECEDENTS AND PRACTICES, S. DOC. NO. 101-28, at 463 (1992).

163. *Id.*

164. *Id.*

165. RYBICKI, *supra* note 125, at 1.

166. *Id.*

complicate matters further, even if there is no evidence of waiver, senators and representatives may simply have chosen not to raise a scope point of order.

One could make an argument that courts must assume that members of Congress are "faithful agents" who follow the rules.[167] Even where the rules are evaded, for instance by inserting material at conference that was out of scope, a member voting on the material would assume the rules are followed and that the addition was immaterial. Thus, the general force of the rules still stands.[168]

It is unclear that members would necessarily assume the rules were being followed. Given the endogenous and politicized nature of legislative rules, an agent may fully grasp the reality that the rules are often broken, sometimes egregiously so, while still being "faithful" to the congressional enterprise. In other words, faithful adherence to the congressional enterprise does not require faithful adherence to the rules since the rules are meant to flexibly accommodate the political desires of the members.

Thus, a lawmaker who sees that "utilize" has been added to the conference report in *Public Citizen* may have simply assumed that conferees had taken latitude with the rules rather than that its meaning had not changed. She may have decided that a point of order was unwarranted given her agreement with the bill's substance. Pretending that a member assumes rule compliance thereby erodes the self-executing nature of the rules, which presents separation of powers concerns as discussed below.[169]

B. The Budget Process

In addition to general legislative rules, the budget process prescribes intricate procedures for the houses through both statutory and internal rules. The basic scaffolding for the budget process is the Congressional Budget Act of 1974, which prescribes the development of Congress's budget plan through the budget resolution.[170] The overarching goal of the process is to determine how much money Congress can spend each year, its spending priorities, and how those priorities can be funded.[171] The budget process has become of increasing importance due to (1) the reconciliation process, which circumvents the filibuster, and (2) PAYGO rules, which require deficit neutrality of new legislation. The following Section discusses possible

167. Nourse, *supra* note 1, at 95 n.100.

168. *Id.* at 92 n.86.

169. *See infra* notes 262–93 and accompanying text.

170. Congressional Budget and Impoundment Control Act of 1974, Pub. L. No. 93-344, 88 Stat. 297 (1974).

171. CTR. ON BUDGET & POLICY PRIORITIES, POLICY BASICS: INTRODUCTION TO THE FEDERAL BUDGET PROCESS (2019), https://www.cbpp.org/research/policy-basics-introduction-to-the-federal-budget-process [https://perma.cc/327L-FFF3].

methods by which courts could look to the budget process in statutory interpretation.

1. The Rules of Reconciliation

One challenge posed to interpreters is the increasingly nontraditional manner in which Congress legislates. Rather than following the classic path outlined in the *Schoolhouse Rock* cartoon, Congress deploys what Barbara Sinclair has labeled "unorthodox lawmaking."[172] A notable example of this is the reconciliation process.[173] Reconciliation allows for legislation to pass without threat of filibuster and with limited debate and amendments. Majorities have used this powerful tool to pass major pieces of legislation, like the Tax Cuts and Jobs Act (TCJA) and the Affordable Care Act (ACA). The rushed process sometimes results in less-than-perfect legislation, to put it charitably.

As other scholars have noted, *King v. Burwell*[174] illustrates the Court's possible turn toward recognition of unorthodox lawmaking in its interpretive presumptions.[175] The Court considered the question of whether a sloppily drafted tax provision providing for health insurance subsidies purchased through the "Exchange[s] *established by the State*" included insurance through state *and* federal exchanges or just the former.[176] The IRS had interpreted the Act as providing for tax subsidies not only in relation to state-run exchanges but federal ones as well. At stake was the health insurance of some 6.4 million Americans who purchased insurance through the federal exchanges and who received a subsidy.[177]

The Court ultimately construed the phrase at issue liberally to encompass federal exchanges. In so doing, the Court recognized the streamlined process by which the Act was enacted, reasoning that

172. BARBARA SINCLAIR, UNORTHODOX LAWMAKING: NEW LEGISLATIVE PROCESSES IN THE U.S. CONGRESS (5th ed. 2017).

173. *See, e.g.*, Rebecca Kysar, *Tax Law and the Eroding Budget Process*, 81 LAW & CONTEMP. PROBS. 61, 61 (2018) [hereinafter Kysar, *Taxes*] (describing the reconciliation process in the context of tax reform); Rebecca Kysar, *Reconciling Congress to Tax Reform*, 88 NOTRE DAME L. REV. 2121, 2123 (2013) [hereinafter Kysar, *Reconciling Congress*] (same).

174. 135 S. Ct. 2480 (2015).

175. *See, e.g.*, Gluck et al., *supra* note 35, at 1794 (positing that *King* reflected the new reality that "unorthodoxies are everywhere" in the legislative process).

176. *King*, 135 S. Ct. at 2487.

177. Lena H. Sun, *6.4 Million Americans Could Lose Obamacare Subsidies, Federal Data Showed*, WASH. POST (June 2, 2015), https://www.washingtonpost.com/national/health-science/64-million-americans-could-lose-obamacare-subsidies-federal-data-show/2015/06/02/fe0c87be-095a-11e5-95fd-d580f1c5d44e_story.html [https://perma.cc/CX4Q-4MLX].

reconciliation took away "care and deliberation that one might expect of such significant legislation" resulting in "inartful drafting."[178]

This case reflects an important willingness by the Court to adapt its interpretive rules based on congressional process. The Court could have easily embraced a purposive approach in interpreting the Affordable Care Act, reasoning that limiting insurance subsidies to state-run exchanges was perhaps within the letter of the statute but not its spirit.[179] It would have done so, however, by flouting the text of the statute. By instead grounding its reasoning in process, the Court privileges the text, albeit through unconventional interpretations of it.[180]

Courts may run into trouble, however, if they try to apply the rules of the reconciliation process on a more granular level. After senators began adding unrelated amendments to reconciliation bills in the 1980s, concern arose over how the process was being abused. West Virginia Senator Robert Byrd secured a safeguard, called the "Byrd Rule," that prevents the Senate from considering a reconciliation bill with certain forbidden provisions.[181] Originally codified in 1985, the Byrd Rule has since been expanded and revised.[182] The Byrd Rule now allows a Senator to raise a point of order if reconciliation legislation includes a provision that is "extraneous." A provision is "extraneous" if it:

> (A) does not produce a change in outlays or revenues;
>
> (B) produces an increase in outlays or decrease in revenues that does not follow the reconciliation instructions in the budget resolution;
>
> (C) is not in the jurisdiction of the committee that reported the provision;
>
> (D) produces changes in outlays or revenues that are merely incidental to the nonbudgetary components of the provision;
>
> (E) increases the deficit in any fiscal year after the period specified in the budget resolution (i.e., the "budget window"); or
>
> (F) recommends changes to Social Security.[183]

178. *King*, 135 S. Ct at 2492 (citations omitted).

179. Barrett, *supra* note 2, at 2199.

180. *Id.*

181. ROBERT KEITH, CONG. RESEARCH SERV., THE BUDGET RECONCILIATION PROCESS: THE SENATE'S "BYRD RULE" 1 (2009), https://budgetcounsel.files.wordpress.com/2016/11/crs-the-budget-reconciliation-process-the-senate_s-e2809cbyrd-rulee2809d-bob-keith-rl30862-july-8-2009.pdf [https://perma.cc/Z6XR-BLF4].

182. Consolidated Omnibus Budget Reconciliation Act of 1985, Pub. L. No. 99-272, § 20001, 100 Stat. 82, 390–91 (1986); Kysar, *Reconciling Congress*, *supra* note 173, at 2131–32.

183. *See* 2 U.S.C. § 644(b)(1) (2018) (providing these requirements).

Like other legislative rules, the Byrd Rule is not self-executing.[184] A senator has to first challenge a provision on the grounds that it is extraneous. The Presiding Officer of the Senate then decides whether to sustain or overrule the point of order.[185] If sustained, unless sixty senators vote to waive the Byrd Rule or override the Presiding Officer, the offending provision must be excised from the bill.[186] Sixty senators can also overcome the Presiding Officer's rejection of a point of order.[187]

In order to determine whether or not a provision is extraneous, the Presiding Officer consults with the Senate Budget Committee Chair or the Senate Parliamentarian.[188] The Senate Budget Committee Chair consults on challenges under subparagraphs (B) and (E) of the Byrd Rule and the Parliamentarian on the rest.[189] The Senate Budget Committee Chair uses Joint Committee on Taxation (JCT) and CBO estimates in making decisions under (B) and (E).[190] Thus, their estimates are crucial to passing these types of Byrd Rule challenges.

In *Association of Accredited Cosmetology Schools v. Alexander*,[191] a D.C. district court construed a statute that was passed through the reconciliation process so that it complied with subsection (A) of the Byrd Rule.[192] The D.C. district court was considering the meaning of a statute that affected the plaintiff school's eligibility to participate in federal student aid programs. The statute excluded institutions with a "cohort default rate" equal or greater to a threshold percentage, which was 35% for 1991 and 1992 and 30% for any subsequent year.[193] The plaintiffs argued that the threshold percentages should be determined in the year the defaults occurred, while the government argued that they applied to the year in which the determinations of ineligibility were made.[194]

The court sided with the government, in part, because its interpretation was "most compatible with the underlying congressional purpose."[195] The court rejected the plaintiff's reading of the statute because it would have

184. Ellen P. Aprill & Daniel J. Hemel, *The Tax Legislative Process: A Byrd's Eye View*, 81 LAW & CONTEMP. PROBS. 99, 105 (2018).

185. 2 U.S.C. § 644(e) (2018).

186. KEITH, *supra* note 181, at 4.

187. *Id.*

188. Aprill & Hemel, *supra* note 184, at 105.

189. *Id.* at 106.

190. *Id.* at 105.

191. 774 F. Supp. 655 (D.D.C. 1991).

192. *Id.* at 659.

193. *Id.* at 658.

194. *Id.* at 658–59.

195. *Id.* at 659.

meant that the bill did not impact the budget in 1991. This would have subjected the bill to a point of order under the Byrd Rule.[196]

The flaw in the district court's reasoning is that senators often do not raise points of order during reconciliation.[197] Moreover, the Parliamentarian's rulings in this area are often nontransparent, inconsistent, and often reflect a judgment call that is not easily replicated by a court.[198] The ability of a judge to even discern Byrd Rule violations in the first place is questionable.

Consider a precedent from the 107th Congress. Senate Parliamentarian Robert Dove ruled that a measure setting aside $5 billion for natural disasters did not comply with the Byrd Rule since there would be no impact on revenues or outlays in the case of no natural disasters.[199] The ruling was heavily publicized because it prompted Senate Majority Leader Trent Lott to fire Dove.[200] Most of the time, however, the Parliamentarian's rulings on the subject are not public. Instead, the Parliamentarian rules on Byrd Rule violations behind closed doors.[201] Only when senators or staffers disclose what transpired are we privy to how the Parliamentarian ruled and on what grounds.[202]

If a court were to try to apply the Byrd Rule on its own, it would thus be able to draw upon only a very narrow slice of the Parliamentarian's rulings, which can prove challenging since the Byrd Rule is not always easy to apply. Take, for instance, the above example. Yes, it is true that, if there are no natural disasters, the $5 billion set-aside would not have impacted revenues or outlays. But from a risk-adjusted perspective, surely there would have been the expectation that the set-aside would have been drawn down

196. *Id.* (citing H.R. REP. NO. 101-881, at 61 (1990)).

197. *See, e.g.*, George K. Yin, *How the Byrd Rule Might Have Killed the 2017 Tax Bill . . . and Why It Didn't*, A.B.A. TAX TIMES, Aug. 2018, at 16, 20, https://www.americanbar.org/groups/taxation/publications/abataxtimes_home/18aug/18aug-pp-yin-how-the-byrd-rule-might-have-killed-the-2017-tax-bill/ [https://perma.cc/RH88-4V9U] ("If the reconciliation process is now to be used principally to enable thin majorities in Congress to pass important legislative priorities . . . it is not likely that a senior member of such a majority . . . will thwart that goal by requiring strict compliance with the Byrd rule.").

198. *See* Aprill & Hemel, *supra* note 184, at 107–08 (detailing the lack of transparency in rulings by the Senate Parliamentarian).

199. *See* ALLEN SCHICK, THE FEDERAL BUDGET: POLITICS, POLICY, PROCESS 148–49 (3d ed. 2007) (explaining Senate Parliamentarian Dove's pivotal role in reconciliation disputes during the Bush Administration); David E. Rosenbaum, *Rules Keeper Is Dismissed by Senate, Official Says*, N.Y. TIMES (May 8, 2001), https://www.nytimes.com/2001/05/08/us/rules-keeper-is-dismissed-by-senate-official-says.html [https://perma.cc/AJ8F-URV4] (noting the $5 billion disaster-relief provision at issue).

200. Rosenbaum, *supra* note 199.

201. Aprill & Hemel, *supra* note 184, at 107.

202. *Id.* at 134.

somewhat. The ruling therefore reflected the idiosyncratic judgement of Robert Dove.

A similar issue arose in the context of the TCJA. Senator Bob Corker of Tennessee had predicated his support for the bill on the addition of a "trigger" mechanism that would have reversed some of the bill's tax cuts if revenues fell below projections at a future date.[203] Reportedly, the Parliamentarian ruled that the provision violated the Byrd rule.[204] The rationale of the Parliamentarian is unknown, but the most likely explanation is that the trigger did not "produce a change in outlays or revenues."[205] This is again a bit odd. The JCT listed the trigger as having a "negligible" effect on revenues, although it is unclear whether this means there were no costs or whether JCT was instead following CBO policy of not estimating budget costs or savings from measures targeting overall spending and revenues.[206]

Taking into account the expected value of the trigger, meaning both upside and downside risks, however, would have clearly cost the government revenues. A reasonable person could have decided the question very differently. Moreover, triggers have made their way into prior reconciliation bills. Expecting a judge to make such calls on how the Byrd Rule would have been interpreted by a Parliamentarian is problematic given the nontransparency of such prior rulings.

Muddying the picture further, the precedence of former rulings may not be given much weight. Even where the Parliamentarian's rulings are available, they often conflict. Under subparagraph (D) of the Byrd Rule, the provisions cannot produce changes in outlays or revenues that are "merely incidental to the non-budgetary components of the provision."[207] During consideration of the TCJA, the Parliamentarian aggressively applied this provision to remove several provisions from the bill, including:

> A provision that would have required foreign airlines to pay corporate tax on some of their profits, producing $200 million in revenues;
>
> A provision that would have allowed taxpayers to set up college savings plans for children who were not yet born but in utero, costing $100 million in revenues;

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203. Ryan McCrimmon & Joe Williams, *GOP Searching for New Tax Tweak After Senate Parliamentarian Guidance*, ROLL CALL (Nov. 30, 2017), https://www.rollcall.com/news/policy/tax-increase-trigger-would-violate-rules-perdue-says [https://perma.cc/4G2H-RVKM].

204. *Id.*

205. *See* 2 U.S.C. § 644(b)(1)(A) (2018) (considering provisions in reconciliation bills "extraneous" if they do "not produce a change in outlays or revenues").

206. David Kamin, *The Senate's Revenue-Trigger Giveaway to Businesses*, MEDIUM (Nov. 20, 2017), https://medium.com/whatever-source-derived/the-senates-revenue-trigger-giveaway-to-businesses-97b73a624ec1 [https://perma.cc/53G7-XEPA].

207. 2 U.S.C. § 644(B)(1)(D) (2018).

> A provision that would have taken away the tax-exempt status of professional sports leagues, producing $100 million in revenues;
>
> A provision that spared certain private foundations from an excise tax on for-profit companies they own, aimed at benefitting Newman's Own and costing less than $50 million in revenues.[208]

The Parliamentarian even ruled against a TCJA provision that would have permitted charities to engage in political activities, costing $2.1 *billion* in revenues.[209] Contrast these provisions with earlier precedents that allowed a vaccine price provision even though CBO could not determine its score or an imported tobacco provision that netted only $6 million in revenues over five years.[210]

One could reconcile these decisions by making the determination that the TCJA provisions had a strong moral or policy component that overwhelmed any revenue coming in or out and the earlier provisions did not, but this is an inherently subjective determination that is impossible for a court to replicate. Further complicating matters, the Parliamentarian has recently started applying the Byrd Rule on a word-by-word and sentence-by-sentence basis, rather than the per-provision approach that was embraced by prior precedents and the statutory language of the Byrd Rule itself. This decision also produces unpredictable results.[211]

Even within the TCJA context, however, the Parliamentarian's rulings are difficult to reconcile. She allowed, for instance, a provision expanding oil drilling in Alaska that would have raised only $910 million. According to scientists, its negative impact on wildlife most likely dwarfed the revenues gained from the provision, and somehow it still made it into the final bill.[212] Stranger still was the Parliamentarian's decision to axe the short name of the bill, the Tax Cuts and Jobs Act, allegedly because it had "no budgetary impact."[213] This departed radically from an earlier Parliamentarian's view, who reasoned that the Byrd Rule "does not cover trifling matters."[214]

In short, interpreting legislation to comport with the Byrd Rule has obvious shortcomings. Many times, the Parliamentarian's rationales are not available, and predicting how they would have turned out is difficult given the conflicting precedents that do exist. Additionally, the particular provision at issue could have garnered sufficient support on its substance such that it avoided points of order altogether, notwithstanding a technical violation. On

208. Aprill & Hemel, *supra* note 184, at 121.
209. *Id.* at 123–24.
210. *Id.* at 122.
211. *Id.* at 124.
212. *Id.* at 125.
213. *Id.*
214. *Id.*

the other hand, the rules of reconciliation *can* tell the interpreter something about the legislative process that is helpful to the interpretation. The rules impart the information that Congress is operating with speed rather than deliberation. They need not be followed precisely in order to convey that to the interpreter.

2. CBO/JCT Scores

a. Black-Box Modeling.—Process-based theorists have recognized the rising importance of the budget process in lawmaking and have called upon courts to take this into account in the interpretive process. Professors Gluck and Bressman have advocated for the use of a CBO canon, which directs judges to interpret statutes so that they comport with the underlying assumptions of the official CBO estimates of the legislation in question.[215] Clint Wallace has extended this recommendation to the tax context, which utilizes estimates from the JCT.[216]

Predating this scholarly work, courts have sporadically relied upon CBO estimates in interpreting statutes. For instance, in 1982, the U.S. District Court for the District of Columbia held that a statute applied retroactively because the CBO estimates assumed as much.[217] In another case, the Seventh Circuit also decided a question of retroactivity utilizing CBO estimates.[218] Other courts have relied on other work product from CBO.[219]

Some courts have declined to rely upon CBO estimates. In a 2005 case, the Seventh Circuit interpreted whether the term "governmental entity" in the

215. Bressman & Gluck II, *supra* note 1, at 780; *see also* Gluck, *supra* note 1, at 182 (defining the CBO canon by these terms).

216. Clinton G. Wallace, *Congressional Control of Tax Rulemaking*, 71 TAX L. REV. 179, 181–82 (2017). Residing in the legislative branch, the CBO is a federal agency created by the Congressional Budget Act of 1974 that provides budget and economic information to Congress. CONG. BUDGET OFFICE, *An Introduction to the Congressional Budget Office* (May 2019), https://cbo.gov/system/files/2019-05/2019-IntroToCBO.pdf [https://perma.cc/FY4S-6NUT]. The JCT is a nonpartisan committee in Congress that has been providing expertise, including revenue estimates, on tax-related legislation since 1926. JOINT COMMITTEE ON TAX'N, *Overview*, https://jct.gov/about-us/overview.html [https://perma.cc/KQ8T-33QU].

217. Nunes–Correia v. Haig, 543 F. Supp 812, 815–16 (D.D.C. 1982).

218. Berman v. Schweiker, 713 F.2d 1290, 1298–99 (7th Cir. 1983); *see also* ABKCO Music, Inc. v. LaVere, 217 F.3d 684, 690 (9th Cir. 2000) (relying on CBO analysis that the bill in question had no fiscal impact in ruling that a phonorecord was not a copy for purposes of the Copyright Act); Gay v. Sullivan, 966 F.2d 1124, 1129 (7th Cir. 1992) (stating that CBO estimates are "persuasive evidence" of congressional intent); Hendricks v. Bowen, 847 F.2d 1255, 1259 (7th Cir. 1988) (reasoning that the lack of CBO consideration to attorney fee costs indicates that the government was not required to pay attorney fees).

219. King v. Burwell, 759 F.3d 358, 374 (4th Cir. 2014) (relying on CBO report in interpreting the ACA); Heckler v. Turner, 470 U.S. 184, 206 (1985) ("[W]e hesitate to tell Congress that it might have achieved its budgetary objectives by less than the full range of changes it chose to utilize, particularly when the information provided Congress by its own Budget Office, on which it presumably relied, belies that conclusion.").

Electronic Communications Privacy Act required state, as well as federal, governments, to pay for information they sought from phone companies.[220] In so doing, they rejected a CBO opinion that the law would not impose new costs on states, reasoning that CBO's view "on which Congress did not vote, and the President did not sign" could have been in error.[221] That case was later cited by a district court in Ohio, which rejected a CBO report in construing the scope of the ACA since the "CBO does not and cannot authoritatively interpret federal statutes."[222]

The democratic concerns underlying the Seventh Circuit's opinion should certainly give us pause, but if the scores are salient to Congress, which they undoubtedly are in many contexts, does this not at least somewhat alleviate the concern? Ultimately, if democratically elected members heavily rely upon CBO and JCT materials, then we should view those materials as incorporated into the democratic process.

The CBO and JCT estimates are attractive for reasons similar to the rules of reconciliation, in that they can impart general information to the interpreter even when the budget rules that inspire them are not being precisely followed. *That is, the estimates matter even when Congress takes liberty with the rules.*

Before we get to this, however, we must first answer a practical question. Are CBO estimates typically helpful to the interpreter? Many times, they are not. For instance, after a rushed legislative process, Congress enacted the TCJA, one of the largest overhauls to our tax system. The lack of deliberation contributed to the legislation being riddled with errors. One such example ended up being very costly to certain taxpayers. The omission of four words from the statute meant that retailers and restaurants could not take advantage of a provision that would have allowed them to immediately expense renovation costs, instead requiring them to depreciate the costs even more slowly than was granted under prior law.[223]

To illustrate, assume that a Dunkin' franchise owner invests $1000 in a new donut-making machine. Under old law, a business owner would have gotten a deduction of $844. As intended, the new tax law would have allowed the owner to deduct the full $1000. As written, however, the new law allows a deduction of only $421. Since any technical corrections bill seems like an

220. Ameritech Corp. v. McCann, 403 F.3d 908, 912 (7th Cir. 2005).

221. *Id.* at 913.

222. Ohio v. United States, 154 F. Supp. 3d 621, 642 (S.D. Ohio 2016).

223. Richard Rubin, *Four Words Missing in the New Tax Law Give Restaurants Heartburn*, WALL ST. J. (July 10, 2018), https://www.wsj.com/articles/four-words-missing-in-the-new-tax-law-give-restaurants-heartburn-1531215000 [https://perma.cc/A2UC-NTJQ].

impossible feat in a sharply divided Congress, judges are left to resolve this conundrum—labeled as the "retail glitch"—in the interim.[224]

What would the JCT score of the TCJA tell us about whether Dunkin' can deduct the costs of the donut-making machine? Not much, it turns out. This is because the relevant line item in the revenue estimate, like most such line items, does not unpack the assumptions that the JCT made in the scoring process. Instead, the JCT revenue estimates simply enumerate the cost of the relevant expensing provisions as applied to all taxpayers, as can be seen in Figure 1.

Figure 1: Expensing Provision Revenue Estimate in TCJA[225]

Year	2018	2019	2020	2021	2022	2023	2024	2025	2026	2027	2018–2022	2018–2027
Extension, expansion, and phase down of bonus depreciation	–32.5	–36.5	–24.6	–14.2	–11.6	–4.9	3.3	8.4	12.5	13.7	–119.4	–86.3

From this, we can discern only that the expensing provision in question will cost $86 billion over the ten-year budget window. There is no public breakdown of what the provision costs on a sectorial basis, so we have no insight as to whether JCT assumed the provision encompasses retailers and restaurants.

In many cases then, the CBO and JCT canons do little, if any, work. If, however, a judge wanted to try to understand JCT's assumptions about the retail glitch, some contextual clues could assist in arriving there. For one, the conference report for the TCJA reflected that congressional intent was to give Dunkin' and similar retailers and restaurants their deduction.[226] A judge could assume that JCT relied on the conference report in scoring the bill. Second, in scoring a later proposed (but never passed) technical corrections bill that would have fixed the retail glitch, among other errors, JCT concluded the bill had no revenue effect.[227]

This could be taken to mean that JCT originally assumed that the TCJA allowed expensing. All of this, of course, is circumstantial and does not illustrate with any certainty JCT's assumptions. It also presents another

224. Jad Chamseddine, *Republicans Fail to Move Retail Glitch Fix on House Floor*, TAX NOTES (Nov. 21, 2019), https://www.taxnotes.com/tax-notes-federal/legislation-and-lawmaking/republicans-fail-move-retail-glitch-fix-house-floor/2019/11/25/2b51v [https://perma.cc/RM2L-3PMH].

225. JOINT COMMITTEE ON TAX'N, JCX-67-17, ESTIMATED BUDGET EFFECTS OF THE CONFERENCE AGREEMENT FOR H.R. 1, THE 'TAX CUTS AND JOBS ACT' 1, 3 (2017), https://www.jct.gov/publications.html?func=startdown&id=5053 [https://perma.cc/345B-T66Z].

226. H.R. REP. NO. 115-466, at 365–66 (2017) (Conf. Rep.).

227. JOINT COMMITTEE ON TAX'N, JCX-1-19, TECHNICAL EXPLANATION OF THE HOUSE WAYS AND MEANS COMMITTEE CHAIRMAN'S DISCUSSION DRAFT OF THE "TAX TECHNICAL AND CLERICAL CORRECTIONS ACT" 17 (2019), https://www.jct.gov/publications/2019/jcx-1-19/ [https://perma.cc/Z835-PSD9].

interpretive puzzle. Since JCT appears to follow "congressional intent," even when faced with contradictory text of the bill, isn't this problematic for a textualist?

To be sure, there are instances where the revenue scores can assist the interpreter. Gluck and Bressman developed the CBO canon in the context of the aforementioned *King v. Burwell* challenge to the Affordable Care Act regarding when "Exchange[s] established by the State" included federal exchanges.[228] Like the JCT's scoring of the TCJA, it is not possible to tell from the face of CBO's estimate its assumptions regarding how the agency construed this language. The estimate merely showed a line item that the subsidies amounted to $350 billion in outlays over the ten-year budget window period.

Figure 2: Expensing Provision Revenue Estimate in ACA[229]

Year	2010	2011	2012	2013	2014	2015	2016	2017	2018	2019	2010–2014	2010–2019
Premium and cost sharing subsidies	0	0	0	0	14	32	59	75	82	88	14	350

Later statements by CBO staff, however, aligned with the view that the agency assumed the subsidies were available on both federal *and* state exchanges. In a 2012 letter to House Oversight Chair Darrell Issa (R-CA), the CBO Director confirmed that the agency did not consider the possibility that the subsidies would only be available on state-created exchanges.[230] Some courts used this letter in their interpretation of the scope of the ACA.[231]

In the unique context of the ACA, the CBO made transparent its underlying assumptions. It did so in response to an official request by Representative Issa under Congress's oversight authority. The majority of the time, however, the estimators do not make public their assumptions. In fact, outside of special requests from congressional members or committees, CBO and JCT rules prohibit staff from disclosing the inputs of their models.[232] To the extent the assumptions underlying the scores are opaque, members of

228. *See supra* notes 33–35 and accompanying text.

229. Letter from Douglas W. Elmendorf, Dir. of the Cong. Budget Office, to Nancy Pelosi, Speaker of the U.S. House of Representatives, at tbl.2 (Mar. 20, 2010), http://www.cbo.gov/sites/default/files/cbofiles/ftpdocs/113xx/doc11379/amendreconprop.pdf [https://perma.cc/DY4T-Y8JW].

230. Letter from Douglas W. Elmendorf, Dir. of the Cong. Budget Office, to Rep. Darrell E. Issa, Chairman of the Comm. on Oversight and Gov't Reform, at *1 (Dec. 6, 2012), https://www.cbo.gov/sites/default/files/112th-congress-2011-2012/reports/43752-lettertochairmanissa.pdf [http://perma.cc/AX56-LX4J].

231. Halbig v. Burwell, 758 F.3d 390, 426 (D.D.C. 2014); King v. Sebelius, 997 F. Supp. 2d 415, 431 (E.D. Va. 2014); Halbig v. Sebelius, 27 F. Supp. 3d 1, 24 (D.D.C. 2014).

232. Matt Jensen, *Transparency for Congress's Scorekeepers*, NAT'L AFF. (Winter 2018), https://nationalaffairs.com/publications/detail/transparency-for-congresss-scorekeepers [https://perma.cc/2QEW-6EHF].

Congress will be unable to ascertain what they are, let alone an interpreting court.

The secrecy shrouding the work of CBO and JCT is intentional. The entities do not provide enough details for Congress or other independent experts to replicate or second-guess their analyses, thereby insulating the estimators from politics.[233] The lack of transparency has even inspired legislation that would require the estimators to make their models and data available to legislators and the public.[234]

One could imagine that if courts began deploying the CBO and JCT canons with frequency, congressional members, under the guise of their oversight authority, might then pressure their staff to release their underlying assumptions in hopes of swaying the judicial outcome. This would undermine the ability of the estimators to fend off political pressure, with the benefit of more openness and transparency in the revenue estimating process. These considerations must be carefully balanced. In 2018, however, CBO announced an initiative to increase transparency.[235] These efforts may ultimately provide more useful material to the interpretive process.

In some cases, the line items in the scores may be narrow enough to shed light on the interpretive question. Suppose, for instance, that a taxpayer argued that it was ambiguous whether TCJA repealed the deduction for personal exemptions. Consulting the official revenue estimates of the legislation, we can see that the JCT in fact scored such a repeal, and it was anticipated to add over a trillion dollars in revenue during the budget window period.[236]

Figure 3: Revenue Estimate for Repeal of Personal Exemptions in TCJA[237]

Year	2018	2019	2020	2021	2022	2023	2024	2025	2026	2027	2018–2022	2018–2027
Repeal of deduction for personal exemptions	93.3	137.1	141.6	146.4	151.8	157.6	163.3	169.2	51.3	---	670.1	1,211.5

This would be fairly damning evidence that the JCT did not share the taxpayer's interpretation of the provision in question.

233. *See* Catherine Rampell, *Academic Built Case for Mandate in Health Care Law*, N.Y. TIMES (Mar. 28, 2012), https://www.nytimes.com/2012/03/29/business/jonathan-gruber-health-cares-mr-mandate.html ("The C.B.O.'s assessment of a bill's efficacy and costs strongly influences political debate, but the office does not publicly reveal how it calculates those numbers.").

234. CBO Show Your Work Act, S. 1746, 115th Cong. (2017).

235. CONG. BUDGET OFFICE, AN UPDATE ON TRANSPARENCY AT CBO 1 (2018), https://www.cbo.gov/system/files/2018-08/54372-TransparencyUpdate.pdf [https://perma.cc/7K36-VLM3].

236. JOINT COMMITTEE ON TAX'N, JCX-67-17, *Estimated Budget Effects of the Conference Agreement for H.R. 1, The 'Tax Cuts and Jobs Act,'* at 8 (Dec. 18, 2017), https://www.jct.gov/publications.html?func=startdown&id=5053 [https://perma.cc/6R3D-HDCY].

237. *Id.* at 1.

Often, however, several elements of the law are often rolled into a single line item in the score. Also, even if the provision whose interpretation is in question warrants its own line item in the score, the precise interpretive question may not be binary such that the very existence of the score would tell the interpreter anything. For instance, if the taxpayer in our example is not arguing whether TCJA repealed the deduction but whether that repeal applied to her particular circumstances, the score will be of little use.

b. Contextualizing the CBO/JCT Canons.—So far, the above discussion illustrates that, although the CBO/JCT canons hold promise as reflecting modern congressional reality, they may only help the interpreter in certain circumstances. When information underlying the scores is available to the interpreter, however, we must first ask a preliminary question: In what contexts do the scores matter?

i. The Reconciliation Process.—Motivating Gluck and Bressman's embrace of a CBO canon is empirical evidence they gathered indicating that congressional staff heavily relies upon the all-important score. In Gluck and Bressman's survey to congressional staffers, 15% of respondents identified the Congressional Budget Office as a significant influence.[238] One staffer said, "[a]nything with a budget impact, we have to repeatedly go back to [CBO] to understand . . . their reading of the statute and then we have to go back and change it. This is extraordinarily widespread."[239]

No doubt that the CBO and JCT scores have risen in importance in recent decades, but the degree depends heavily on the circumstances. In the context of the ACA, news outlets accurately reported that "the bill's fate hinged on the results" of CBO's analysis.[240] The reason, however, was not some immutable characteristic of the legislative process but one particular to reconciliation. At the time the health-care bill was being debated, the Democrats lost their sixtieth vote needed in the Senate and thus used the reconciliation process to enact parts of Obamacare.[241]

The CBO and JCT scores dramatically shape reconciliation legislation because sections (B) and (E) of the Byrd Rule require them as inputs, as discussed above.[242] The reconciliation instructions for the TCJA, for

238. Bressman & Gluck II, *supra* note 1, at 763.

239. *Id.* at 764.

240. David M. Herszenhorn & Robert Pear, *Senate Democrats See Hope on Health Bill*, N.Y. TIMES (Dec. 9, 2009), http://www.nytimes.com/2009/12/10/health/policy/10healthbill.html [https://perma.cc/H8U2-TU2J]; Bressman & Gluck II, *supra* note 1, at 764.

241. Health Care and Education Reconciliation Act of 2010, Pub. L. No. 111-152, 124 Stat. 1029. Other parts of the healthcare reform plan are enacted under the Patient Protection and Affordable Care Act, Pub. L. No. 111-148, 124 Stat. 119 (2010).

242. *See supra* notes 188–89 and accompanying text.

instance, restricted impact on deficits to $1.5 trillion over the budget window period.[243] Because its architects wished to bring the corporate tax rate down as low as possible while also giving individual tax cuts, even this high figure forced the creation of numerous provisions that helped offset the revenue losses. This was so that the legislation complied with subsection (B) of the Byrd Rule, which requires that the legislation stay within the parameters of the reconciliation instructions. More evidence of the Byrd Rule's impact on the TCJA is that many of its key provisions expire at the end of 2025. This brought the legislation's cost down to comport with (B) and also ensured that the legislation would not violate subsection (E) of the Byrd Rule, which prohibits bills from increasing the deficit beyond the budget window.

From this discussion, we can conclude that reconciliation is the appropriate context in which to deploy the CBO/JCT canons. As mentioned above, fiscal conservatives demanded that the TCJA's impact be capped at $1.5 trillion, and the reconciliation instructions as adopted in the budget resolution set forth this figure. Given the ambitious list of tax changes Republicans wished to accomplish, it proved rather limiting. It is possible that in a different political environment, a much greater cap would have alleviated any fiscal constraints and diluted the impact of the JCT score. Still, in a fiscal environment of climbing deficits, the reconciliation instructions will most likely have high salience among congressional members.

There are tactics, however, that could arguably reduce the salience of the score.[244] In the months leading up to the TCJA's enactment, Republicans toyed with the idea of lengthening the budget window. A longer budget window would heavily test the CBO and JCT because forecaster variables across a much longer time period introduce significant uncertainty. This is because the longer the estimating period, the more sensitive are the forecasts to subtle changes in the assumptions underlying the scores, such as discount rates, economic growth, and macroeconomic factors.[245] Costs inside the

243. H.R. Con. Res. 71, 115th Cong. §§ 2001–02 (2017) (budget resolution).

244. The Budget Act of 1974 provides a floor of five years for the length of budget windows but does not provide a ceiling. Since the mid-1990s, the CBO has used a ten-year budget window. Rudolph G. Penner, *Dealing with Uncertain Budget Forecasts*, 22 PUB. BUDGETING & FIN., Spring 2002, at 1, 12. Republicans, worried that sunsetting their complex tax reform after just ten years to comply with subsection (E) would cause greater planning distortions, floated a twenty- or even thirty-year budget window. Sahil Kapur, *GOP Push for 20-Year Tax Cut Grows as Ryan Seeks Permanent Fix*, BLOOMBERG (June 24, 2017), https://www.bloomberg.com/news/articles/2017-06-24/gop-push-for-20-year-tax-cut-grows-as-ryan-seeks-permanent-fix [https://perma.cc/TH4P-U86P]. This tactic would accommodate a much further off sunset date, potentially overcoming the downsides of temporary policies.

245. George K. Yin, *Temporary-Effect Legislation, Political Accountability, and Fiscal Restraint*, 84 N.Y.U. L. REV. 174, 209 (2009).

budget window would contain a large margin of error.[246] Measuring costs outside the budget window for purposes of ensuring compliance with subsection (E) of the Byrd Rule would become even more attenuated. Although the scorekeepers are technically tasked by subsection (E) to look at all periods beyond the budget window, this is an aspirational goal, and scorekeepers cannot reliably estimate many years into the future. If the budget window period were lengthened by decades, the subsection (E) analysis would become relatively meaningless.

A longer budget window would also decrease the importance of the official score along another dimension. Such a window would present opportunities for lawmakers to pretend to pay for costly policies by enacting tax increases or spending cuts that would not go into effect for many years, if ever.[247] It is important to note, however, that this type of problem already exists under the current budget window. Congress has repeatedly delayed the effective date of the Cadillac Tax, for instance, which was designed to pay for part of the ACA through an excise tax on high-cost, employer-provided health plans. As part of the 2010 health care legislation, the tax was originally set to begin in 2018, although that has been delayed until 2022.[248] The TCJA also deployed phase-in taxes on multinational corporations.[249] The advantage of phasing in unpopular taxes is to meet the requirements of reconciliation while also signaling to taxpayers that lawmakers do not intend for them to take effect since a longer delay allows many chances for repeal or further delay.

Lawmakers also possess another means to achieve technical compliance with the Byrd Rule, which exploits *short* budget windows. This type of budget gimmick involves pushing costs beyond the budget window and is nicely illustrated by the tax provisions involving IRAs. Traditional and Roth IRAs are similar savings vehicles that differ in how they are taxed.

246. The CBO has estimated the 90% confidence range of its deficit forecasts to be plus or minus 5% of GDP after five years, but this number rises to 17% of GDP after twenty years. CONG. BUDGET OFFICE, THE UNCERTAINTY OF BUDGET PROJECTIONS: A DISCUSSION OF DATA AND METHODS 12 (Mar. 2007), https://www.cbo.gov/sites/default/files/cbofiles/ftpdocs/78xx/doc7837/03-05uncertain.pdf [https://perma.cc/ZVJ6-F6XD].

247. For instance, a 1997 advisory council formed to tackle the insolvency of Social Security suggested a 1.6% increase in the payroll tax to fund the system, but only starting in 2045. SOC. SEC. ADMIN., 1994-96 ADVISORY COUNCIL REPORT: FINDINGS, RECOMMENDATIONS AND STATEMENTS, https://www.ssa.gov/history/reports/adcouncil/report/findings.htm [https://perma.cc/YLU5-EBGK]. A long budget window of 75 years allowed such a tax to count as an offset even though it was unlikely to ever take effect.

248. Patient Protection and Affordable Care Act, Pub. L. No. 111-148, § 9001 124 Stat. 865 (2010); Suspension of Certain Health-Related Taxes, H.R. 195, 115th Cong. § 4002 (2018).

249. *E.g.*, 26 U.S.C. § 250(a)(1) (2018). The deduction for taxes on global intangible low-taxed income is currently set at 50%. *Id.* For tax years beginning after 2025, the 50% deduction is reduced to 37.5%, and thus the effective rate on such income goes up to 13.125% in those years. 26 U.S.C. § 250(a)(3) (2018).

Contributions to traditional IRAs are deductible but withdrawals are taxable. Contributions to Roth IRAs on the other hand are not deductible but withdrawals are tax-free. Assuming constant tax rates and interest, these vehicles produce identical revenue costs from a present value perspective. Traditional IRAs produce revenue losses at contribution, whereas revenue losses from Roth IRAs arrive in the year of withdrawal.

Historically, lawmakers have gamed the differing tax treatments to push revenues to the budget window period. For instance, in 2006, Congress passed a law that expanded the ability of taxpayers to convert traditional IRAs to Roth IRAs. The conversion was taxable, thereby raising $6.4 billion in revenues during the budget window.[250] In present value terms, the change in law actually *cost* the government $25 billion in revenues over a longer time horizon. Because they fell outside the budget window period, however, these costs largely escaped the budget process.

That being said, it is difficult to conclude which way the budget games cut. On the one hand, the games potentially reduce the significance of the score since the score is only politically salient to lawmakers to the extent it hems in policy. On the other hand, their very existence seems to underscore the observation that the estimates are of the utmost important to lawmakers.[251]

Although each of the potential levers has the potential to take pressure off the official score of the reconciliation bill in question, Congress's

250. Richard Rubin & Margaret Collins, *Tax Break for IRA Conversion Lured 10% of Millionaire*s, BLOOMBERG (Jan. 3, 2014), https://www.bloomberg.com/news/articles/2014-01-04/tax-break-for-ira-conversion-lured-10-of-millionaires [https://perma.cc/Z4K7-K784].

251. A host of other possible tactics exist to circumvent the Byrd Rule. Sunset provisions are one. Being able to enact a costly law, but using a sunset date to avoid violating the Byrd Rule, takes less pressure off of the official score. Another related tactic is the gaming of budget baselines. The official baseline is one of "current law," meaning that it generally follows current law as written with some exceptions. *See* Omnibus Budget Enforcement Act of 1990, Pub. L. No. 101-508, § 257(a), 104 Stat. 1388–591 (1990) (using a baseline of "current-year levels"). For instance, the baseline assumes a sunsetted law will expire as scheduled. Recently, lawmakers, think tanks, and the official scorekeepers have experimented with alternative baselines, typically referred to as "current policy." These baselines assume current policy will continue, therefore that sunsetted laws will not expire. This is because Congress has a tendency to renew sunsetted laws as a routine matter. Assuming they are used consistently, either baseline will ostensibly capture the full costs of the legislation. If a current law baseline is used throughout, the law's costs beyond the sunset date will be captured upon renewal of the provision in question. If a current policy baseline is deployed, the budget process assumes the law continues to be in effect regardless of the sunset date, and all costs are captured upfront. A problem arises, however, if one toggles between the two types of baselines. If a temporary law is first scored using a current law baseline, then the budget process assumes there are no costs beyond the sunset date. If we then switch to a current policy baseline at the sunset date, the costs of reenactment escape the budget process because the baseline assumes the law continues. *See* David Kamin & Rebecca Kysar, *Temporary Tax Laws and the Budget Baseline*, 157 TAX NOTES 125, 128 (2017) ("[U]nder a current law baseline, the tax cut is assumed to expire as scheduled and thus is scored as costing $100 billion. . . . [A] current policy baseline assumes . . . the expiring policy is permanent, [so] the extension is scored as costing nothing.").

insatiable appetite for deficit spending means that, in spite of the gamesmanship, the rules likely still have bite.

ii. CBO/JCT Estimates Outside of Reconciliation.—Are there contexts outside of reconciliation for which the CBO and JCT scores matter? Without reconciliation, there is, of course, no Byrd Rule. Without the Byrd Rule, then it would seem the CBO score is not as significant. There are other budget rules we must consider, however. These "PAYGO" rules require offsets for revenue-decreasing legislation. If new legislation increases spending or enacts tax cuts, the associated costs must be offset with spending decreases or tax increases.

PAYGO rules have been a significant part of the budget process since the 1990s. Their most recent incarnation is in the form of statutory PAYGO rules passed through the Statutory Pay-As-You-Go Act of 2010.[252] The Act generally requires that the net budgetary effect of direct spending and revenue bills not increase the deficit, judged in both a five-year and a ten-year period. The new PAYGO rules are aimed at discouraging net deficit increases. To that aim, the statute prescribes that the Office of Management and Budget (OMB) record the budgetary effects of legislation across five- and ten-year periods on a rolling basis. The chairpersons of the House and Senate Budget Committees are responsible for submitting the budgetary effects into the Congressional Record. These effects are based on estimates by CBO. If the Budget Committees do not submit the budgetary effects, then OMB determines them. After each congressional session, OMB finalizes the PAYGO scorecards and determines whether PAYGO has been violated, in which case the President orders a sequestration order.[253]

CBO and JCT scores thus matter greatly, even outside of reconciliation. To be sure, when PAYGO was enacted, important exceptions were carved out from its reach. For instance, measures relating to the extension of the majority of the Bush tax cuts were assumed within the budget baseline, thereby effectively making PAYGO inapplicable to such measures.[254] The Act also excludes any budgetary effects designated by Congress as for an "emergency."[255] Finally, Congress can expressly exclude legislation from the PAYGO scorecards when enacting subsequent legislation.

Through these various means, Congress has excluded the budgetary effects of approximately thirty measures from PAYGO from the period

252. Statutory Pay-As-You-Go Act of 2010, Pub. L. No. 111-139, § 2, 124 Stat. 4 (2010).
253. *Id.* § 5.
254. *Id.* § 7.
255. *Id.* § 4(g).

between 2010 and 2016.[256] Some of these measures increased the deficit by trillions of dollars. In 2017, the $1.5 trillion TCJA was shielded from PAYGO through a piece of legislation passed subsequently to TCJA.[257] In 2018 alone, Congress excluded the PAYGO effects from the scorecards of three bills.[258] In 2018, Congress also zeroed out the PAYGO balance altogether as of the date of enactment in the Bipartisan Budget Act of 2018.[259]

To summarize, outside of reconciliation, the score certainly matters unless PAYGO has been waived. If an interpreter wishes to use the scores and underlying assumptions in the interpretive process, then the weight given to them should vary depending on whether such waivers are in effect.

c. Coda on the Filibuster.—In the spring of 2017, Senate Republicans deployed the so-called "nuclear option," removing the filibuster obstacle to the confirmation of nominees to the Supreme Court.[260] Given the radical shift away from the protection of minority rights, one wonders how long the legislative filibuster can hold on. If anything, reconciliation functions as a "release valve," allowing a simple majority to determine major policy outcomes and thereby preserving the legislative filibuster for perhaps longer than it otherwise would last.[261] Eventually, however, increasing gridlock and partisanship may make the legislative filibuster a relic of a bygone era of minority rights in the Senate. If this occurs, the role of the budget process will greatly diminish. In a world without the filibuster, the Byrd Rule and PAYGO would have no teeth since they are enforced only by the threat of minority protections. Any interpretation based on budget rules may thus have to be discarded if the filibuster falls.

256. BILL HENIFF JR., CONG. RESEARCH SERV., MEMORANDUM: BUDGETARY EFFECTS EXCLUDED FROM THE STATUTORY PAY-AS-YOU-GO (STAT-PAYGO) SCORECARDS, 4–5 tbl.1 (2017).

257. Further Additional Continuing Appropriations Act, H.R.J. Res. 28, 116th Cong. § 104 (2019).

258. *See* VA MISSION Act of 2018, Pub. L. No. 115-182, § 512, 132 Stat. 1393, 1481 (2018); FAA Reauthorization Act of 2018, Pub. L. No. 115-254, § 1701, 132 Stat. 3186, 3532 (2018); SUPPORT for Patients and Communities Act, Pub. L. No. 115-271, § 8231, 132 Stat. 3894, 4143 (2018); *see also* David Ditch, *PAYGO: A Bipartisan Failure in Need of Replacement*, HERITAGE FOUND. (Jan. 28, 2019), https://www.heritage.org/budget-and-spending/report/paygo-bipartisan-failure-need-replacement [https://perma.cc/29Y5-6KWU] (identifying the exclusions in the 2018 bills as a technique used to skirt the consequences of PAYGO).

259. Bipartisan Budget Act of 2018, Pub. L. No. 115-123, § 30102, 132 Stat. 64, 123; *see also* Ditch, *supra* note 258 (calling the zeroed-out scorecard the "most abusive" technique to avoid PAYGO responsibility).

260. Matt Flegenheimer, *Senate Republicans Deploy 'Nuclear Option' to Clear Path for Gorsuch*, N.Y. TIMES (Apr. 6, 2017), https://www.nytimes.com/2017/04/06/us/politics/neil-gorsuch-supreme-court-senate.html [https://perma.cc/J32M-87RH].

261. Kysar, *Taxes*, *supra* note 173, at 63.

C. Summary

We can make a few general observations from our canvassing of general legislative and budget process rules. The most rudimentary insight is that legislative rules are not followed with precision and instead flexibly accommodate political preferences. It is surprisingly difficult to tell when the rules are being followed. The rules are not self-enforcing; a member of Congress must affirmatively make a point of order against a rule violation. But the absence of points of order against the bill may simply reflect political support of its substance rather than compliance with the rules.

From this, we can conclude that, as a descriptive matter, construing a statute in a way that follows the rules may be an inaccurate depiction of congressional reality. I will flesh out more of what the interpreter *can* take from the rules below in Part IV, but we can glean some important insights from the discussion of budget rules.

In the context of interpreting in accordance with the rules of reconciliation, we also encounter rules that are not followed. The picture is complicated further by the opacity of the Parliamentarian's rulings in this area. Nonetheless, the discussion does show how the stratospheric rise in reconciliation's importance may have some interpretive payoffs. Congress is legislating through this harried and truncated process in order to accomplish any policymaking at all in a highly partisan era. Perhaps, then, courts should be somewhat forgiving in their interpretation of its slipshod work product.

The CBO and JCT canons show particular promise, with some caveats. They derive somewhat from an assumption that Congress is following its rules; the estimates would be much less important to lawmakers if the rules of reconciliation or PAYGO were immaterial. But we need not assume perfect compliance with those rules in order to see their power. This is because the general architecture of the budget process and the pressures on Congress to deliver legislative benefits through tax and spending guarantee that the estimates remain a focal point in the legislative process.

Of course, there are caveats here too. Congress has several mechanisms through which it can significantly reduce the salience of the scores. If those mechanisms are present, then courts should take this into account in deciding how much weight to give to the scores. The biggest limitation for the CBO and JCT canons stems from the fact that the nontransparency of the estimators' assumptions will present a challenge to an interpreter who wishes to use them.

III. Normative Considerations

Leaving aside qualms as to whether the rules accurately capture congressional behavior, one could still argue that leveraging the rules in the

interpretive process allows the judiciary to indirectly enforce them.[262] Perhaps, then, this is beneficial. Although this indirect enforcement is presumably constitutionally permissible whereas direct enforcement is generally not, it still presents normative considerations. This Part III explores such arguments.

A. Undermining the Political Will of Congress

First and foremost, nonenforcement of the rules may reflect strong political support for the bill on its substance. If the body overruled a chair's ruling on a point of order, this may also reflect substantive support on the legislation's merits rather than support for the procedural ruling.[263] This may also be the case if no point of order is made. In this manner, the rules are inherently politicized.[264] To assume they are being followed undermines the core of the lawmaking function—to formulate and implement policy judgments. Nourse contends that courts must assume lawmakers are faithful agents and therefore that they follow their own rules.[265] In other words, only bad actors would flout the rules. But this is not the case. Congress itself intends the rules to accommodate political preferences rather than being ironclad. A good actor can thus violate the rules because the rules contemplate such violations.

One could reason that encouraging Congress to follow its rules, however, improves the legislative process. Embracing rule-based interpretation thus harkens back to Hans Linde's "due process of lawmaking" theory.[266] Linde criticized rationality review of legislation for its inconsistency with congressional reality, since laws are the product of policy choices and compromises, appeasement of certain interests, and equitable considerations, rather than being tailored to a precise goal.[267]

Linde instead proposed that the legislation be evaluated based on whether Congress observed due process of lawmaking, attempting to avoid the countermajoritarian difficulty. This due process of lawmaking means that "[the] government is not to take life, liberty, or property under color of laws that were not made according to a legitimate law-making process."[268] Although Linde did not flesh out which procedures were forbidden and which

262. Kysar, *Listening to Congress*, *supra* note 1, at 521 (arguing this in the context of earmark disclosure rules); *see also* WILLIAM D. POPKIN, MATERIALS ON LEGISLATION: POLITICAL LANGUAGE AND THE POLITICAL PROCESS 1075 (5th ed. 2009) (describing circumstances in which courts might be able to enforce congressional rules indirectly through statutory interpretation).

263. POPKIN, *supra* note 262, at 1075.

264. *Id.*

265. Nourse, *supra* note 1, at 95 n.100.

266. Hans Linde, *Due Process of Lawmaking*, 55 NEB. L. REV. 197 (1976).

267. *Id.* at 207–08.

268. *Id.* at 239.

were mandated, he summarized that the "[d]ue process of lawmaking will include some but not all of the rules governing the particular lawmaking body."[269] Linde acknowledged that judges may be reluctant to strike down legislation based on process concerns.[270] He nonetheless encouraged them to do so while also reiterating the value of fostering good process, regardless of the availability of judicial review.[271]

Professors Daniel Farber and Philip Frickey identified three different iterations of process-oriented judicial review.[272] One concerns whether the legislature is the right policymaking institution for the given question. Another focuses on whether the legislature followed rules of procedure. And a third, reflected in the federalism cases, focuses on whether Congress sufficiently deliberated a statute.[273] Collectively, these strands encourage the legislature to compile findings, identify applicable legal standards, and enact law through legitimate procedures and deliberation.[274]

Generally, courts have been reluctant to embrace due process of lawmaking, with a few exceptions.[275] The most notable are the federalism cases, in which the Court required Congress to make certain findings before legislating in an area traditionally reserved to the states.[276] Another example is *Powell v. McCormack*,[277] in which the Court held that Congress could not expel a member when it did not follow certain procedures.[278] In *INS v. Chadha*,[279] the Court invalidated the legislative veto as in conflict with Article I, Section Seven.[280] The Court struck down the line item veto for similar reasons in *Clinton v. City of New York*.[281]

The judiciary, however, generally shies away from intruding too deeply into the legislative process. The Court has interpreted the Rulemaking Clause

269. *Id.* at 245.

270. *Id.*

271. *Id.*

272. DANIEL A. FARBER & PHILIP P. FRICKEY, LAW AND PUBLIC CHOICE 118–31 (1991).

273. *Id.*

274. *Id.* at 1710.

275. The Court has, for instance, held that the Due Process Clause does not apply to legislatures. Bi-Metallic Inv. Co. v. State Bd. of Equalization, 239 U.S. 441, 445 (1915).

276. *See, e.g.*, United States v. Morrison, 529 U.S 598, 612 (2000) (suggesting that when Congress legislates on matters traditionally reserved to the states, the Court may expect Congress to make particular findings about that legislation's effects on interstate commerce); City of Boerne v. Flores, 521 U.S. 507, 530–31, 536 (1997) (same); United States v. Lopez, 514 U.S. 549, 562–63 (1995) (suggesting the same with respect to congressional overreach under Section Five of the Fourteenth Amendment).

277. 395 U.S. 486 (1969).

278. *Id.* at 550.

279. 462 U.S. 919 (1983).

280. *Id.* at 958.

281. 524 U.S. 417, 421 (1998).

broadly, holding that the Clause preempts judicial review of the rules.[282] Other courts have continued this expansive view of the Clause, generally deferring to Congress except to the extent congressional procedure faces constitutional limitations[283] or infringes upon fundamental rights of individuals (as when Congress is sitting in a semijudicial role).[284] A stark example of this is *Field v. Clark*,[285] in which the Court held that it could not second-guess the congressional practice that presumes the bill presented to the President is the one agreed to by Congress, even if the bills in question differed. The *Field* Court reasoned that Congress, and Congress alone, had the power to determine the details of the lawmaking process.[286]

Professors Frickey and Steven Smith recognized that at least some strands of the deliberative model of Congress are in conflict with its decision-making reality.[287] Although their comments were aimed specifically at the third strand of due process of lawmaking, regarding whether Congress sufficiently deliberated, they are equally relevant to the theory as a whole. This is because the normative argument for holding Congress to its rules is presumably aimed at improving the deliberative process.

Frickey and Smith draw upon the work of James Q. Wilson, who noted that the imposition of rational policymaking is in tension with democratic ideals. Specifically, that imposing rational policymaking on lawmakers reduces their ability to bargain, to engage interest groups, and to represent their constituents.[288] Where the Court assumes a deliberative legislature is where it falters, according to Frickey and Smith. The Senate, House, and President must all vote on policies when, much of the time, the process involves developing majority coalitions through competitive, antideliberative tactics.[289] The Constitution does not require that this process reflect reasoned deliberation. Going beyond the enforcement of explicit constitutional constraints on lawmaking, like the Origination Clause or the legislative veto,

282. United States v. Ballin, 144 U.S. 1, 5 (1892).

283. Kysar, *Lasting Legislation*, *supra* note 80, at 1022–23.

284. Yellin v. United States, 374 U.S. 109, 117–19 (1963) (reversing a petitioner's conviction because a congressional committee did not follow its own rules in considering the petitioner's request for a closed session); Christoffel v. United States, 338 U.S. 84, 88–89 (1949) (holding that a witness could not be convicted of perjury because the House Committee to which he gave testimony lacked a quorum according to the legislative rules); United States v. Smith, 286 U.S. 6, 33 (1932) (interpreting Senate rules to bar the reconsideration of a nominee to the Federal Power Commission).

285. 143 U.S. 649 (1892).

286. *Id.* at 671; *see also* John C. Roberts & Erwin Chemerinsky, *Entrenchment of Ordinary Legislation: A Reply to Professors Posner and Vermeule*, 91 CALIF. L. REV. 1773, 1790 n.63 (2003) (describing the enrolled bill doctrine "as an analytical corollary to the Rulemaking Clause").

287. Frickey & Smith, *supra* note 93, at 1709.

288. *Id.* at 1742.

289. *Id.* at 1744.

also squarely puts the judiciary in conflict with separation of powers values.[290]

Professor Ittai Bar-Siman-Tov has argued in favor of judicial review of the legislative process. Bar-Siman-Tov invokes H.L.A. Hart's assertion that a given legal system must have mechanisms to determine the legal rules, or "rules of recognition." According to Bar-Siman-Tov, because the judiciary can only apply those laws that meet the rules of recognition, the judiciary must have the means to determine their content, i.e., whether laws were validly enacted.[291]

This argument assumes its conclusion, however, in that equally plausible is the possibility that the judiciary defers to Congress in determining whether laws are validly enacted before conducting its substantive review. Indeed, this is the American tradition since the Founding, which is contemplated by the Rulemaking Clause in the Constitution.[292] In other words, judicial review derives ultimately from the people, and the people have chosen to reserve process to Congress. As discussed above, this has roots in separation of powers concerns that trace back to England. These concerns recognize that process cannot be separated from politics and policymaking. Without the ability to enforce, shape, and waive the rules governing lawmaking, Congress cannot effectuate its inherently political role as policymaker. Process is important for institutional legitimacy, but, as a constitutional and normative matter, it must ultimately give way to politics.

One possible area that deserves special consideration are rules aimed at transparency in the lawmaking process. In prior work, I have previously argued for the judiciary to assume legislative rules are functioning correctly in the context of earmark disclosure rules, which attempt to disclose special interest spending and tax legislation.[293] By refusing to recognize undisclosed special interest deals, I argued, Congress would be incentivized to follow the disclosure rules.

The reason why this context is distinct from a separation of powers perspective is that even where Congress collectively wishes to follow the earmark rules, it cannot enforce them upon its members. After all, the goal of the rules is to unearth *hidden* special interest deals. It may, then, be appropriate for the judiciary to assist Congress in following its rules when

290. *Id.* at 1750.

291. Ittai Bar-Siman-Tov, *The Puzzling Resistance to Judicial Review of the Legislative Process*, 91 B.U. L. REV. 1915, 1946 (2011).

292. *See* POPKIN, *supra* note 262, at 1074 ("There is no doubt that Congress can disregard its own procedural rules concerning how it adopts, statutes, assuming these rules are not constitutionally required. This is true even if the rules are contained in a prior statute, rather than in a House or Senate resolution.").

293. Kysar, *Listening to Congress*, *supra* note 1.

the rules are aimed at transparency. Otherwise, there is no mechanism to identify rule violations within Congress.

B. The Practical Need for Rule Flexibility

Giving Congress the leeway to apply its rules flexibly also allows it to navigate between two competing goals in the legislative process: deliberation and efficiency. The rules themselves oscillate between these two poles. Giving Congress the liberty to relax the rules, at times, allows it to balance the two needs given the circumstances.

Although thus far our discussion of enforcing the rules upon Congress suggests this would further deliberation, not all the rules further that end. Consider the most famous legislative rule of all—the rule that allows a supermajority in the Senate to invoke cloture, thereby cutting off the Senate tradition of unlimited debate.[294] The minority right to filibuster has been further eroded by other developments, such as the elimination of the filibuster with respect to lower court and Supreme Court nominees.[295]

Reconciliation and other fast-track processes, by definition, limit deliberation. Some of the legislative rules governing conference committees could also be characterized as curtailing deliberation. Once a bill comes out of conference, for instance, amendments cannot be made on the floor.[296] Debate on conference bills is often limited, even in the Senate.[297]

Notably absent from the legislative rules are those long embraced by state legislatures to improve deliberation. For instance, many state constitutions require that all legislation be confined to a single subject.[298] Tracing back to ancient Rome,[299] the purpose of this rule is to prevent logrolling, which allows otherwise unpopular provisions to be consolidated into one package in hopes of garnering a majority vote.[300] The single-subject rule helps ensure that each provision gets full attention from legislators and citizens so that they are carefully considered.[301] Other requirements missing from the rules that would improve deliberation are rules requiring all bills to be read or barring the introduction of legislation at certain points in time.[302]

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294. STANDING RULES OF THE SENATE, S. DOC. NO. 113-18, r. XXII (2013).

295. *See* Kysar, *Taxes*, *supra* note 173, at 68 (describing the elimination of the filibuster for court appointments as part of an incremental erosion of the filibuster's power).

296. STANDING RULES OF THE SENATE, S. DOC. NO. 113-18, r. XVII, at 12 (2013).

297. *Id.*

298. Michael D. Gilbert, *Legislative Single Subject Rules and the Legislative Process*, 67 U. PITT. L. REV. 803, 805 (2006).

299. *Id.* at 811.

300. *Id.* at 813–14.

301. *Id.* at 816.

302. Adrian Vermeule, *The Constitutional Law of Congressional Procedure*, 71 U. CHI. L. REV. 361, 365 (2004).

On the other hand, some of the rules are aimed at preserving the deliberative character of the legislature. The rules confining conferees to previously agreed upon matters could be said to function like a single-subject rule, allowing conferees ample opportunity to consider each provision. The rules forbidding legislating on appropriations are similar. By closing the universe of possible provisions, Congress can more fully deliberate on the ones that remain.

The rules thus represent the reality that deliberation cannot be pursued at all costs. An overly robust deliberative process could damage the democracy since Congress would not be able to legislate effectively. The legislative rules, as written, attempt to navigate between these two goals. Ultimately, however, achieving the balance between deliberation and legislative efficiency is highly contextual. The ability of Congress to adapt the rules to accommodate political will allows it to navigate between debate and action in a given circumstance. Holding Congress to the rules, either directly through judicial enforcement or indirectly through statutory interpretation, would hinder this process.

Still, perhaps the interpretive process could fulfill other goals of the rules by incorporating them. For instance, one aim of the budget process is to assist Congress in making coordinated decisions in an attempt to reign in deficits.[303] One might posit, then, that indirect enforcement of the budget rules could help further fiscal discipline.

In particular, the aim of the Byrd Rule is to protect Congress from its worst impulses by closing off the reconciliation process to deficit-increasing legislation. In practice, however, the Byrd Rule has failed to achieve its goal.

As I have discussed in prior work, Congress can enact costly tax cuts through reconciliation by simply sunsetting them so that there are no deficit effects beyond the budget window. Because the tax cuts become politically entrenched once the public gets used to them, lawmakers tend to extend them without paying for them in the budget process.[304] The existence of the sunset provision may allow lawmakers to hide behind the guise of fiscal responsibility when in actuality the sunsets are undoing fiscal discipline. The Byrd Rule sets up this dynamic.

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303. This aim may be responsive to public-choice theorists who posit that deficit spending occurs because politicians are inevitably pulled toward spending and away from taxing in order to appease their constituents. *See* JAMES M. BUCHANAN & RICHARD E. WAGNER, DEMOCRACY IN DEFICIT: THE POLITICAL LEGACY OF LORD KEYNES (1977), *in* 8 THE COLLECTED WORKS OF JAMES M. BUCHANAN 144 (2000) (noting that "[t]he possibility of borrowing" allows politicians to "expand rates of spending without changing current levels of taxation" and that the resulting increase in future taxation "will not generate constituency pressures" comparable to an increase in present taxes).

304. Kysar, *Lasting Legislation*, *supra* note 80, at 1034–35.

Further, although the Byrd Rule sets a ceiling such that the reconciliation bill cannot add more to the deficit than as prescribed in the budget resolution, this has effectively functioned as a ceiling *and* a floor, with Congress increasing the deficit in the amount of the cap.[305] For instance, the FY 2018 budget resolution allowed Congress to add $1.5 trillion to the deficit, and the TCJA as enacted added over $1.4 trillion to the deficit.[306]

The Byrd Rule may also, ironically, block fiscally responsible provisions. The trigger mechanism that Senator Corker proposed in the TCJA to reverse some of the tax cuts if certain revenue goals were not met did not make it into the bill because it violated the Byrd Rule, presumably because it would not change outlays or revenues.[307] A more infamous case occurred in 1997, when Senator Bill Frist (R-TN) proposed an amendment that would have required a sixty-vote threshold for legislation that increased the deficit and would have mandated the President's submission of a balanced budget to Congress. A Byrd Rule point of order, which was one vote shy of being waived, struck the provision.[308] This in turn paved the way for the costly Bush tax cuts.[309]

More fundamentally, there is a danger in giving too much primacy to the budget process.[310] The budget process, problematically, does not take into account nonfederal savings.[311] Savings from preventing illnesses of the public do not factor into the cost of, say, providing a vaccine—only preventing illnesses in those who receive federal assistance in the form of Medicare and Medicaid count for budget purposes.[312] Such conventions are there to ensure the budget is depicted accurately. There is tremendous danger, however, in relying on the scores too heavily in the legislative process since there are, of course, societal benefits to off-budget items.

Policymaking is further distorted when budget considerations supplant other policy objectives. Scholars have voiced these concerns in the tax context, observing that tax legislation is increasingly shaped by budget

305. *Id.*

306. H.R. Con. Res. 71, 115th Cong. §§ 2001–02 (2017) (budget resolution); JOINT COMMITTEE ON TAX'N, JCX-67-17, ESTIMATED BUDGET EFFECTS OF THE CONFERENCE AGREEMENT FOR H.R. 1, THE "TAX CUTS AND JOBS ACT" 8 (Dec. 18, 2017), https://www.jct.gov/publications.html?func=startdown&id=5053 [https://perma.cc/8H7P-4GSS].

307. McCrimmon & Williams, *supra* note 203.

308. Aprill & Hemel, *supra* note 184, at 113.

309. *Id.* at 114.

310. Bressman & Gluck II, *supra* note 1, at 765.

311. Tim Westmoreland, *Standard Errors: How Budget Rules Distort Lawmaking*, 95 GEO. L.J. 1555, 1592–93 (2006).

312. *Id.* at 1592.

pressures.[313] We are left with a tax code riddled with sunsets and provisions that are simply there to take advantage of timing games, like the aforementioned Roth IRA.

Strict adherence to budget rules may also be entirely inappropriate in certain economic contexts. For instance, during the late 2000s, a reluctance to deficit-spend muted government responses to the financial crisis, likely prolonging the downturn. The ability to relax the budget rules to deliver stimulus is essential to the proper functioning of the economy.

Finally, the budget process gives a tremendous amount of power to unelected staff of the estimating entities. Reinforcing this power through statutory interpretation arguably moves the lawmaking process further from democratic accountability.[314]

C. Summary

To summarize, democracy demands nimbleness of legislative rules. Inherently politicized, the rules cannot be deployed with rigidity without threatening the lawmaking endeavor. Within Congress, procedure on the ground reflects this maxim. Judicial interpretation should as well.

Practical concerns also dictate a relaxed approach to the rules. Strict enforcement of them prevents Congress from weighing deliberative goals against efficiency, and budgetary aims against other policies. Still, the rules may impart some valuable information to the interpreter, a topic to which I now turn in Part IV.

IV. Taking Procedure Seriously

If a strictly applied rule-based approach to interpretation is problematic, then how should a process-based interpreter think about congressional procedure?

One possible interpretive approach that follows from these insights is to distinguish those unwavering features of the legislative process from more ephemeral ones. Others' contributions in this area are useful, ranging from how legislative history works in particular areas of law[315] to how certain types

313. Professor Michael Graetz concludes that budget pressures restrict lawmakers to "mak[e] the revenue numbers 'come out right,'" crowding out traditional tax policy criteria, like simplicity, efficiency, and fairness. Michael J. Graetz, *Paint-by-Numbers Lawmaking*, 95 COLUM. L. REV. 609, 673 (1995).

314. Gluck and Bressman recognize this danger but argue that it reflects a view that legal doctrine should "improve upon, not merely reflect, the legislative process," a goal about which courts need to be explicit. Bressman & Gluck II, *supra* note 1, at 783.

315. *See, e.g.*, James J. Brudney & Corey Ditslear, *The Warp and Woof of Statutory Interpretation: Comparing Supreme Court Approaches in Tax Law and Workplace Law*, 58 DUKE L.J. 1231, 1235 (2009) (comparing the Supreme Court's use of legislative history in its tax law and workplace law jurisprudence).

of legislation operate.[316] Grounding an interpretive approach in fundamental features of the legislative process safely guards against unintentionally straying from reality.

On the other hand, the insights of this Article could instead support a highly granular approach to process-based interpretation. If the context allows, an interpreter could dive deep into the process to see how it has borne out in the particular circumstances. As to which road the interpreter should take at this fork, of course, depends on the context. If an interpreter is assured in her ability to understand the ins and outs of the process, then a detailed approach may be justified. If instead the interpreter can glean only generalities with confidence, then an approach incorporating more high levels of abstraction is warranted.

Importantly, congressional procedure can guide the interpreter in both of these endeavors, so long as it is contextualized. *The architecture and thrust of the legislative rules, in turn, can often assist a court in developing a more nuanced understanding of congressional procedure.* The remainder of this Part IV explores examples to illustrate. My general aim is to begin to lay the groundwork for refinements of the process-based school. My audience is those who take an interpretive view rooted in the judiciary as a faithful agent of the legislature. Thus far, I have detailed ways in which a process-based interpretation woodenly premised on proper functioning of the rules can undermine the interpreter's role as faithful agent. I now explore ways in which taking procedure seriously, in all its pliancy, has the potential to *strengthen* this relationship.

A. Reconciliation

Revisiting *King v. Burwell* can help illustrate the promise of using procedure in interpretation. Recall the issue was whether subsidies for health insurance purchased on "an Exchange established by the State" also included federal exchanges.[317] The *King* Court reasoned that Congress used reconciliation to pass the ACA, which provided limited opportunities for debate and amendment. "[A]s a result, the Act does not reflect the type of care and deliberation that one might expect of such significant legislation."[318] The Court then concluded that the statute was ambiguous, making this conclusion after considering "that the words of a statute must be read in their context."[319]

316. *See* Bressman & Gluck II, *supra* note 1, at 763–64 (discussing the impact of the CBO's budget score on proposed legislation).

317. King v. Burwell, 135 S. Ct. 2480, 2487 (2015).

318. *Id.* at 2492.

319. *Id.*

If the ACA had been enacted in the course of the regular legislative process, the *King* Court may have been less forgiving of the legislature in finding the statute unambiguous. Although this approach could shape the legislative process by forcing Congress to draft more accurately, it would impede Congress's ability to privilege action over deliberation.

Importantly, the *King* Court focused on reconciliation but did so in broad strokes. Identifying reconciliation as having a tendency to produce imperfect drafting is by no means an arcane feature of reconciliation. Rather, it flows from reconciliation's fundamental feature—it's a fast-track process intended to expedite legislation rather than nurture debate. In so doing, the *King* Court privileged legislative rules in its interpretation—specifically the rules that limit debate in this fashion—but examined their general thrust rather than their precise application.

If instead the Court had focused on the minutiae of reconciliation, it might have run into trouble. Suppose, for instance, that giving tax credits for insurance bought on state exchanges did not have an impact on revenue because, in our hypothetical world, the states also were required to reimburse the federal government for the tax credits. A court could reason that the term "Exchange" must in fact cover those set up by the federal government, otherwise the relevant provision would have violated the Byrd Rule for not impacting revenues.

Would this have been a fair application of the Byrd Rule? For one, it overlooks the possibility that members may not have objected to a Byrd Rule violation because they agreed with the provision's policy. Even those members opposed to the provision may have been unwilling to object if they thought a supermajority would have easily overcome a point of order.

Furthermore, it may also not be easy to ascertain whether in fact the provision had impacted revenues. Suppose for instance that a few states were insolvent and therefore unable to reimburse the federal government for tax credits. In that case, interpreting exchanges to only encompass states would have lost revenues, thereby meeting the Byrd Rule requirements even without the federal exchanges. Because the Parliamentarian rulings in this area are opaque, a court may lack relevant information in this regard.

Another approach, and one taken by the lower courts, was to focus on the CBO estimate. As mentioned above, a congressional committee subpoenaed CBO to release its underlying assumptions, which indicated the subsidies were aimed at insurance purchased on both state and federal exchanges.

With some caveats, the CBO score does not present the same concerns that a granular-level reading of the Byrd Rule does. A court's reliance on the CBO score is premised on the efficacy of legislative rules but not their precise enforcement. Assuming the rules of reconciliation or PAYGO are in general effect, it is reasonable for a judge to assume that the CBO score influences

Congress. Notably, the rules need not be perfectly followed for that to be the case, which is why reliance on CBO assumptions is descriptively accurate.

There are, of course, contexts in which the CBO score cannot help the interpreter. Most notably, the interpreter may not have access to the underlying assumptions made by the estimators. Additionally, if an act was outside reconciliation and Congress has waived PAYGO, the CBO or JCT scores have much less impact. In these contexts, then, it would be unwise to rely heavily upon the scores in the interpretation of the statute.

To summarize, courts should not ignore the context in which legislation is enacted. A court's knowledge of the general rules of reconciliation limiting debate allows it to understand how the process leads to poor drafting. Recreating how the more granular rules of reconciliation, such as the Byrd Rule, functioned in that process is much more problematic.

B. Appropriations

Subpart II(A) examined whether congressional rules on appropriations could be used to guide interpretation and found Congress often disregards them. How might a contextualized process-based interpretative approach look? We can turn once again to *TVA v. Hill*, the snail darter case. As mentioned above, the Court invoked the legislative rules in the area that foreclosed legislating on appropriations, ruling that the appropriations for the dam could not be spent since the dam would have conflicted with the Endangered Species Act.[320]

Congressional rules, however, can say one thing while Congress does another. Underlying the Court's approach is a deeper misunderstanding of the legislative process. The Court, in enforcing a rule against implied repeals, rejected expressions by the appropriations committees that the dam would take precedence over the prior act.[321] In so doing, the Court reasoned that appropriations were somehow lesser than "statutes enacted by Congress" in the deliberative process.[322] In the Court's view, the appropriations process was an insignificant part of the legislative process, with Congress as a whole ignoring the appropriations committees.[323]

Interestingly, the Court misses the fact that Congress heavily focuses upon the appropriations process. It is, after all, where the money is. As a result, there are a vast number of interests that signal their demands to legislators, and the appropriations-committee members are among the most

320. *See supra* notes 100–03 and accompanying text..

321. TVA v. Hill, 437 U.S. 153, 191–92 (1978).

322. *Id.* at 191; Matthew D. McCubbins & Daniel B. Rodriguez, *Canonical Construction and Statutory Revisionism: The Strange Case of the Appropriations Canon of Statutory Interpretation*, 14 J. CONTEMP. L. ISSUES 669, 683–84 (2005).

323. McCubbins & Rodriguez, *supra* note 322, at 684.

powerful. The engaged and interested stakeholders ensure that Congress actively participates in the appropriations process.[324] A contextualized, process-based approach to interpretation would take this into consideration in interpreting appropriations statutes. Far from hiding in obscurity, the appropriations bill at issue in *TVA v. Hill*, and the accompanying committee reports, was likely subject to much scrutiny in Congress. The Court, in adopting a stricter stance against repeals by implication in the context of appropriations, goes against the bigger realities of the legislative process, obscuring the forest for the trees.

Building upon this contextualized view further, the *TVA v. Hill* Court rejected the legislative history preserving the dam project because it was in the legislative history rather than the text. This overlooked the congressional reality that appropriations bills generally contain directives in the legislative history since the financial blueprint resides in the text.[325] In fact, the legislative rules prohibiting regulatory language in the appropriations text make legislative history exceptionally important in the appropriations context. In this context, then, a court's knowledge of the rules can assist it in giving proper weight to legislative history.[326] Regardless of whether Congress follows the rules forbidding legislating on appropriations with precision (and they do not, as we now know), these rules serve generally to elevate the importance of legislative history in the appropriations context.

C. Subject Specific Interpretation

Another implication of developing a highly contextualized approach to process-based interpretation is recognition of the advantages that an "intra-substantive" approach entails.[327] Courts themselves have begun to develop interpretive principles that reflect the particular committees and processes of the subject matter at issue. James Brudney and Corey Ditslear have, for instance, compared the interpretive approaches of tax statutes and workplace

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324. *Id.* at 696–97.

325. *See* Bressman & Gluck II, *supra* note 1, at 761 (characterizing legislative history as a "necessary repository of Congress's directives with respect to how the money should be spent").

326. *See* CONSTITUTION, JEFFERSON'S MANUAL, AND RULES OF THE HOUSE OF REPRESENTATIVES, H.R. DOC. NO. 115-177, r. XXI(2)(a)(1), (c) at 871–72 (2019) (discussing unauthorized appropriations reported in general appropriation bills); STANDING RULES OF THE SENATE, S. DOC. NO. 113-18, r. XVI(2), at 11 (2013) (prohibiting amendments to appropriations bills from proposing "new or general legislation" or restricting expenditures based on limitations "not authorized by law").

327. Bressman & Gluck II, *supra* note 1, at 800; *see* Jonathan R. Siegel, *Textualism and Contextualism in Administrative Law*, 78 B.U. L. REV. 1023, 1033–58 (1998) (highlighting cases in which "background principles" were a "vital consideration" in the interpretation of administrative law statutes).

statutes, concluding that the Supreme Court often tailors their interpretation based on the realities of the committees and process at issue.[328]

For instance, many members of the Court make heavy reliance upon legislative history in the tax context.[329] This reflects the fact that committee reports in the tax context have been essential in elaborating complex, arcane, and highly technical tax statutes. The JCT is traditionally heavily involved in the process of drafting the committee reports, as are members of the Treasury Department and the tax committees. In the Senate, committee votes on tax policies occur on conceptual markups, rather than actual statutory text, making the legislative history even more important. For all of these reasons, members tend to rely heavily on committee reports on tax legislation.[330]

A contextualized, process-based view would commend the Court's attunement to the procedural differences across subject matter. That being said, some procedures *reduce* the differences between subject matters. For example, when tax legislation is passed through reconciliation, as was done with the TCJA, the legislative history becomes of reduced importance. In the TCJA context, contrary to past practice in major tax acts, the committee reports did not generally detail the policy reasons behind legislative changes. This reflects the rushed process in which it was passed. A court should adjust its interpretative stance accordingly, perhaps decreasing reliance on legislative history in the tax-reconciliation context or not reading too much into its absence.

D. Summary

To summarize, knowledge of congressional procedure can guide the judiciary to a more nuanced understanding of Congress and the meaning of its statutes. This is a different project than strict interpretation of a statute in accordance with legislative rules, which has the danger of leading the interpreter astray from congressional reality. Nonetheless, familiarity with the rules can deepen awareness of congressional procedure, allowing the interpreter to take it seriously.

Conclusion

The process-based school of interpretation is poised to reinvigorate the field of statutory interpretation through the formulation of predictable rules with democratic bona fides. New interpretive presumptions, however, must strive to reflect congressional process without essentializing it. Congress's procedural frameworks are a tempting shorthand, but they are only a guideline.

328. Brudney & Ditslear, *supra* note 315.
329. *Id.* at 1283.
330. *Id.* at 1281–82.

This Article began with a riddle: What is the significance of the rules to an interpreter when Congress routinely flouts them? Attempts to improve the process by indirectly enforcing the rules through statutory interpretation risks subverting Congress's lawmaking. Such coercion also risks advancing rules in a manner that is *corruptive* to the legislative process rather than ameliorative. This is because such an approach necessarily ignores the inherent safety valves of the rules. The rules in the abstract do not guarantee a rational lawmaking process; instead, it is their application that allows Congress to weigh competing considerations that are essential to the legislative endeavor.

Should, then, we abandon the procedural framework in interpretation? I have begun to explore the ways in which the rules can deepen our understanding of Congress, even when they are not being followed. At times, this leads the interpreter to glean only high-level glimpses into Congress's inner workings. Other times, the interpreter may achieve a more granular reconstruction of the process through the rules.

To be sure, rooting interpretation in congressional procedure presents formidable difficulties. In just a few years, however, undaunted scholars and judges have made important inroads to the project through careful study of Congress. Building a robust picture of the legislative arena is a collective enterprise that will continue to take the time and effort of many contributors. Perhaps most challenging, it will require the recognition of modest insights into the legislative process rather than simply extraordinary ones.