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## DECONSTRUCTING DEEM AND PASS: A CONSTITUTIONAL ANALYSIS OF THE ENACTMENT OF BILLS BY IMPLICATION

RONALD J. KROTOSZYNSKI, JR.\*

### ABSTRACT

*Since 1933, the U.S. House of Representatives has maintained a procedure, the self-executing rule, that permits a single floor vote to pass multiple independent bills. Using this procedure, the House can pass a bill and, at the same time, “deem passed” entirely separate bills via a single floor vote. Some legal scholars have argued that this procedure is constitutionally unobjectionable, provided that members of the House clearly understand the legislative effects, whether singular or plural, of a particular vote. Others, however, have argued that the device violates the Constitution because the House and Senate do not vote on the same question. Careful consideration of the relevant constitutional text and legislative history reveals that the question does not have an easy or obvious answer. Perhaps surprisingly, the Constitution does not speak with clarity on whether a single floor vote may pass multiple, separate bills, nor does the Constitution’s legislative history provide any clear*

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\* John S. Stone Chair, Director of Faculty Research, and Professor of Law, University of Alabama School of Law. The University of Alabama Law School Foundation provided generous research support for this project. I wish to express my thanks to Robert Marshall, research librarian at the University of Alabama School of Law, and Kerry Fitz-Gerald, research librarian at the Seattle University School of Law, who both provided invaluable research assistance with this project. Thanks also to Professors Dan Cole, David Law, Ron Levin, Lyrissa Lidsky, Robert Mikos, Andy Morriss, James Puckett, and Chris Wells for reading and commenting on an earlier draft of this Article. Sean Fahey, Alabama Class of 2012, and Mark Harris, Alabama class of 2014, provided very useful research assistance. In addition, I am grateful for the helpful comments and suggestions provided by the faculty of the Stetson University College of Law incident to a faculty workshop. As always, any and all errors or omissions are my responsibility alone.

*guidance on this question. Instead, the answer depends on whether one generally embraces formalism or functionalism in one's separation of powers analysis. From a formalist perspective, the House and Senate must not only adopt the same identical text, but must also vote on the same question. From a functionalist perspective, however, the precise procedure used to approve the text should not matter so long as both the House and Senate take political responsibility for adopting a particular statutory text. Given the relatively weak reasons that undergird the House's use of the deem-and-pass procedure—namely a desire to avoid political responsibility for unpopular legislation by rendering electoral accountability more difficult—the formalist position has much to recommend it.*

## I. INTRODUCTION

In March 2010, Rep. Louise Slaughter, then-chair of the Rules Committee of the House of Representatives, with the approval of then-Speaker Nancy Pelosi and the House Democratic party leadership, publicly floated the idea of using a special “self-executing” rule to permit the members of the House to use a single floor vote to adopt a bill that would simultaneously amend and pass the Senate-enacted health care reform bill.<sup>1</sup> Under the special rule, dubbed the “Slaughter Solution” by critics,<sup>2</sup> House approval of the separate House-originated amendments bill

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1. See Jess Bravin, *Legislative Maneuver Would Spur Challenges*, WALL ST. J., Mar. 18, 2010, at A4 (“The House Rules Committee, which has broad authority over how the chamber handles bills, could create a rule that once the House approves the package of changes, the chamber would be ‘deemed’ to have approved the main Senate bill as well. That could allow House Democrats to claim, with technical accuracy, that they never voted for the Senate bill and to avoid association with its unpopular provisions.”); David M. Herszenhorn & Robert Pear, *Democrats Consider New Maneuvers for Health Bill*, N.Y. TIMES, Mar. 17, 2010, at A18 (“House Democrats are so skittish about the piece of legislation that is now the vehicle for overhauling the health care system—the bill passed by the Senate in December—that they are considering a maneuver that would allow them to pass it without explicitly voting for it.”). For a particularly outraged editorial reaction to the proposed use of a special rule to enact the Patient Protection and Affordable Healthcare Act, see Editorial, *Slaughter House Rules: How Democrats May ‘Deem’ ObamaCare Into Law*, WALL ST. J., Mar. 16, 2010, at A22 (“We’re not sure American schools teach civics any more, but once upon a time they taught that under the U.S. Constitution a bill had to pass both the House and Senate to become law. Until this week, that is, when Speaker Nancy Pelosi is moving to merely ‘deem’ that the House has passed the Senate health-care bill and then send it to President Obama to sign anyway.”).

2. See Jerry Zremski, *‘Slaughter Solution’ Is Health Bill’s Flash Point*, BUFFALO NEWS (Buffalo, NY), Mar. 17, 2010, at A1. Coined by GOP members of the House of Representatives vehemently opposed to enactment of health care reform legislation, the catch-phrase “Slaughter Solution” was intended to be a pejorative phrase; accordingly “[Rep.] Slaughter seemed nonplussed that her last name was being used to try to tar the Democrats as they close in on their singular goal: health care reform.” *Id.*

would also “deem” passed the Senate bill.<sup>3</sup> The vote on the amendments legislation would, therefore, advance the Senate bill to the President for his consideration and also send a new House bill containing amendments to the Senate bill to the Senate for its consideration.<sup>4</sup> If the Senate enacted the House amendments bill, that bill would also be presented to the President for his consideration; the fate of the House amendments bill, however, would be wholly independent of the fate of the Senate version of the healthcare reform legislation.

Then-Majority Leader Steny H. Hoyer defended the proposed parliamentary maneuver arguing that the use of a special rule “deeming” the Senate bill enacted upon passage of the House amendatory bill “is consistent with the rules” and “is consistent with former practice.”<sup>5</sup> President Barack Obama also demurred when asked about the legitimacy of using this procedure to enact comprehensive health care reform, saying “I don’t spend a lot of time worrying about what the procedural rules are in the House or Senate” and suggesting that “[i]f people vote yes, whatever form that takes, that is going to be a vote for health-care reform.”<sup>6</sup>

A public outcry against this “deem-and-pass” procedure arose,<sup>7</sup> and the House leadership ultimately abandoned the plan, instead holding a

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3. See Adam Nagourney, *Point of (Dis)order*, N.Y. TIMES, Mar. 21, 2010, at WK1 (noting that “House Democrats . . . were moving to pass the Senate health care bill over the weekend with a deem-and-pass maneuver, which means they would be voting on fixes to the Senate bill after agreeing that the vote would also serve to pass the Senate bill itself, something many Congressional Democrats were loath to do.”); see also Ezra Klein, *Nancy Pelosi’s Strategy for Passing Health-Care Reform*, WASH. POST (Mar. 15, 2010, 1:31 PM), [http://voices.washingtonpost.com/ezra-klein/2010/03/nancy\\_pelosis\\_strategy\\_for\\_pas.html](http://voices.washingtonpost.com/ezra-klein/2010/03/nancy_pelosis_strategy_for_pas.html) (noting that “Pelosi said that she favors the ‘deem and pass’ strategy”). Klein further explains:

Here’s how that will work: Rather than passing the Senate bill and then passing the fixes, the House will pass the fixes under a rule that says the House “deems” the Senate bill passed after the House passes the fixes.

The virtue of this, for Pelosi’s members, is that they don’t actually vote on the Senate bill. They only vote on the reconciliation package. But their vote on the reconciliation package functions as a vote on the Senate bill. The difference is semantic, but the bottom line is this: When the House votes on the reconciliation fixes, the Senate bill is passed, even if the Senate hasn’t voted on the reconciliation fixes, and even though the House never specifically voted on the Senate bill.

*Id.*

4. See Herszenhorn & Pear, *supra* note 1 (“The idea is to package the changes and the underlying bill together in a way that amounts to an amended bill in a single vote.”).

5. *Id.*

6. Bravin, *supra* note 1.

7. See, e.g., Zremski, *supra* note 2 (“Meanwhile, right-wing blogs were filled with talk that Slaughter was committing treason, the Wall Street Journal editorial page weighed in against what it called ‘Slaughter House Rules,’ and conservative radio host Rush Limbaugh said: ‘The House Democrats are ripping up the Constitution.’”).

separate floor vote on the Senate health reform bill and then a second, wholly independent vote on the House amendments legislation.<sup>8</sup> Upon passage in the House, the Senate health care reform bill advanced to the President and the separate amendments bill advanced to the Senate for its consideration.<sup>9</sup>

During the contretemps over the possible use of deem-and-pass to enact the Senate bill without amendments, leading constitutional law scholars offered strikingly divergent opinions regarding the constitutionality of the procedure. Professor Michael McConnell argued that the deem-and-pass maneuver was patently unconstitutional;<sup>10</sup> whereas Professor Jack Balkin opined that the procedure was assuredly constitutional.<sup>11</sup> Other legal academics offered summary conclusions on the question in the press without providing any independent constitutional

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8. See David M. Herszenhorn & Robert Pear, *Health Vote Is Done, but Partisan Debate Rages On*, N.Y. TIMES, Mar. 23, 2010, at A19; see also Lori Montgomery & Paul Kane, *Health-care Cliffhanger*, WASH. POST, Mar. 21, 2010, at A1 (“House leaders determined Saturday that they will stage a vote on the Senate’s health-care bill, dropping a much-criticized strategy of allowing lawmakers to deem the landmark legislation into law.”); *id.* (“Pelosi’s decision to have the House hold two votes, one on the Senate bill and one on a separate package of revisions, reversed her position from earlier in the week, when she said she preferred to use a legislative procedure called ‘deem and pass.’”); Nagourney, *supra* note 3 (noting that “Democrats on Saturday dropped the deem-and-pass idea, presumably figuring that it might have been one legislative maneuver too many”).

9. See Robert Pear & David M. Herszenhorn, *Congress Sends White House Landmark Health Overhaul*, N.Y. TIMES, Mar. 22, 2010, at A1. “With the 219-to-212 vote, the House gave final approval to legislation passed by the Senate on Christmas Eve.” *Id.* The House adopted the bill proposing amendments to the Senate legislation by a vote of 220 to 211. *Id.* The Senate bill, as amended by the separate House “fixes” legislation, is now law. See Patient Protection and Affordable Care Act, Pub. L. No. 111-148, 124 Stat. 119 (2010).

10. Michael W. McConnell, Editorial, *The Health Vote and the Constitution—II*, WALL ST. J., Mar. 20, 2010, at A15 (“This approach appears unconstitutional.”).

11. Jack Balkin, *Is Deem and Pass Constitutional?*, BALKINIZATION (Mar. 15, 2010, 10:00 PM), <http://balkin.blogspot.com/2010/03/is-deem-and-pass-constitutional.html> (“Under Article I, section 5 of the Constitution, the House can determine its own rules for passing legislation. There are plenty of precedents for passing legislation by reference through a special rule.”); *id.* (“The House may do this on a single vote if the special rule that accompanies the reconciliation bill says that by passing the reconciliation bill the House agrees to pass the same text of the same bill that the Senate has passed.”); see also McConnell, *supra* note 10 (“Rep. Louise Slaughter (D., N.Y.), chair of the House Rules Committee and prime mover behind this approach, has released a letter from Yale Law School’s Jack Balkin asserting that a ‘rule which consolidates a vote on a bill and accompanying amendments, or, as in this case, a reconciliation measure and an amended bill, is within the House’s powers under Article I, Section 5, Clause 2.’”); Warren Richey, *Even Before House Vote on Healthcare Bill, Legal Challenges Loom*, THE CHRISTIAN SCI. MONITOR, Mar. 19, 2010, available at <http://www.csmonitor.com/USA/Politics/2010/0319/Even-before-House-vote-on-healthcare-bill-legal-challenges-loom> (“Yale Law Prof. Jack Balkin disagrees with McConnell’s precise reading of the requirement. He has written on his popular blog that the House maneuver would satisfy constitutional requirements provided the House accepts the same text as the Senate bill as its own act.”). The text of Professor Balkin’s letter of March 18, 2010, to Rep. Slaughter, regarding the constitutional status of the proposed self-executing rule may be found at: <http://balkin.blogspot.com/2010/03/michael-mcconnell-and-metaphysics-of.html> (last visited Oct. 12, 2012) [hereinafter “Balkin Letter”].

analysis.<sup>12</sup> Finally, some legal commentators seemed rather unclear on precisely what the procedure entailed, but nevertheless expressed skepticism about it.<sup>13</sup>

Because the House leadership ultimately abjured the use of the special rule, the controversy has largely fallen away. Ultimately, President Obama signed both the original Senate bill<sup>14</sup> and House amendatory bill<sup>15</sup> into law,<sup>16</sup> and the Supreme Court subsequently sustained the law's individual mandate to purchase health insurance coverage, a central enforcement feature of the Patient Protection and Affordable Care Act.<sup>17</sup> Even so, the

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12. For example, Professor Michael Dorf, of the Cornell Law School, endorsed Balkin's analysis, *see* Bravin, *supra* note 1 ("It still will be the case that the legislation had majority support in both houses and signature by the president.") (internal quotations omitted), whereas Professor Ronald Rotunda argued that McConnell's analysis was correct, *see* Ashby Jones, *On Health Care Reform and the Constitution, Part IV*, WALL ST. J. LAW BLOG (Mar. 18, 2010, 10:13 AM ET), <http://blogs.wsj.com/law/2010/03/18/on-health-care-reform-and-the-constitution-part-iv/> (noting Rotunda's suggestion that the argument against the constitutionality of the deem and pass procedure "is a reasonable one, and I wouldn't be surprised if the court bought it").

13. *See, e.g.*, Fred Barbash, *'Slaughter Solution' Could Face Legal Challenge*, POLITICO, Mar. 16, 2010, available at <http://www.politico.com/news/stories/0310/34508.html> (last visited Oct. 12, 2012) (quoting George Washington University law professor Alan Morrison). Professor Morrison stated that:

[y]ou run the risk that it could be declared unconstitutional. If both houses vote on the substance of everything, then I'm not troubled. But if it looks like the House is never going to vote on the Senate bill, that's very troubling. I wouldn't want to stake the entire bill on that.

*Id.* (internal ellipsis omitted). But, under a special rule whereby the passage of bill A implies the passage of bill B, the House votes on both bills by implication, and it does so twice—first, when it adopts the special rule with the deem and pass provision and again, when it votes on the bill that serves to "piggyback" the bill being enacted by implication. Professor Morrison added, unhelpfully, "What does 'deem' mean? In class I always say it means 'let's pretend.' 'Deems' means it's not true." *Id.* This comment seems to reflect a misunderstanding of how a special rule adopting a deem-and-pass procedure actually works; it does not involve any "pretending" or a "fake" vote on the bill being passed by implication. Instead, the procedure simply links up two separate pieces of legislation for the purpose of a holding a single floor vote. It is akin to adopting an amendment and then passing a bill, but differs in that the two bills remain entirely separate legislative vehicles (as opposed to an amended bill, which constitutes a single legislative vehicle after final passage on the floor).

14. H.R. 3590, 111th Cong. (2010); Patient Protection and Affordable Care Act, Pub. L. No. 111-148, 124 Stat. 119 (2010), available at <http://www.gpo.gov/fdsys/pkg/PLAW-111publ148/pdf/PLAW-111publ148.pdf>. The Senate amended this House bill and the House then simply enacted the Senate's version of the original bill—without any amendments—in order to avoid having to send a further amended bill back to the Senate, where 60 votes would have been required to overcome a certain filibuster by the GOP caucus.

15. H.R. 3962, 111th Cong. (2010); Preservation of Access to Care for Medicare Beneficiaries and Pension Relief Act of 2010, Pub. L. No. 111-192, 124 Stat. 1280, available at <http://www.gpo.gov/fdsys/pkg/PLAW-111publ192/pdf/PLAW-111publ192.pdf>.

16. *See* Patient Protection and Affordable Care Act, Pub. L. No. 111-148, 124 Stat. 119 (2010); *see also* Sheryl Gay Stolberg & Robert Pear, *A Stroke of a Pen, Make That 20, and It's Official*, N.Y. TIMES, Mar. 24, 2012, at A19 ("Mr. Obama signed the measure, the Patient Protection and Affordable Care Act, during a festive and at times raucous ceremony in the East Room of the White House.").

17. Nat'l Fed'n of Indep. Bus. v. Sebelius, 132 S. Ct. 2566 (2012).

rules of the House of Representatives still permit use of the deem-and-pass procedure, and its constitutional status deserves more sustained analysis than it has received to date. Indeed, no carefully considered legal analysis of the procedure exists in scholarly literature, and only a handful of law review articles mention self-executing rules at all.<sup>18</sup> The rather fundamental question of what it means for a house of Congress to “pass” a bill demands more thorough attention and analysis.

The answer to the constitutional question of whether a single floor vote may pass multiple, separate bills does not have an obvious answer.<sup>19</sup> The text of the Constitution does not clearly resolve this question.<sup>20</sup> Nor is recourse to the legislative history of the Constitution much help in answering what, at first blush, seems as if it should be an easy, indeed obvious, issue.<sup>21</sup>

Ultimately, the constitutionality of a special rule using the deem-and-pass maneuver turns on extra-textual considerations that generally track the debate between formalist and functionalist theories about the separation of powers.<sup>22</sup> From a formalist perspective, deem-and-pass is objectionable because each house of Congress does not vote on the exact same question incident to consideration of an identical legislative vehicle. Instead, the House of Representatives votes on the Senate-passed bill, in addition to other legislative acts. These other acts could include bills originating in the House of Representatives, other Senate-passed bills, and conceivably even overrides of presidential vetoes. This arguably undermines the bicameralism requirement set forth in Article I, Section 7.<sup>23</sup> If, as Professor McConnell argues, Article I, Section 7 requires both

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18. See Paul Frymer & Albert Yoon, *Political Parties, Representation, and Federal Safeguards*, 96 NW. U. L. REV. 977, 1018 (2002); Gerald B.H. Solomon & Donald R. Wolfensberger, *The Decline of Deliberative Democracy in the House and Proposals for Reform*, 31 HARV. J. ON LEGIS. 321, 358 (1994).

19. See *infra* notes 78–100, 142–48 and accompanying text.

20. See *infra* Part III.

21. Neither the extant records of the Federal Convention nor the Federalist Papers directly address precisely *how* each house of Congress must “pass” a pending bill. See *infra* notes 101–45.

22. See Linda D. Jellum, “Which Is to Be Master,” *The Judiciary or the Legislature? When Statutory Directives Violate Separation of Powers*, 56 UCLA L. REV. 837, 860–79 (2009) (discussing “formalism” and “functionalism” in the context of separation of powers theory and doctrine). Although I have adopted the nomenclature of “formalism” and “functionalism,” I fully recognize that some prominent legal scholars have questioned the utility of traditional separation of powers analysis and thinking in light of the modern reality of blended functions shared among the three branches of the federal government. See, e.g., EDWARD RUBIN, *BEYOND CAMELOT: RETHINKING POLITICS AND LAW FOR THE MODERN STATE* (2005); Bruce Ackerman, *The New Separation of Powers*, 113 HARV. L. REV. 633 (2000); M. Elizabeth Magill, *Beyond Powers and Branches in Separation of Powers Law*, 150 U. PA. L. REV. 603 (2001).

23. See *infra* note 187 and accompanying text.



houses to conduct votes on identical questions, the use of a self-executing rule that “deems” another bill enacted should be constitutionally impermissible.<sup>24</sup>

From a functionalist perspective, on the other hand, a single vote could advance an infinite number of bills, so long as the bill serving as the legislative train’s engine receives majority support, the members are clear on the precise effects of the vote, and a majority agrees by special rule to permit a single floor vote with multiple legislative effects. In other words, no serious constitutional objection exists provided that all the members are clear on the legislative outcome of a positive vote because each house has a constitutional mandate to establish its own internal operating procedures.<sup>25</sup>

The use of deem-and-pass special rules obviously presents a serious and difficult question of constitutional law: May a single floor vote in either house of Congress have multiple legislative effects that advance entirely separate bills simultaneously? The Constitution plainly requires that both houses of Congress must “pass” a bill in order for it to become a law,<sup>26</sup> but does this bicameralism requirement, set forth in Article I, Section 7, encompass a duty on the part of both houses to take the exact same vote?

In the end, and despite the importance and centrality of this question, the federal courts might well decline to reach the merits of a challenge to the deem-and-pass procedure—save perhaps in the case of a presidential veto override vote.<sup>27</sup> Even so, consideration of the constitutional status of the deem-and-pass procedure is important because it demonstrates that in matters of constitutional law we often know a great deal less than we think we know. Furthermore, both Congress and the President may someday need to consider not merely the political implications of the deem-and-pass procedure, but also its constitutional status, when deciding whether to embrace its use in the federal legislative process.

This Article considers these questions in some detail over the next six parts. Part II examines the use of special rules, including the deem-and-pass special rule, in the House of Representatives.<sup>28</sup> Part III analyzes the Constitution’s text with respect to the enactment of bills, the ratification of

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24. See *infra* notes 175–77 and accompanying text.

25. See *infra* notes 164–68 and accompanying text.

26. See *infra* note 82 and accompanying text.

27. See *infra* notes 80–81 and accompanying text.

28. See *infra* notes 34–73 and accompanying text.

treaties, and the override of presidential vetoes.<sup>29</sup> Part IV undertakes a review of the legislative history of the Constitution in general, and Article I's provisions on the enactment of laws in particular, to determine whether the Framers expressed any clear intention regarding whether each house of Congress must take an identical vote, rather than simply adopt the same text via non-mirror image votes.<sup>30</sup> Part V offers an analysis and critique of the House's use of the deem-and-pass procedure from both formalist and functionalist perspectives.<sup>31</sup> Part VI considers whether the federal courts would be willing to reach the merits of a constitutional challenge to the House's use of deem-and-pass special rules to enact bills only by implication rather than directly.<sup>32</sup> Finally, Part VII briefly concludes and summarizes my argument.<sup>33</sup>

Because the use of the deem-and-pass maneuver significantly diminishes accountability and transparency, and also undermines the importance of the bicameralism requirement, the practice should not be used to advance multiple separate bills through a single floor vote. Moreover, the question of what the Constitution requires for both houses of Congress to pass a bill should constitute a justiciable question, although this proposition is arguably stronger in contexts involving the use of deeming to override a presidential veto or to ratify a treaty.

## II. SPECIAL RULES, SELF-EXECUTING RULES, AND THE DEEM-AND-PASS PROCEDURE

Since the New Deal era, the House of Representatives has used a variety of "special rules" designed to facilitate or expedite the legislative process. A "special rule" refers to a rule that waives or alters the legislative procedures on the floor of the House with respect to a particular bill or resolution, thereby departing from the "regular order."<sup>34</sup> Deem-and-pass rules originated in the 1930s<sup>35</sup> (the same time that Congress devised

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29. See *infra* notes 74–96 and accompanying text.

30. See *infra* notes 98–143 and accompanying text.

31. See *infra* notes 148–91 and accompanying text.

32. See *infra* notes 192–244 and accompanying text.

33. See *infra* notes 245–47 and accompanying text.

34. See *infra* note 37; see also Norman J. Ornstein, *Hypocrisy: A Parliamentary Procedure*, AM. ENTER. INST.: THE ENTER. BLOG (Mar. 16, 2010, 4:24 PM), <http://blog.american.com/?p=11467> (discussing special rules, including deem and pass rules, and expressing a general preference for the regular order, or default rules of the House).

35. The first use of a "deeming" maneuver took place in 1933 and was used to raise the national debt ceiling—a vote that was necessary but politically unpopular with many members of the House Democratic caucus. See Ryan Grim, *House Has Long History of Political Cowardice, Prolific Use of 'Deeming Resolutions'*, HUFFINGTON POST (May 16, 2010, 4:50 PM), <http://www.huffingtonpost.com/>

the legislative veto)<sup>36</sup> and the procedure has been used hundreds of times over the past eighty years by the leadership of both political parties.<sup>37</sup> Thus, deem-and-pass rules enjoy a reasonably long and non-partisan historical imprimatur. Nor has the procedure ever been successfully challenged in federal court.<sup>38</sup> Myriad forms of special rules exist, including “deem-and-pass,” but also including “king-of-the-mountain” special rules.<sup>39</sup>

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2010/03/16/house-has-long-history-of\_n\_500623.html. Grim notes that “[t]he first time that the chamber used what’s known as a ‘deeming resolution’—the mechanism Democrats are leaning toward using to pass the Senate health care bill through the House—was March 16, 1933.” *Id.* The special rule, set forth in House Resolution 63, provided “Resolved, That immediately upon the adoption of this resolution the bill H.R. 2820, with Senate amendments thereto, be, and the same hereby is, taken from the Speaker’s table to the end that all Senate amendments be, and the same are hereby, agreed to.” H. Res. 63, 73d Cong. (Mar. 16, 1933). For a transcript of the debate associated with this first use of the deem-and-pass special rule, see Jordan Fabian, *Rules Committee claims precedent for ‘deem and pass’ plan*, THE HILL (Mar. 16, 2010, 8:36 AM), <http://thehill.com/blogs/blog-briefing-room/news/86987-rules-committee-claims-precedent-for-deem-and-pass-plan>, (publishing in full a House Rules Committee staff memorandum released to the media that reprints both the full text of H.R. Res. 63 and also a transcript of the debate arising over it on the House floor).

36. See *INS v. Chadha*, 462 U.S. 919, 968–974 (1983) (White, J., dissenting).

37. See David Dayen, *Constitutional Questions Arise From “Deeming” Strategy*, FIREDOGLAKE, (Mar. 16, 2010, 6:54 AM) <http://news.firedoglake.com/2010/03/16/constitutional-questions-arise-from-deeming-strategy/> (“Not only have Republican leaders said they cannot actually stop the House from advancing in this manner if they have the votes, but when they were in the majority, they used ‘self-executing rules,’ which is the procedural way in which this process works, over and over again, hundreds of times in fact over a 12-year period.”); Tory Newmyer, *Pelosi Defends Deem-and-Pass Tactic*, ROLL CALL (Mar. 18, 2010, 2:29 PM), <http://www.rollcall.com/news/-44357-1.html> (quoting then-House Speaker Nancy Pelosi (D-CA) as stating that the deem-and-pass special rule “has been used hundreds of times” by the House); see also WALTER J. OLESZEK, CONG. RESEARCH SERV., “SELF-EXECUTING” RULES REPORTED BY THE HOUSE COMMITTEE ON RULES, CRS-1–2 (Dec. 21, 2006) (discussing the development and use of the special self-executing rules to “deem-and-pass” bills).

38. Whether a federal court would find the constitutionality of a deem-and-pass special rule justiciable presents a difficult question. Arguably, the federal courts might decline to answer the question either on political question grounds or under the enrolled bill doctrine. See *infra* notes 197–204 and accompanying text; see also *Pub. Citizen v. U.S. Dist. Court*, 486 F.3d 1342, 1351–52 (D.C. Cir. 2007) (applying the enrolled bill doctrine in support of decision to dismiss a case challenging the validity of a congressional enactment on political question grounds, thereby sustaining the validity of the statute over Public Citizen’s objection to its manner of enactment).

39. This is a particularly clever—and objectionable—kind of special rule. Under a “king-of-the-mountain” (or “king-of-the-hill”) rule, the House will take recorded floor votes on a series of amendments to a pending bill, but only the *last* enacted amendment will actually be incorporated. See Frymer & Yoon, *supra* note 18, at 1018. This allows members to vote in favor of, and seemingly adopt, amendments that the House leadership dislikes, putting members on the record as having supported a particular amendment. Because only the last amendment to carry a majority actually gets incorporated into the bill, however, the votes are really a meaningless form of political theater, meant to obfuscate accountability for final content of the bill that might be objectionable to particular constituencies. A member could truthfully state “we amended the bill to address ‘x,’” but the amendment will be ineffectual unless it is the very last to garner a majority. Of course, the House leadership sequences the amendments to ensure that the last enacted amendment is unobjectionable to the House majority’s leadership. See *id.* (“The [Rules] Committee members strategically place

A special rule generally defines what amendments, if any, will be in order on the floor and also can specify what particular legislative effects either passage of the special rule or another piece of legislation will have. Strictly speaking, a rule providing for the enactment of another bill or the incorporation of an amendment without committee action or a floor vote constitutes a species of a “self-executing rule.”<sup>40</sup>

A Congressional Research Service report explains that:

One of the newer types [of special rules] is called a “self-executing” rule; it embodies a “two-for-one” procedure. This means that when the House adopts a rule it also simultaneously agrees to dispose of a separate matter, which is specified in the rule itself. For instance, self-executing rules may stipulate that a discrete policy proposal is deemed to have passed the House and been incorporated in the bill to be taken up. The effect: neither in the House nor in the Committee of the Whole will lawmakers have an opportunity to amend or vote separately on the “self-executed” provision. It was automatically agreed to when the House passed the rule.<sup>41</sup>

Most commonly, the Rules Committee proposes a self-executing rule to dispose summarily of Senate amendments to an earlier House-passed bill.<sup>42</sup> However, there is nothing in the House rules that would prevent the use of a self-executing rule to “deem passed” an entirely independent piece of legislation rather than to incorporate amendments into a pending bill.<sup>43</sup>

Sarah Binder, a senior fellow at the Brookings Institution, explains that self-executing rules “provide that the House—upon adoption of the special rule—is considered or ‘deemed’ to have taken some other action as well.”<sup>44</sup> Moreover, the “deeming” function, under the terms of a rule, could be tied either to adoption of the rule itself *or* to the subsequent vote

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amendments that are popular with constituents who oppose the party’s choice of ultimate legislation” and, accordingly, “members wishing to take a position to please their constituents can vote exuberantly in favor of as many amendments as they like.”). A better moniker for this kind of special rule would be the “musical chair rule,” in that only the last amendment seated wins.

40. See WM. HOLMES BROWN & CHARLES W. JOHNSON, *HOUSE PRACTICE: A GUIDE TO THE RULES, PRECEDENTS, AND PROCEDURES OF THE HOUSE* 823–27, 857–58, 866–67 (2003) [hereinafter “HOUSE PRACTICE”]. Obviously, the use of a special self-executing rule to amend a single bill presents a much different—and easier—question than the use of this device to enact multiple, entirely separate bills through a single floor vote.

41. OLESZEK, *supra* note 37, at CRS-1.

42. See *id.* at CRS-2.

43. See Sarah A. Binder, *A Primer on Self-Executing Rules*, UP FRONT BLOG (Mar. 17, 2010, 4:09 PM), [http://www.brookings.edu/opinions/2010/0317\\_rules\\_binder.aspx](http://www.brookings.edu/opinions/2010/0317_rules_binder.aspx).

44. *Id.*

on the bill the rule addresses. Thus, the passage of a bill by deeming would not necessarily have to be a function of enactment of the special rule but could instead relate to the vote on the main bill to which the special rule relates.<sup>45</sup>

To adopt a special rule, however, the House must adopt the report of the Rules Committee that pertains to a specific bill.<sup>46</sup> Accordingly, there must *always* be at least two floor votes: a vote on the special rule, and a subsequent vote on the substantive legislation itself.<sup>47</sup> As *House Practice* observes:

A resolution that specifies the manner in which a measure is to be taken up and the procedures to be followed during its consideration is called a “special order of business” or “special rule.” Such a resolution, *once adopted by the House*, gives privilege to the measure to be considered. . . . By adoption of a special order by majority vote, the House establishes the parameters of its agenda on an ad hoc basis.<sup>48</sup>

The Rules Committee enjoys broad discretion to use its authority to establish a special rule for consideration of a particular bill. “The privilege of the Committee on Rules to report special orders of business extends to special orders for the consideration of individual bills or classes of bills or the consideration of a specified amendment to a bill and the prescription of

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45. *See id.* Binder notes that “[o]ne form of this deeming provision could provide that when the House votes to approve the special rule for the reconciliation bill (or, alternatively, when the House votes to pass the reconciliation bill), the House is simultaneously considered to have voted for and passed the Senate-passed health care overhaul.” *Id.*

46. HOUSE PRACTICE, *supra* note 40, at 827 (“The House may adopt a special rule from the Committee on Rules that has the effect of setting aside the standing rules of the House insofar as they impede the consideration of a particular bill.”). Most commonly, a special rule establishes the terms of debate, determines which amendments, if any, may be presented on the floor, and waives any potential points of order that might be used to delay or prevent House action on the bill. A “self-executing rule,” for example, which includes “deem and pass” rules, “is not subject to a point of order that the amendment would otherwise be subject to because the amendment is not separately before the House during consideration of the special order.” *Id.*

47. *See* OLESZEK, *supra* note 37, at CRS-1–2 (“This means that when the House adopts a rule it also simultaneously agrees to dispose of a separate matter, which is specified in the rule itself.”); Kenneth W. Smith, Jr., *Understanding the self-executing rule*, WASH. POST, Mar. 17, 2010, 10:33 AM, <http://voices.washingtonpost.com/44/2010/03/understanding-the-self-executi.html> (noting that “lawmakers have no opportunity to amend or vote separately on the self-executed provision” and that this unrelated provision will be “automatically agreed to upon passage of a related measure”); *see also* Don Wolfensberger, *House Executes Deliberation With Special Rules*, ROLL CALL (June 19, 2006, 12:00 AM), [http://www.rollcall.com/issues/51\\_139/-13866-1.html](http://www.rollcall.com/issues/51_139/-13866-1.html) (describing the mechanics and frequency of the use of self-executing deem and pass rules); HOUSE PRACTICE, *supra* note 40, at 860–61 (same).

48. HOUSE PRACTICE, *supra* note 40, at 857 (emphasis added).

a mode of considering such amendment.”<sup>49</sup> The only real restriction on the Rules Committee is the necessity of securing enactment of the special rule by the House; a special rule can exist *only* if the House itself votes to adopt it.

The Rules Committee uses a special, self-executing rule most commonly to secure agreement to Senate amendments to a House-passed bill. This device permits the House to avoid committing the amended bill to a House committee of jurisdiction and also obviates the need for a floor vote on the amendment or amendments:

The Committee on Rules may recommend a “hereby” resolution that provides for a concurrent resolution correcting the enrollment of a bill to be considered as adopted by the House upon adoption of the special order. Similarly, it may provide that a Senate amendment pending at the Speaker’s table and otherwise requiring consideration in Committee of the Whole be “hereby” considered as adopted upon adoption of the special order or considered as adopted with a further specified amendment.<sup>50</sup>

Although “at one time the Rules Committee used self-executing amendments only for making technical changes, the Rules Committee increasingly uses such amendments to make substantive changes in bills without subjecting the changes to separate debate and votes.”<sup>51</sup> This approach makes great sense if the House wishes to concur with Senate amendments and simply debate and vote directly on the Senate-enacted version of a pending bill. The Senate amendments are “deemed passed” and the House considers the Senate version of the bill directly, rather than taking separate votes on amendments or sending the bill to a joint conference committee for the purpose of writing a blended bill.

House rules clearly permit the use of a special rule to do more than merely amend a pending bill.<sup>52</sup> The device, simply put, provides a means to “hook-up” otherwise independent legislative measures—bills that otherwise would require independent, separate floor consideration—including measures to incorporate amendments and to enact other free-standing pieces of legislation.<sup>53</sup> For better or worse, House practice

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49. *Id.* at 859.

50. *Id.*; see also Solomon & Wolfensberger, *supra* note 18, at 358 (“Even more frequently, the Rules Committee introduces into the base text of a rule a self-executing further amendment; by adopting the rule, the House also adopts the amendment to the bill.”).

51. Solomon & Wolfensberger, *supra* note 18, at 358.

52. HOUSE PRACTICE, *supra* note 40, at 859–60.

53. See *id.* at 859–61.

permits the use of a self-executing rule that “consider[s] as adopted” either an amendment or an entirely different bill.<sup>54</sup>

For example, in the context of the 2010 health reform legislation, the most likely form of a deem-and-pass special rule would have made the vote on the amendments package—rather than the rule itself—the act that “deemed passed” the Senate version of the bill. Thus, if the special rule had carried at step one, a subsequent vote on the House amendments bill would also have the legislative effect of “deeming passed” the entirely separate Senate version of the health care bill. As a matter of metaphysics, at the instant the Speaker gavelled to a close the vote on the House amendments bill and declared it passed, the Senate bill would simultaneously be “deemed” enacted as well. In effect, a single floor vote would have two entirely separate legislative effects: a majority vote would enact both *x and y*, rather than simply *x or y*.

A special deem-and-pass rule may have the effect of linking unrelated pieces of legislation for the purpose of a single floor vote. In theory the House Democratic leadership could have made House passage of the Rules Committee resolution the vote that “deemed passed” the Senate version of the health care reform bill. But, linking the passage of the Senate bill to the floor vote on the substantive House amendments bill, rather than to the Rules resolution, would benefit the majority party’s members by avoiding the possibility that the Senate bill might pass while the House amendments bill fails.

At all points in time, however, the House members are cognizant of the effect of a particular floor vote. If a special rule itself has a “deem-and-pass” clause or establishes that a subsequent positive floor vote “deems” another bill or an amendment to be passed, all members of the House of Representatives have clear notice of the precise effect of a vote on both the rule and also the substantive bill. Accountability, then, is not really diminished in the House of Representatives, and an interested constituent could ascertain precisely what proposition her member of Congress supported on the floor of the House.

Moreover, there is, at least in theory, no restriction on the number of legislative effects that could be linked together via a deem-and-pass special rule. The House could enact multiple Senate bills, advance multiple independent bills to the Senate, and perhaps even override a presidential veto with two votes: one on a special rule that specifies how the deem-and-pass will work and a second on the “engine” measure that

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54. *See id.* at 868.

will trigger the deem-and-pass effects. This assumes, of course, that the deem-and-pass linkage uses the substantive bill, rather than the special rule itself, to work its legislative magic. A successful linkage simply requires specification that enactment of either the special rule itself or subsequent House enactment of the bill the special rule addresses will have the *additional* effect of also enacting other bills or overriding a presidential veto (or vetoes) concurrently.

In recent times, the House leadership, under both parties, has been using special rules with more frequency and greater creativity in order to control and shape the legislative process. Walter Oleszak explains that “[s]tarting about twenty-five years ago, in response to developments such as increased partisanship and uncertainty with respect to how long or controversial the amendment process on the floor might be, the Rules Committee began to issue more procedurally imaginative and complex rules.”<sup>55</sup> Jess Bravin adds that “[b]oth parties have used deeming many times dating back to at least 1933,”<sup>56</sup> and have used a special, self-executing rule to secure passage of major legislation. For example, “[u]nder Republican Speaker Newt Gingrich, the House used it to pass a bill in 1996 that gave the president line-item veto power over the federal budget.”<sup>57</sup> The House also has used this procedure “to pass such legislation as the smoking ban on domestic airline flights, an employment verification system meant to screen out illegal immigrants and a ban on using statistical sampling for the 2000 census.”<sup>58</sup>

Moreover, such self-executing rules have been used dozens of times in recent sessions of Congress.<sup>59</sup> The House has even used self-executing rules to enact major legislation. As Binder observes, “perhaps the most

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55. OLESZEK, *supra* note 37, at CRS-1.

56. Bravin, *supra* note 1, at A4.

57. *Id.* For the substantive legislation at issue and subsequent litigation over its constitutional validity, see Line Item Veto Act, Pub. L. No. 104-130, 110 Stat. 1200 (1996) (codified at 2 U.S.C. § 691 *et seq.* (1996)) and *Clinton v. City of New York*, 524 U.S. 417, 420–21 (1998). The Supreme Court invalidated this statute because “[i]n both legal and practical effect,” it permitted the President to amend laws without recourse to the bicameral enactment of a bill. See *Clinton*, 524 U.S. at 438–47.

58. Matt Kelley, *Expert: Pelosi ‘Deem and Pass’ Strategy for Health Care Is Not Unusual*, USA TODAY, Mar. 15, 2010, at A4, available at <http://content.usatoday.com/communities/onpolitics/post/2010/03/expert-pelosi-deem-and-pass-strategy-for-health-care-is-not-unusual/1> (quoting Brookings Institute Fellow Thomas Mann); see also OLESZEK, *supra* note 37, at CRS-2 (listing examples of major bills enacted pursuant to a self-executing rule in the House).

59. Kelley, *supra* note 58, at A4 (reporting that Congress used the procedure “36 times in 2005 and 2006, when the GOP was in charge, and 49 times in 2007 and 2008, after the Democrats had taken control”); see Ornstein, *supra* note 34 (noting that the House Republican Party leadership repeatedly used self-executing rules when they enjoyed a majority from 1995 to 2007 and asking “is there no shame anymore?”). Ornstein, a prolific and well-regarded scholar of Congress, notes, however, that “I don’t like self-executing rules by either party—I prefer the ‘regular order.’” *Id.*



salient use of self-executing rules—reaching back to 1979—allows the House to avoid casting a direct vote on raising the federal debt limit.”<sup>60</sup> She persuasively observes that “[i]t is hard to argue that there’s any measure more central to the functioning of the nation than its ability to issue debt.”<sup>61</sup>

One might ask, why would the House use a special rule to enact either amendments or a major piece of legislation? The answer is obvious: these devices permit a member to go on the record on a given question (even if the final bill does not incorporate the member’s proposed amendment) *or* avoid going on the record, at least nominally, with respect to an unpopular bill. Consider, for example, a “king-of-the-hill” self-executing rule. Brown and Johnson explain,

Although regular order does not permit further amendments to a text once it has been amended in its entirety, a “king-of-the-hill” rule permits several substitute amendments to be voted on in the Committee of the Whole, with only the last one adopted to be considered as finally adopted and reported to the House. This procedure permits consideration of conflicting amendments in a series, with only the one winning the most votes being finally voted on in the House.<sup>62</sup>

Professors Frymer and Yoon report that normally “only the last successful amendment passed becomes part of the legislation” as opposed to the amendment winning the most votes.<sup>63</sup> The purpose of this parliamentary stratagem is to make it easier for members to defend their final vote before their constituents: “After a series of extreme stances, it becomes easier for members to defend themselves to their constituents—they are only one of 435 people; they voted in correspondence with constituency interests as much as possible; but in the end, they accepted the ‘compromise’ to avoid a potentially worse outcome.”<sup>64</sup> Professors Frymer and Yoon go on to explain that “[s]elf-executing’ rules have a similar ability to insulate members from controversial decisions.”<sup>65</sup> They observe that “the party leadership wants to find a way to structure the choices offered to its members on the House floor so that members can

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60. Binder, *supra* note 43, at 4.

61. *Id.*

62. HOUSE PRACTICE, *supra* note 40, at 868.

63. Frymer & Yoon, *supra* note 18, at 1018.

64. *Id.*

65. *Id.*

vote with the party without deeply offending their constituents, and, if constituents are offended, to cover up their own involvement in the legislation's passage."<sup>66</sup> Hardly the stuff of *Profiles in Courage*,<sup>67</sup> to be sure. The device exists to try to obfuscate—or avoid entirely—hard votes for legislation that will likely prove noxious to a member's constituents.

It is patently obvious that the motive for at least some special rules is highly questionable. The self-executing rule renders political accountability for unpopular votes more difficult, and the “king-of-the-hill” special rule permits a member to take false credit for an unincorporated substitute version of a bill. Both rules facilitate politically useful “position taking” that can enhance the member's prospects for reelection.<sup>68</sup> The idea is that by staking out positions, rather than actually making decisions, the member satisfies the policy demands of her constituency without actually breaking from the leadership. As Mayhew puts it, “The electoral requirement is not that [s]he make pleasing things happen but that [s]he make pleasing judgmental statements.”<sup>69</sup>

Does the use of a self-executing rule really work to insulate members from political accountability for the net effects of their floor vote on the main bill? Brookings Institute Senior Fellow Sarah Binder is highly dubious, observing that she “would hazard [that] most close observers doubt that it will make a difference to voters whether Democrats explicitly voted for the Senate-passed [health care reform] bill or voted for a procedure that allowed it to be passed.”<sup>70</sup> Even so, “legislators sure *think* it matters” because use of the deem-and-pass procedure “offers a method of avoiding blame should they be attacked come election time for their votes.”<sup>71</sup> Thus, Frymer and Yoon have observed that the game afoot involves the House Rules Committee “cleverly . . . devis[ing] procedures that allow members to support the party leadership while at the same time appealing to their districts through various complex and restrictive rules.”<sup>72</sup>

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66. *Id.*

67. See JOHN F. KENNEDY, *PROFILES IN COURAGE* (1st ed. 1956) (recounting the stories of U.S. public officials who exemplified the virtues of courage and integrity while in office, public servants who subordinated their own short term political and personal interests to advance causes and principles more important than their own political careers).

68. See DAVID R. MAYHEW, *CONGRESS: THE ELECTORAL CONNECTION* 62 (1974).

69. *Id.*

70. Binder, *supra* note 43, at 5.

71. *Id.*

72. Frymer & Yoon, *supra* note 18, at 1017.

To date, the rules of the Senate do not include the use of the deem-and-pass special rule. However, if the Constitution permits its use by the House, the Senate could certainly decide to adopt the procedure at some future point in time. Were the Senate to use the deem-and-pass procedure, the accountability problem associated with its use by the House would be greatly exacerbated.<sup>73</sup>

Regardless of the efficacy of the House's use of special rules as a means of either avoiding a hard vote or going on the record for a bill that everyone knows will not receive a final floor vote, a larger question remains, particularly with respect to the use of a special rule to vest a single floor vote with multiple, perhaps wholly unrelated, legislative effects: Does the Constitution permit a single vote, or even a pair of floor votes, to advance a potentially infinite number of separate bills? The question of the constitutional status of the deem-and-pass procedure should be considered independently of its political morality or political expediency.

### III. THE CONSTITUTIONAL TEXT AND THE ENACTMENT OF BILLS

Despite the fundamental importance of how Congress operates, the Constitution provides precious little detail about the operation of each house of Congress or the potential effect of a single floor vote (or pair of votes) in particular. One would think that the Framers would have carefully delineated the steps necessary to enact a law, including the procedural steps and substantive effect of a floor vote in either chamber. Surprisingly, the Constitution's text is entirely silent on these questions.

To be sure, the Constitution does establish a few procedural requirements for the enactment of a law or ratification of a treaty. In particular, Article I, Section 7, Clause 2 provides that:

Every Bill which shall have passed the House of Representatives and the Senate, shall, before it become a Law, be presented to the President of the United States; If he approve he shall sign it, but if not he shall return it, with his Objections to that House in which it shall have originated, who shall enter the Objections at large on their Journal, and proceed to reconsider it. If after such Reconsideration two thirds of that House shall agree to pass the Bill, it shall be sent, together with the Objections, to the other House, by which it shall likewise be reconsidered, and if approved

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73. See *infra* notes 174–80 and accompanying text.

by two thirds of that House, it shall become a Law. But in all such Cases the Votes of both Houses shall be determined by yeas and Nays, and the Names of the Persons voting for and against the Bill shall be entered on the Journal of each House respectively. If any Bill shall not be returned by the President within ten Days (Sundays excepted) after it shall have been presented to him, the Same shall be a Law, in like Manner as if he had signed it, unless the Congress by their Adjournment prevent its Return, in which Case it shall not be a Law.<sup>74</sup>

This clause plainly requires bicameral enactment and presentment to the President,<sup>75</sup> but it does not specify whether a single vote of either House may advance more than one bill at a time. The relevant operative language—“shall have passed”—simply does not define what “passed” means. Thus, Article I, Section 7’s literal language does not specify any particular rules for the consideration of pending legislation, nor does it explicitly require that a single floor vote have only one legislative effect or that both houses of Congress vote on precisely the same question when enacting a bill.

In one context, the Constitution does provide particularized procedures. Article I, Section 7, provides very specific procedures governing the overriding of a presidential veto:

But in all such Cases [of veto override votes] the Votes of both Houses shall be determined by the yeas and Nays, and the Names of the Persons voting for and against the Bill shall be entered on the Journal of each House respectively.<sup>76</sup>

This provision requires a recorded vote by name. Normally, the Constitution requires recorded votes only if at least one-fifth of the members present and voting request a recorded vote on any question pending before the body.<sup>77</sup> Thus, the veto override provisions require a recorded vote that facilitates political accountability. A veto cannot be sustained or overridden on a voice vote, which means that each member

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74. U.S. CONST. art. I, § 7, cl. 2. On the origins and meaning of the “Sundays excepted” language, see Jaynie Randall, *Sundays Excepted*, 59 ALA. L. REV. 507 (2008).

75. See *INS v. Chadha*, 462 U.S. 919, 956–59 (1983).

76. U.S. CONST. art. I, § 7, cl. 2.

77. U.S. CONST. art. I, § 5, cl. 3 (“Each House shall keep a Journal of its Proceedings, and from time to time publish the same, excepting such Parts as may in their Judgment require Secrecy; and the Yeas and Nays of the Members of either House on any question shall, at the Desire of one fifth of those Present, be entered on the Journal.”).

must publicly declare her position on the question at issue if she elects to vote.

Moreover, the legislative history of the Constitution demonstrates that the Framers considered, but expressly rejected, a lower threshold for requiring votes to be recorded in either house of Congress.<sup>78</sup> The delegates at the Federal Convention feared that the ability to demand a recorded vote with less than 20 percent of the voting members would invite procedural shenanigans that would disrupt the operation of the House and Senate.<sup>79</sup> In the case of a presidential veto, however, the delegates believed that it was important to force a public vote on the question of an override and *required* a recorded vote as a condition of a valid veto override.<sup>80</sup>

Perhaps more important, the text of Article I, Section 7 specifies that “[i]f after such Reconsideration two thirds of that House shall agree to pass *the bill, it shall be sent, together with the Objections, to the other House, by which it shall likewise be reconsidered, and if approved by two thirds of that House it shall become a Law.*”<sup>81</sup> The precise language used, “the bill,” as well as the consistent use of a singular pronoun (viz., “it”), seems to bespeak that *only* the vetoed bill will be pending before the House during the veto override proceeding.

By way of contrast, the constitutional language creating the bicameralism requirement provides that “[e]very *Bill* which shall have passed the House of Representatives and the Senate, shall, before it become a Law, be presented to the President of the United States.”<sup>82</sup> Rather than “a bill” or “the bill,” the Framers wrote the bicameralism requirement in vaguer terms than the veto override procedure rules. This nomenclature lends further support to a constitutional requirement that a

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78. The delegates considered, but rejected, permitting a single member of either house to demand a recorded vote on any question pending before the chamber. See 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 255–56 (Max Farrand ed., 1911) [hereinafter “2 Farrand”]. They rejected this rule, in favor of the 20 percent requirement, because they feared that a rule permitting any member to demand a recorded vote would inevitably be abused to slow down legislative proceedings by minority party members. See *id.*

79. See *id.* at 255 (“Mr Ghorum was opposed to the motion for allowing a single member to call the yeas and nays, and recited the abuses of it, in Massts,” which included “stuffing the journals with them on frivolous occasions” and “misleading the people who never know the reasons determining the votes.”).

80. See *id.* at 161–62 (presenting an early draft of the Constitution from the Committee of Detail that require[d] a recorded vote whenever a house of Congress takes a vote to override a presidential veto).

81. U.S. CONST. art. I, § 7, cl. 2 (emphasis added). The same exact language also appears later in the veto override procedural rules: “the Names of the Persons voting for and against *the Bill* shall be entered on the Journal of each House respectively.” *Id.* (emphasis added).

82. U.S. CONST. art. I, § 7, cl. 2 (emphasis added).

veto override vote be limited solely to the question of sustaining or overriding the President's veto of a single bill.

Thus, one could infer from the text of Article I, Section 7 that a straight up or down vote should be required on at least the override question. Because the Constitution provides such specific rules governing override proceedings, it would be something of a stretch to suggest that a vote on an unrelated bill, even if recorded, would satisfy the requirements of Article I, Section 7. When a President exercises a veto and Congress wishes to override that decision, it must observe specific procedures, and these procedures do not permit the override vote to include extraneous legislative business unrelated to the up-or-down vote on sustaining or overturning the veto. Given the specificity of the procedures for a veto override vote, it would be very odd to say that the House could employ a special rule to piggy-back other legislation on a floor vote to override a presidential veto.

Presumably the House could not amend a vetoed bill before voting on whether to override the veto—even incident to a special rule governing the veto override proceeding on the floor. The amendment itself would trigger the requirement of bicameral enactment and presentment to the President for signature or veto.<sup>83</sup> To yoke another bill, or any other legislative measure, to a veto override vote would be to deny the President a full, fair, and clean consideration of his reasons for rejecting the bill. It also would undermine the practical and political utility of the recorded vote requirement. A member could say “I voted for the override measure in order to advance another bill, not because I rejected the President's position on the vetoed bill,” thereby denying the President, and the member's constituents, the ability to hold that member of Congress politically accountable for opposing the President's position. So too, using a veto override to achieve unrelated legislative effects would not really constitute a vote on “the Bill.” Considering unrelated questions when voting on a motion to override a presidential veto means that House members are not simply voting on the vetoed bill, but rather on the vetoed bill and something else; this would deny the President the full benefit of the procedural protections, including enhanced accountability and transparency for override votes, that the Framers intended to provide both the President and the citizenry who elect members of Congress.

Consistent with this analysis, I could not find any instance of a special rule being used to “deem and override” a presidential veto or a veto

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83. See U.S. CONST. art. I, § 7, cl. 2; *INS v. Chadha*, 462 U.S. 919, 956–59 (1983).

override vote being used to advance unrelated bills. Instead, the historical practice of the House of Representatives has been to hold clean votes on overriding a presidential veto when the only question pending before the chamber is whether to enact the bill into law notwithstanding the President's exercise of a veto. Of course, the fact that the House has not yet used a special rule in the context of a veto override vote does not mean that the House would never attempt such a legislative maneuver. The validity of the special rule procedure is an important question not only with respect to past practice, but also with respect to *future* legislative practice. Given the House's present practice, however, the Constitution answers a question that the House of Representatives has not yet sought to ask.

The treaty power also merits brief mention. As with a presidential veto, the Constitution expressly provides a procedure for ratification of a treaty. More specifically, Article II, Section 2, Clause 2 states that the President "shall have Power, by and with the Advice and Consent of the Senate, to make Treaties, provided two thirds of the Senators present concur."<sup>84</sup> Thus, the President has the sole power to negotiate and conclude treaties, but for a treaty to be ratified, the Senate must approve the treaty by a two-thirds majority vote, with a quorum present.<sup>85</sup> As in the case of a veto override, strong arguments exist that the Constitution should be understood to require that the Senate afford a treaty a clean vote.<sup>86</sup> This is especially true given the diplomatic implications of the Senate refusing to ratify a treaty signed by the President or—and arguably worse—ratifying a treaty without careful and sober consideration. It would be particularly objectionable for the Senate to approve a treaty using a deem-and-pass maneuver because the treaty power may be used to expand the scope of

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84. U.S. CONST. art. II, § 2, cl. 2.

85. See generally *Missouri v. Holland*, 252 U.S. 416, 434–35 (1920) (sustaining treaty over Tenth Amendment objection); *Altman & Co. v. United States*, 224 U.S. 583, 600–601 (1912) (outlining the constitutional requirements for valid adoption of a treaty); *Martin v. Hunter's Lessee*, 14 U.S. 304, 356–62 (1816) (holding that a validly enacted treaty preempts conflicting state law); *Fairfax's Devisee v. Hunter's Lessee*, 11 U.S. 603, 626–28 (1813) (same).

86. It bears noting that Article II, § 2 indicates that two-thirds of a quorum of the Senate is sufficient to consider ratification of a treaty, as opposed to an absolute two-thirds requirement of the entire body. The text specifies that two-thirds "of the Senators *present*" must concur in ratifying a treaty; the clear implication of the word "present" in this context is to resolve a potential ambiguity that might otherwise exist if the text simply provided that "two thirds of the members of the Senate concur." U.S. CONST. art. II, § 2, cl. 2 (emphasis added). The alternative formulation, omitting the modifier "present," would leave open the question of whether the two-thirds requirement applies to the whole membership of the Senate or, rather, to merely a quorum of the body. The drafters plainly believed that, given the importance of ratifying or refusing to ratify a treaty, the two-thirds requirement might be read to require two-thirds of the full membership.

federal power beyond the four corners of Article I, Section 8.<sup>87</sup> Because treaties can arguably extend the scope of federal authority thereby preempting pre-existing residual state authority,<sup>88</sup> such decisions should be made only through a clean up or down vote on ratification.

To be clear, I do not argue that the Senate has any absolute duty to vote on all treaties submitted by the President for ratification. I argue only that the presence of a specific procedure for the ratification of a treaty arguably should be read to limit the Senate's power to use its general authority under Article I, Section 5 to make and enforce rules of procedure to govern its own operations. The Senate remains free to vote, or not vote, on a treaty submitted by the President for a good reason, a bad reason, or no reason at all.

Although the deem-and-pass question cannot arise in this context, because the House of Representatives has no role in the ratification of a treaty and the Senate does not currently use the deem-and-pass procedure, the text of Article II is important in contextualizing the use of special rules. I would argue that the treaty ratification procedure specified in Article II should be understood to preclude a deem-and-pass procedure

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87. See *Holland*, 252 U.S. at 433 (“It is obvious that there may be matters of the sharpest exigency for the national well being that an act of Congress could not deal with but that a treaty followed by such an act could [constitutionally address].”); see also LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* § 4–5, at 227 (2d ed. 1988) (“*Missouri v. Holland* thus views the treaty power as a delegation of authority to federal treaty-makers independent of the delegations embodied in the enumeration of Congress’s own powers.”). Of course, this power to establish new federal authority by virtue of a ratified treaty *does not* and arguably *cannot* extend to the repeal or abridgement of rights secured by the Constitution and its amendments, notably including the Bill of Rights and the Fourteenth Amendment. See *Reid v. Covert*, 354 U.S. 1, 16 (1957) (opining that international agreements, including both treaties and executive agreements, cannot “confer power on the Congress, or on any other branch of Government, which is free from the restraints of the Constitution”).

88. Under the Constitution, treaties constitute “the supreme Law of the Land.” See U.S. CONST. art. VI, cl. 2 (“This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.” (emphasis added)). The effect of this rule, when coupled with *Missouri v. Holland*’s expansive construction of the scope of the treaty power, means that if the President and two-thirds of the Senate agree, see U.S. CONST. art. II, § 2, cl. 2, it is possible to displace the traditional role of the states over any matter not expressly protected by an individual right. For example, a treaty, at least in theory, could extend plenary federal authority over the structure of local governments, family law, or other matters traditionally thought to reside squarely within the reserved police powers of the states. *Martin v. Hunter’s Lessee* provides an excellent example: a treaty between the United States and the United Kingdom had the effect of entirely displacing Virginia’s common law of property with respect to the vesting of fee simple absolute title in a parcel of land. See *Hunter’s Lessee*, 14 U.S. at 340–41 (holding that state judges, when deciding cases involving a conflict between a state law and a valid federal treaty, “were not to decide merely according to the laws or constitution of the state, but according to the constitution, laws and treaties of the United States—the supreme law of the land”).



with respect to ratification votes, if the Senate were to adopt the practice at some point in the future. The Constitution's specific provisions for ratification of a treaty arguably should be read as establishing the exclusive procedures for ratification. Moreover, the President deserves a straight up or down vote on the treaty itself given the potentially severe negative foreign relations implications of failing to ratify a pending treaty and the concomitant, structural changes that a ratified treaty can work in "Our Federalism."<sup>89</sup> This argument is, to be sure, as much functionalist as formalist because the text of the Constitution does not expressly require the Senate to afford proposed treaties a straight up or down vote on ratification.<sup>90</sup>

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89. See generally *Younger v. Harris*, 401 U.S. 37, 44–45 (1971) ("It should never be forgotten that this slogan, 'Our Federalism,' born in the early struggling days of our Union of States, occupies a highly important place in our Nation's history and its future."); *id.* at 44 (explaining that the concept of "Our Federalism" means "a system in which there is sensitivity to the legitimate interests of both State and National Governments, and in which the National Government, anxious though it may be to vindicate and protect federal rights and federal interests, always endeavors to do so in ways that will not unduly interfere with the legitimate activities of the States"). The requirement that Congress speak with clarity when it seeks to apply general federal laws, often enacted pursuant to the Commerce Clause, U.S. CONST., Art. I, § 8, cl. 3, provides an illustrative example of how careful enforcement of federalism principles could imply limits on the Senate's voting procedures for treaties. See *Gregory v. Ashcroft*, 501 U.S. 452, 461–62, 467 (1991) (holding that if Congress wishes to apply a general federal commerce regulation to state government entities, it must include a plain statement of this intention and that, in the absence of such an express plain statement, federal courts should assume that Congress did not seek to subject state government entities to federal regulation). Justice O'Connor, writing for the *Gregory* majority, explained that "[t]his plain statement rule is nothing more than an acknowledgment that the States retain substantial sovereign powers under our constitutional scheme, powers with which Congress does not readily interfere." *Id.* at 461; see also *id.* at 470 (holding that "[i]n the face of [an] ambiguity, we will not attribute to Congress an intent to intrude on state governmental functions regardless of whether Congress acted pursuant to its Commerce Clause powers or § 5 of the Fourteenth Amendment"). Thus, in some important ways, the Supreme Court's contemporary approach to *federalism* questions could be characterized as "formalist" rather than "functionalist." See, e.g., *Coleman v. Court of Appeals*, 132 S. Ct. 1327 (2012); *Bd. of Trs. v. Garrett*, 531 U.S. 356 (2001); *Alden v. Maine*, 527 U.S. 706 (1999).

90. Such a requirement is most logically derived from the implications of ratifying or rejecting a treaty (and particularly the potential effects on federalism and the residual police powers of the states). See generally *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 132 S. Ct. 2566, 2604–07 (2012) (holding that Congress could not significantly alter the terms of states' participation in the Medicaid program without offending the Tenth Amendment and the notion that states are not merely administrative appendages of the national government, and observing that the "threatened loss of over 10 percent of a State's overall budget [constitutes] economic dragooning that leaves the States with no real option but to acquiesce in the Medicaid expansion"); *New York v. United States*, 505 U.S. 144, 168–69, 188 (1992) (holding that Congress may not "commandeer" state legislatures by forcing them involuntarily to enact laws necessary to operationalize federal regulatory schemes and observing that "[s]tates are not mere political subdivisions of the United States"); *FERC v. Mississippi*, 456 U.S. 742, 775 (1982) (O'Connor, J., concurring in part and dissenting in part) (arguing that Congress may not simply "conscript state [agencies] into the national bureaucratic army"); Ronald J. Krotoszynski, Jr., *Cooperative Federalism, the New Formalism, and the Separation of Powers Revisited: Free Enterprise*

The specific constitutional provisions governing the override of presidential vetoes and the ratification of treaties suggest that Congress may not use a special self-executing deem-and-pass rule to take extraneous actions unrelated to the vetoed bill or the pending treaty.<sup>91</sup> But what about the constitutional status of using special, self-executing rules in other contexts to allow a single floor vote to advance multiple, independent bills? One must discern the precise meaning of “passing” a bill in the House or Senate in order to analyze the constitutionality of using self-executing rules to achieve multiple, legislative effects via a single floor vote in these other, more quotidian contexts.

James Madison feared that Congress might attempt to evade the presentment requirement by calling a bill something else. To avoid this, he successfully urged the delegates to adopt the rule reflected in Article I, Section 7, Clause 3:

Every Order, Resolution, or Vote to which the Concurrence of the Senate and House of Representatives may be necessary (except on a question of Adjournment) shall be presented to the President of the United States, and before the Same shall take Effect, shall be approved by him, or being disapproved by him, shall be repassed by two thirds of the Senate and House of Representatives, according to the Rules and Limitations prescribed in the case of a Bill.<sup>92</sup>

This so-called “ORV” Clause prevents the use of creative nomenclature to avoid the presentment requirement. It does not, however, define what “passage” of a bill requires. The Constitution does define a “quorum” for

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Fund and the Problem of Presidential Oversight of State-Government Officers Enforcing Federal Law, 61 DUKE L.J. 1599, 1646–53 (2012) [hereinafter “The New Formalism”].

91. In some respects, the veto override and, arguably, the treaty ratification procedures impose a kind of “single subject rule” in these specific contexts. See Millard H. Ruud, “No Law Shall Embrace More Than One Subject”, 42 MINN. L. REV. 389, 389–91 (1958). The idea is that in order to secure political accountability for a veto override or ratification of a treaty, the members must vote on that question *and only on that question*. This approach prevents the harnessing of various minorities to support an omnibus measure that overrides a veto or ratifies a treaty—and also does enough additional unrelated things to secure the necessary votes to ensure passage of the motion. See Michael D. Gilbert, *Single Subject Rules and the Legislative Process*, 67 U. PITT. L. REV. 803, 811–15 (2006). This use of combining minorities to form a majority is called “logrolling” and has given rise to requirements that bills encompass only a single subject, as well as plain title requirements for bills. For a discussion of logrolling, the adoption of single subject rules as a response to it in the vast majority of the states, and its potential relevance to the use of special, self-executing rules, see *infra* notes 150–55 and accompanying text.

92. U.S. CONST. art. I, § 7, cl. 3; see Seth Barrett Tillman, *A Textualist Defense of Article I, Section 7, Clause 3: Why Hollingsworth v. Virginia Was Rightly Decided, and Why INS v. Chadha Was Wrongly Reasoned*, 83 TEX. L. REV. 1265, 1274–75, 1315–30 (2005) (discussing the legislative history and meaning of the “Orders, Resolution, or Vote” or “ORV” Clause).

the purpose of conducting business,<sup>93</sup> but it simply does not provide any specific procedural rules for voting on pending legislation (save, as noted above, in the case of overriding a presidential veto).

Article I, Section 5, Clause 2 provides language that could be relevant to defining the “passage” requirement:

Each House may determine the Rules of its Proceedings, punish its Members for disorderly Behaviour, and, with the Concurrence of two thirds, expel a member.<sup>94</sup>

This language would seem to empower either house to establish rules governing floor action and, arguably, to define for itself what “passage” means.

As a general matter, then, the text of the Constitution does not directly speak to whether a single floor vote can advance multiple, separate bills at once under a special rule. A single floor vote could create five legislative effects. The House of Representatives could “pass” three Senate bills and send them to the White House while also “passing” two additional House bills headed for the Senate. Contrary to Professor McConnell’s claims,<sup>95</sup> there is no textual requirement that every bill receive its own floor vote within the four corners of the Constitution.

There remains, of course, one final context in which the use of a deem-and-pass rule might be constitutionally unobjectionable: to waive House rules that would otherwise require commitment of a bill to a committee or separate floor votes on a series of amendments to a House-initiated bill. It is difficult to see the harm in allowing the use of a special rule to waive internal House rules, perhaps to expedite consideration of a bill amended by the Senate. So long as the House actually takes a single vote on the same question as the Senate, no serious objection can exist to the use of the deem-and-pass procedure. Such use of a special deem-and-pass rule seems entirely within the residual authority of the House under Article I, Section 5, Clause 2 to establish—and presumably also to waive—its own internal rules of procedure. Because this particular use of a special, self-executing rule does not entail the House and Senate voting on essentially

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93. See U.S. CONST. art. I, § 5, cl. 1 (“[A] Majority of each [house] shall constitute a Quorum to do Business; but a smaller Number may adjourn from day to day, and may be authorized to compel the Attendance of absent Members, in such Manner, and under such Penalties as each House may provide.”).

94. U.S. CONST. art. I, § 5, cl. 2.

95. See McConnell, *supra* note 10.

different legislative questions, it should not be deemed a violation of Article I, Section 7, Clause 2.

Returning to the more problematic context of using a self-executing special rule to adopt more than one freestanding bill through a single floor vote, the fact that the Constitution's text does not squarely disallow a procedure does not, of course, definitively resolve the question of that procedure's constitutionality. The text of the Constitution does not prohibit appointing an infant to the Supreme Court or having a sitting U.S. Court of Appeals Judge concurrently serve as Director of the FBI. In other words, the absence of a textual prohibition represents the starting point of the argument, not the end. The U.S. legal system maintains a strong and well-defined constitutional common law,<sup>96</sup> and other sources of authority might support a compelling argument that a single floor vote can only have a single legislative effect.<sup>97</sup>

Outside the specific contexts of overriding a presidential veto and—arguably—ratifying a treaty, the Constitution does not seem to require that either house of Congress maintain a rule that limits a single floor vote to passing a single pending bill. Accordingly, either house of Congress could adopt rules that permit a single vote to advance multiple bills either to the other house or to the President without transgressing a specific textual limitation on the federal legislative process. If any limits on permitting a single floor vote to pass multiple independent bills exist, these limits must arise from either the legislative history of the Constitution or structural considerations, rather than from the constitutional text itself.

#### IV. THE FRAMERS, THE FEDERAL CONVENTION, AND THE PASSAGE OF BILLS

If the Constitution's text does not provide a clear answer to the question of whether the House may use a single floor vote to achieve multiple, legislative effects by a special self-executing rule, the legislative history of the Constitution might help to resolve the question. Moreover, the Supreme Court routinely has looked to the records of the Federal Convention and the ratification debate when determining the constitutional

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96. See Gillian E. Metzger, *Ordinary Administrative Law as Constitutional Common Law*, 110 COLUM. L. REV. 479 (2010); see also AKHIL REED AMAR, *AMERICA'S UNWRITTEN CONSTITUTION: THE PRECEDENTS AND PRINCIPLES WE LIVE BY* (2012) (noting that many important constitutional principles and limitations on government power arise from broader implications of the text, rather than directly from the text itself).

97. See Steven G. Calabresi & Joan L. Larsen, *One Person, One Office: Separation of Powers or Separation of Personnel?*, 79 CORNELL L. REV. 1045 (1994).

permissibility of a particular legislative innovation, such as the legislative veto<sup>98</sup> or a statutory presidential line item veto.<sup>99</sup> Constitutional silence when read against history, can yield a prohibition against a particular innovation in the federal legislative process when the legislative history of the Constitution supports recognition of an implied prohibition.<sup>100</sup> Unfortunately, the Framers did not devote much time or attention to the precise requirements of “passing” a bill in each house despite the question’s central importance. Both the records of the Federal Convention and the Federalist Papers shed remarkably little light on this question.

The delegates in Philadelphia considered at length whether to vest the President alone with a veto power over legislation or, in the alternative, to vest the veto power in a “Council of Revision” that might include members of the President’s cabinet as well as members of the federal judiciary, including Justices of the Supreme Court.<sup>101</sup> However, the delegates first had to decide a preliminary structural question: whether to have a unitary or plural executive.<sup>102</sup>

After considerable debate, the delegates voted in favor of vesting the whole executive power in a single national executive officer on June 4, 1787 by a margin of seven states to three.<sup>103</sup> Even if the executive branch was to be led by a single executive officer, however, the question remained whether to vest a “revisionary” power over bills passed by both houses of Congress in the chief executive officer, the federal courts, or a “Council of Revision.”

The delegates expressed myriad views about the wisdom of a Council of Revision. “Mr. Gerry [of Massachusetts] doubt[ed] whether the

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98. See *INS v. Chadha*, 462 U.S. 919, 946–51 (1983).

99. See *Clinton v. City of New York*, 524 U.S. 417, 439–41 (1998).

100. See *id.* at 439 (“There are powerful reasons for construing constitutional silence on this profoundly important issue as equivalent to an express prohibition.”); see also *Printz v. United States*, 521 U.S. 898, 905, 933–35 (1997) (noting that “[b]ecause there is no constitutional text speaking to th[e] precise question” pending at bar, the Supreme Court must examine “historical understanding and practice, . . . the structure of the Constitution, and . . . the jurisprudence of this Court” to resolve the issue and, using this method of analysis, holding that well-settled principles of federalism preclude Congress from “commandeering” state executive officers to enforce federal law).

101. See 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 97–98 (June 1, 1787) (Max Farrand ed., 1911) [hereinafter “1 Farrand”]; *id.* at 138–40 (June 6, 1787); see also Randall, *supra* note 74, at 512–13.

102. See 1 Farrand, *supra* note 101, at 65–75 (June 1, 1787); *id.* at 96–97 (June 4, 1787); see Steven G. Calabresi & Kevin H. Rhodes, *The Structural Constitution: Unitary Executive, Plural Judiciary*, 105 HARV. L. REV. 1153 (1992); Saikrishna Bangalore Prakash, *Hail to the Chief Administrator: The Framers and the President’s Administrative Powers*, 102 YALE L.J. 991 (1993).

103. 1 Farrand, *supra* note 101, at 97 (June 4, 1787). Elbridge Gerry argued that a plural executive “[would] be a general with three heads” and “would be extremely inconvenient in many instances, particularly in military matters.” *Id.*

Judiciary ought to form a part of it, as they [would] have [had] a sufficient check [against] encroachments on their own department by their exposition of the laws, which involved a power of deciding on their Constitutionality.”<sup>104</sup> Along similar lines, delegate James Wilson, of Pennsylvania, argued that “[i]f the Legislative, [Executive], and Judiciary ought to be distinct [and] independent, The Executive ought to have an absolute negative.”<sup>105</sup> Roger Sherman of the Connecticut delegation, on the other hand, “was [against] enabling any one man to stop the will of the whole.”<sup>106</sup> And, Benjamin Franklin, in his capacity as a delegate from Pennsylvania, warned that “[t]he Executive will be always increasing here, as elsewhere, till it ends in a monarchy.”<sup>107</sup>

The delegates ultimately postponed deciding whether to adopt a Council of Revision by a vote of six states to four.<sup>108</sup> The delegates soon thereafter voted against vesting the President with an absolute veto power, with no states in favor and ten against.<sup>109</sup> Immediately following this second vote, Pierce Butler of South Carolina moved, and Benjamin Franklin seconded, a motion that the veto power be amended to constitute a power solely to suspend the effectiveness of a new law.<sup>110</sup> This proposal was unanimously rejected.<sup>111</sup> The delegates subsequently adopted a resolution permitting both houses of Congress, by a two thirds vote, “to overrule the revisionary check” and also adopted a resolution “which gave the Executive alone without the Judiciary the revisionary controul on the laws.”<sup>112</sup>

Undeterred by the convention’s failure to embrace the concept of a Council of Revision, James Wilson, a delegate from Pennsylvania, seconded by James Madison, proposed a resolution that the veto power be vested in the President “[and] a convenient number of the National Judiciary.”<sup>113</sup> But, Alexander Hamilton objected to consideration of the motion, and deliberation on the motion was postponed.<sup>114</sup>

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104. *Id.*

105. *Id.* at 98.

106. 1 Farrand, *supra* note 101, at 99 (June 4, 1787).

107. *Id.* at 103.

108. *Id.* at 97.

109. *Id.* at 103.

110. 1 Farrand, *supra* note 78, at 103–04 (June 4, 1787).

111. *Id.* at 104 (June 4, 1787).

112. *Id.*

113. *Id.*

114. *Id.*

On June 6, 1787, the delegates resumed consideration of Wilson's motion.<sup>115</sup> Madison, arguing in support of Wilson's motion, suggested that the joint exercise of the veto power by the President and members of the federal judiciary would lend needed structural support to the President and executive branch.<sup>116</sup> Debate was joined; for example, Rufus King, of Massachusetts, argued that "[i]f the Unity of the Executive was preferred for the sake of responsibility, the policy of it is as applicable to the revisionary as to the Executive power."<sup>117</sup> Ultimately, "[o]n the question for joining the Judges to the Executive in the revisionary business," the vote was three states for to eight against adopting Wilson's proposed amendment.<sup>118</sup> This vote also implicitly rejected the concept of creating a Council of Revision to share the "revisionary power," or veto, with the President.<sup>119</sup>

Undaunted, Wilson, seconded by Madison, again tried to seek amendment of the veto power to include members of the federal judiciary on July 21, 1787.<sup>120</sup> Wilson argued that participation in a Council of Revision would involve exercise of a different power than that of constitutional review: "Laws may be unjust, may be unwise, may be dangerous, may be destructive; and yet not be so unconstitutional as to justify the Judges in refusing to give them effect."<sup>121</sup> He argued "Let them have a share in the Revisionary power, and they will have an opportunity of taking notice of these characters of a law, and of counteracting, by the weight of their opinions the improper views of the Legislature."<sup>122</sup> After another extended debate, Wilson's motion once again failed with a vote of three states in favor, four states against, and two state delegations divided.<sup>123</sup>

The convention delegates also debated the veto override power. The convention initially set the threshold for overriding a presidential veto at

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115. 1 Farrand, *supra* note 101, at 138 (June 6, 1787).

116. *See id.* at 138–39.

117. *Id.* at 139.

118. *Id.* at 140.

119. *See* James T. Barry III, Comment, *The Council of Revision and the Limits of Judicial Review*, 56 U. CHI. L. REV. 235, 257 (1989). Barry provides an excellent overview of the philosophical and practical arguments for and against a Council of Revision, and an overview of such bodies in the British legal system, as well as in the colonial and early state governments. *See id.* at 237–48.

120. 2 Farrand, *supra* note 78, at 73 (July 21, 1787).

121. *Id.*

122. *Id.*

123. *Id.* at 80.

two-thirds,<sup>124</sup> then moved the margin to three-fourths,<sup>125</sup> and finally reset the margin at two-thirds toward the very end of the meeting.<sup>126</sup>

Madison also proposed that the veto power be exercised by the “Executive and Supreme Judiciary Departments” jointly.<sup>127</sup> Under Madison’s proposal, a two-thirds majority of both houses of Congress could override a veto by either branch alone, but “if both should object, 3/4 of each House, should be necessary to overrule the objections and give to the acts the force of law.”<sup>128</sup> James Wilson seconded Madison’s proposed amendment to the working document, but the proposal failed by a margin of three to eight.<sup>129</sup>

On the more specific question of permitting each house to establish their own rules of procedure, the language of Article I, Section 5, Clause 2<sup>130</sup> appears in the draft document submitted to the delegates by the Committee of Detail.<sup>131</sup> This draft also contains the language that sets forth the requirements of bicameralism and presentment.<sup>132</sup> The subsequent debates, however, never focused on the scope of the power to set internal procedures, the requirement of “passage” in each house, or limits on the use of this power to creatively define “passage” in ways that undermine the bicameralism requirement. In fact, the legislative history of the Federal Convention is entirely silent on both these points.<sup>133</sup>

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124. 2 Farrand, *supra* note 78, at 294–95 (Aug. 15, 1787).

125. *Id.* at 298, 301 (Aug. 15, 1787).

126. The delegates changed the override margin from three-fourth to two-thirds of a quorum on September 12, 1787. *See* 2 Farrand, *supra* note 78, at 585–87 (Sept. 12, 1787).

127. *Id.* at 298 (Aug. 15, 1787).

128. *Id.*

129. *Id.*

130. *See supra* notes 94–97 and accompanying text.

131. *See* 2 Farrand, *supra* note 78, at 140–41, 158, 165 (Aug. 6, 1787).

132. *See id.* at 160–62, 167 (Aug. 6, 1787); *see also* Randall, *supra* note 74, at 512–13.

133. The delegates’ resounding silence on this question is certainly surprising. The closest relevant debate involved James Madison’s concern that Congress might attempt to avoid the obligation to present bills to the president by using creative nomenclature. *See* 2 Farrand, *supra* note 78, at 301–02 (Aug. 15, 1787). The convention delegates initially disregarded Madison’s concern on this front, *see id.* at 302, but agreed at the next day’s session to adopt language in the draft addressing Madison’s concern, *see id.* at 304–05 (Aug. 16, 1787). It is more than passing strange that protecting the presentment requirement generated both extensive debate and a significant modification of the Constitution’s text, but that protecting the integrity of the bicameralism requirement did not. Perhaps the notion that both houses of Congress would take the same vote incident to passing a bill was so self-evident, in light of contemporary practice of the state legislatures at that time, that an express textual requirement of identical votes simply seemed neither necessary nor essential. Alternatively, perhaps the question of requiring an identical vote in both houses might not have arisen because the congress established under the Articles of Confederation consisted of only a single house—meaning that the problem of two houses voting on different propositions but still claiming to have enacted a bill simply could not have arisen. *See* ARTICLES OF CONFEDERATION OF 1781, art. V, para. 1; *id.* at art. IX; *see also The New Formalism*, *supra* note 90, at 1627–28 n.146 (discussing the complete centrality of the



A significant debate arose on the question of whether to permit a single member of either house of Congress to require a formal recorded vote.<sup>134</sup> Gouverneur Morris of Pennsylvania, argued that “if the yeas and nays were proper at all[,] any individual ought to be authorized to call for them: and moved an amendment to that effect.”<sup>135</sup> At that time, the draft from the Committee of Detail required that at least one-fifth of the members present seek a recorded vote by the yeas and nays—the requirement that ultimately found its way into Article I, Section 5, Clause 3.<sup>136</sup> Edmund Randolph of Virginia seconded Morris’s motion and a general debate followed. Ultimately, the convention delegates rejected the proposal by a vote of three states to eight.<sup>137</sup>

This debate is significant: recall that a vote to override a presidential veto must be recorded by the “yeas and nays.”<sup>138</sup> Yet many of the delegates expressed antipathy toward taking recorded votes. For example, Roger Sherman argued that he would: “rather strike out the yeas and nays altogether. [T]hey never have done any good, and have done much mischief. They are not proper as the reasons governing the voter never appear along with them.”<sup>139</sup> Moreover, Oliver Ellsworth of Connecticut “was of the same opinion.”<sup>140</sup> Delegate Nathaniel Ghorum of Massachusetts also objected to the use of recorded roll call votes in Congress because the practice resulted “in stuffing the journals with them on frivolous occasions” and had the effect of “misleading the people who

unicameral Congress of the United States under the government created by the Articles of Confederation). Finally, one ought to take into account the fact that Congress did not use special self-executing rules until the 1930s, some 140 years *after* the Constitution of 1787 came into effect. *See supra* notes 34–39 and accompanying text. Surely 140 years of consistent practice—namely taking mirror image votes in both houses to pass a bill—should count strongly against the validity of using the deem-and-pass procedure to advance multiple, independent bills through a single floor vote.

134. 2 Farrand, *supra* note 78, at 255–56 (Aug. 10, 1787).

135. *Id.* at 255.

136. U.S. CONST. art. I, § 5, cl. 3 (“Each House shall keep a Journal of its Proceedings, and from time to time publish the same, excepting such Parts as may in their Judgment require Secrecy; and the Yeas and Nays of the Members of either House on any question shall, at the Desire of one fifth of those Present, be entered on the Journal.”) (emphasis added).

137. 2 Farrand, *supra* note 78, at 255 (Aug. 10, 1787).

138. U.S. CONST. art. I, § 7, cl. 2 (“If after such Reconsideration two thirds of that House shall agree to pass the Bill, it shall be sent, together with the Objections, to the other House, by which it shall likewise be reconsidered, and if approved by two thirds of that House, it shall become a Law. *But in all such Cases the Votes of both Houses shall be determined by yeas and Nays, and the Names of the Persons voting for and against the Bill shall be entered on the Journal of each House respectively.*” (emphasis added)).

139. 2 Farrand, *supra* note 78, at 255 (Aug. 10, 1787).

140. *Id.*

never know the reasons determining the votes.”<sup>141</sup> Morris’s motion failed by acclamation.<sup>142</sup>

Despite this general antipathy toward the use of recorded floor votes, the delegates nevertheless adopted a text that requires a recorded floor vote when each house of Congress considers overriding a presidential veto. The logical implication is that the delegates believed that requiring a recorded vote in this context would enhance the political accountability of the members with respect to each individual member’s decision to support or oppose the President’s veto.

The Federalist Papers also do not shed much light on the question of whether a single floor vote in the House of Representatives may pass multiple, separate bills. Federalist No. 69, for example, notes that “[t]he President of the United States is to have power to return a bill, which shall have passed the two branches of the legislature, for reconsideration; and the bill so returned is to become a law if, upon that reconsideration, it be approved by two thirds of both houses.”<sup>143</sup> Federalist No. 69 also notes that “[t]he President is to have power, with the advice and consent of the Senate, to make treaties, provided two thirds of the senators present concur.”<sup>144</sup>

Along similar lines, Federalist No. 73 notes that the Constitution “establishes a salutary check upon the legislative body [in the President’s veto power], calculated to guard the community against the effects of faction, precipitancy, or of any impulse unfriendly to the public good, which may happen to influence a majority of that body.”<sup>145</sup> Federalist No. 73 also defends the vesting of the veto in the President alone, rather than in a Council of Revision or jointly with members of the federal judiciary.<sup>146</sup> Like Federalist No. 69, however, Federalist No. 73 does not speak to the precise question of whether each house of Congress must conduct an identical vote to enact a bill.

In sum, the debates of the Federal Convention in Philadelphia and the Federalist Papers, simply do not speak to the question of whether Article I, Section 7 requires both houses of Congress not merely to adopt the *same text*, which will be presented to the President, but also to *take identical votes*. On the other hand, the debate regarding whether to allow a single

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141. *Id.*

142. *See id.* (“The motion for allowing a single member to call the yeas & nays was disagd. tonem- con-”).

143. THE FEDERALIST NO. 69, at 416 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

144. *Id.* at 419.

145. THE FEDERALIST NO. 73, at 443 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

146. *Id.* at 446–47.

member to demand a recorded floor vote, in lieu of a requirement that at least one-fifth of the members present seek a recorded vote, demonstrates that the delegates in Philadelphia feared that the ability to demand a recorded vote could easily be abused. Nevertheless, the delegates adopted a text that automatically mandates a recorded vote by yeas and nays for *all* veto override votes. Moreover, the debates reflect real concern about the ability of the President to defend the institutional prerogatives of the executive branch against incursions from the legislative branch; these concerns led Madison to support, repeatedly and unsuccessfully, a plan to vest the veto power jointly either in a Council of Revision or in both the executive and judicial branches. In the context of these debates, the record vote requirement for a veto override plainly reflects the Framers' concern about ensuring and securing political accountability for the members' votes to support, or oppose, the President's veto.

#### V. A NEO-FORMALIST CRITIQUE OF THE DEEM AND PASS PROCEDURE

It seems clear that neither the Constitution nor consistent historical practice imposes limits on the scope of a particular bill. Thus, a single bill could establish appropriations for every federal executive department, rewrite multiple criminal laws, and also reorganize the structure of the federal judiciary. Unlike most state constitutions, the federal Constitution lacks a "single subject" rule, closely related rules against unrelated "riders" within bills, and plain title requirements.<sup>147</sup> Single subject restrictions, bans on riders, and clear title rules came into vogue well into the nineteenth century, starting in 1818.<sup>148</sup> Thus, such provisions significantly post-date the Constitution of 1787.

On the other hand, however, the Framers were quite familiar with classical constitutions, including those adopted in Rome and Greece.<sup>149</sup> The single subject rule relates back to Roman legislative practice in 98 BC, during the years of the Republic.<sup>150</sup> Thus, had the Framers wanted to limit the scope of federal bills to a single subject, to ban riders, or to

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147. See Ruud, *supra* note 91, at 389–90 (discussing the adoption of single subject rules in various state constitutions, beginning with Illinois in 1818 and continuing in other jurisdictions thereafter).

148. See *id.* at 389–90.

149. See Ronald J. Krotoszynski, Jr., *The Shot (Not) Heard 'Round the World: Reconsidering the Perplexing U.S. Preoccupation with the Separation of Legislative and Executive Powers*, 51 B.C. L. REV. 1, 2 n.1 (2010).

150. Gilbert, *supra* note 91, at 811. Professor Gilbert notes that to prevent logrolling, or the combination of legislation that only enjoys minority support in order to obtain majority support, "the Romans in 98 B.C. forbade laws consisting of unrelated provisions." *Id.*

require a clear title for all bills, they would have been quite familiar with these concepts, which all have ancient roots.<sup>151</sup>

Even so, deem-and-pass plainly constitutes a form of “logrolling,” a practice disfavored in the vast majority of state constitutions and that drew the ire of angry constituents going back to the time of the Roman Republic.<sup>152</sup> Most contemporary state constitutions contain a rule requiring that all bills encompass a single subject; many also prohibit riders or mandate the use of “clear titles” that accurately describe a bill’s purpose and effect.<sup>153</sup> All of these devices are aimed to limit, if not entirely eradicate, the practice of joining together minorities to enact a bill consisting of proposals that, taken alone, could not command majority support. As Professor Millard Ruud explains, “[t]he primary and universally recognized purpose of the one-subject rule is to prevent log-rolling in the enactment of laws—the practice of several minorities combining their several proposals as different provisions of a single bill and thus consolidating their votes so that a majority is obtained for the

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151. See Brannon P. Denning & Brooks R. Smith, *The Truth-in-Legislation Amendment: An Idea Whose Time Has Come*, 78 TENN. L. REV. 831, 831–32 (2011); see also Brannon P. Denning & Brooks R. Smith, *Uneasy Riders: The Case for a Truth-in-Legislation Amendment*, 1999 UTAH L. REV. 957, 988–89, 1003–04 (1999) (arguing that although the Framers did not incorporate a single subject rule, a ban against riders, or a plain title rule, such limits on Congress’s legislative powers would be desirable as a matter of policy). Denning and Smith note that President George H.W. Bush claimed that “the Framers understood a ‘bill’ to contain only one subject” and that “therefore, the President had discretion to veto parts of legislation containing more than one subject.” Denning & Smith, *Uneasy Riders*, *supra*, at 961 n.20. Neither the records of the Federal Convention, nor the Federalist Papers, seem to offer much direct support of this claim. Moreover, although colonial charters sometimes included single subject rules, the first post-Revolutionary state constitution to contain such a provision was the Illinois state constitution of 1818, with the next adoption of such a rule not taking place until thirty years later, with Michigan adopting a single subject rule in 1843. Ruud, *supra* note 91, at 389–90. Given the ancient roots of the single subject rule, and its observance in several colonies, including New Jersey, New York, and Pennsylvania during the eighteenth century, see ROBERT LUCE, LEGISLATIVE PROCEDURE 549–50 (1922), the Framers’ resounding silence on this question appears to indicate a rejection of the single subject rule for the federal Congress. This fact, of course, cuts against my main argument, at least to some degree. But to say that the Framers did not attempt to foreclose omnibus legislation that encompasses more than one subject is not to say that the Framers also believed that the houses of Congress would not actually take the same vote on a particular bill (whether or not the bill encompassed a single or multiple subjects).

152. See LUCE, *supra* note 151, at 548–49 (discussing the adoption of the *Lex Caecilia Didia* in 98 BC to prohibit *lex satura*, or laws that encompassed wholly unrelated provisions); see also Gilbert, *supra* note 91, at 811 (“The single subject rule can be traced to ancient Rome, where crafty lawmakers learned to carry an unpopular provision by ‘harnessing it up with one more favored.’” (quoting Luce)). For a history of single subject rules in the colonies and states, see Gilbert, *supra* note 91, at 811–13 & 822; Ruud, *supra* note 91, at 389–96.

153. See Gilbert, *supra* note 91, at 811–17 & 822.

omnibus bill where perhaps no single proposal of each minority could have obtained majority approval separately.”<sup>154</sup>

In the absence of a single-subject rule, however, a single bill’s substantive content is limited only by the procedural necessity of obtaining a majority vote from a quorum of the House of Representatives and the Senate.<sup>155</sup> Moreover, the enactment of “Comprehensive Omnibus” bills, such as continuing resolutions that fund the operations of the entire federal government, has been commonplace since the 1980s. Clearly, then, a single floor vote can have an infinite number of substantive effects, at least if the provisions that will produce these effects are bundled together in a single bill or resolution. Again, the practice in the states is arguably to the contrary.<sup>156</sup>

Moreover, there are no constitutional or historical limits on the amendment of a pending bill. A closed rule in the House of Representatives might disallow offering and voting on particular amendments, but the closed rule must be adopted by the House itself prior to consideration of the bill.<sup>157</sup> Thus, if amendments are limited or

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154. Ruud, *supra* note 91, at 391; *see also* Gilbert, *supra* note 91, at 815 (“The single subject rule attempts to check logrolling by forbidding unnatural combinations of proposals in acts. The theory is that unrelated combinations could only be the product of logrolling.”).

155. The standing rules of the House of Representatives do contain an analogue to the single subject rule, namely, a requirement that amendments be germane: “No motion or proposition on a subject different from that under consideration shall be admitted under color of amendment.” RULES OF THE HOUSE OF REPRESENTATIVES, R. XVI, cl. 7, H.R. Doc. No. 111-157, 111th Congress, 2011. Of course, under a “special rule” that suspends the regular order, this limitation on the scope of an amendment can be—and in practice not uncommonly is—waived. The rule has deep roots in House procedure; the very first House adopted it in 1789. HOUSE COMMITTEE ON RULES, GERMANENESS, *available at* [http://democrats.rules.house.gov/archives/germane\\_over.htm](http://democrats.rules.house.gov/archives/germane_over.htm) (last visited Oct. 12, 2012). One should also note that Rule XVI only prevents non-germane amendments and *does not* prevent provisions in the same bill which are non-germane to each other, as the single-subject rule does, *see id.*, and is thus much weaker than the state-level rule.

156. *See* Denning & Smith, *Uneasy Riders*, *supra* note 151, at 965–67, 1005–25; Gilbert, *supra* note 91, at 811–15, 822; Ruud, *supra* note 91, at 389–92.

157. *See* HOUSE PRACTICE, *supra* note 40, at § 2, 19; CHARLES TIEFER, CONGRESSIONAL PRACTICE AND PROCEDURE 284, 291–93, 296 (1989); *see also* STANLEY BACH & STEVEN S. SMITH, MANAGING UNCERTAINTY IN THE HOUSE OF REPRESENTATIVES: ADAPTATION AND INNOVATION IN SPECIAL RULES 50–74 (1988) (discussing the increasing use over time of special rules to prohibit amendments to legislation pending on the House floor); Michael Doran, *Legislative Organization and Administrative Redundancy*, 91 B.U. L. REV. 1815, 1831 (2011) (observing that “[i]n the contemporary House, few measures are brought to the floor under open rules, which allow any member to offer any germane amendment” and noting that “[i]nstead, most controversial measures are offered under closed rules, which prohibit all amendments, or special rules that so greatly restrict amendments as to be effectively closed”); Michael Doran, *The Closed Rule*, 59 EMORY L.J. 1363, 1365–68, 1375–78, 1385–87 (2010) (discussing the closed rule and its increasing use in the contemporary House of Representatives); Kenneth A. Shepsle & Barry R. Weingast, *The Institutional Foundations of Committee Power*, 81 AM. POL. SCI. REV. 85, 94–95 (1987) (discussing the mechanics of the conference committee reconciliation process and the utility of using closed rules to the majority

prohibited with respect to a particular bill, this is so not because the Constitution itself limits the amendment process, but because the House elected to impose such a restraint on itself with respect to its consideration of a particular legislative measure. Accordingly, then, there can be no serious objection to the House considering an omnibus bill or linking a group of bills together via the amendment process.

However, the deem-and-pass procedure neither combines measures into a single bill, nor does it require a vote to amend a particular bill to incorporate another measure. Instead, it gives ancillary and independent legislative effects to a single vote on a particular bill. Deem-and-pass splits and multiplies the legal effect of a single floor vote with respect to independent pieces of legislation. Moreover, it does so to render the legislative process opaque and undermine transparency in an effort to confuse—or even deceive—voters.<sup>158</sup> So, the fact that the House can consider an omnibus bill or amend a pending measure to incorporate wholly unrelated legislation does not really tell us anything useful about whether a single vote can pass multiple independent bills.

A functionalist argument exists that could be made in favor of deem-and-pass special rules, and it derives from the fact that no substantive limits exist on the scope of a particular bill or amendments to a pending bill. If the House can link unrelated statutory language together via an omnibus bill or the amendment process on the floor, why can't the House achieve the same legal effect by using a deem-and-pass rule? In other words, if the House, by a majority vote, could incorporate an unrelated bill into a piece of legislation pending on the floor, what is the harm in permitting the House to achieve the same result by adopting a rule that says “the enactment of bill A will imply the passage of bill B”? The practical effect of this rule is simply to incorporate the entire substance of bill B into the text of bill A; the only difference is that, strictly speaking,

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party's leadership in controlling the legislative process in this context); Charles Tiefer, *Congress's Transformative "Republican Revolution" in 2001–2006 and the Future of One-Party Rule*, 23 J.L. & POL. 233, 256–59 (2007) (discussing the increasingly frequent use of closed rules to disallow even clearly germane amendments and thereby permit the majority caucus to enact “ideological versions of key bills without competition”). Under the standing rules of the House, an amendment need only be germane in order to be moved from the floor. See RULES OF THE HOUSE OF REPRESENTATIVES, R. XVI, cl. 7, H.R. Doc. No. 111-157, 111th Cong., 2011 (“No motion or proposition on a subject different from that under consideration shall be admitted under color of amendment.”). In order to establish a closed rule, the House must adopt a Rules Committee Report calling for it. See Doran, *The Closed Rule*, *supra*, at 1367 (noting that “[e]ach closed rule must be put to a vote of the full House, but, with rare exceptions (such as the vote that galled President Reagan), the floor ratifies the closed rules proposed by managers” and observing that “[t]he closed rule now constitutes one of the most important parts of the legislative process”).

158. See Frymer & Yoon, *supra* note 18, at 1017–18; Mayhew, *supra* note 68, at 53–62.

bill A and bill B remain separate pieces of legislation for all other purposes. From a functionalist perspective, perhaps this is a distinction without a difference.

From a formalist perspective, however, a significant difference exists between amending a bill to incorporate all of the material provisions of another piece of legislation and using a deem-and-pass special rule. Because deem-and-pass retains the separate legislative identities of both bills, rather than actually merging them into a single text, both bills must be enacted by the Senate and also presented to the President. Thus, if the House voted to amend bill A by incorporating all of the content of bill B, the combined bill would go to the Senate and, if passed in that chamber, to the President.<sup>159</sup> Both the Senate and the President would be required to consider and to act on bill A/B, rather than separately on bill A and bill B. If the Senate wished to divide the bill, by amending bill A/B to extract the content of bill B, then the amended bill would have to be returned to the House and repassed as amended.

So too, if the Senate decided to pass bill A/B, it would go directly to the President for his consideration. The President would not have the option of signing only the provisions of the bill that derived from bill A, but would have to sign bill A/B or veto all of its provisions.<sup>160</sup> Had the House and Senate each voted on a separate bill A and bill B, however, the President would be able to sign only one of the two bills and to veto the other.

When the House enacts separate bills the subsequent legislative process will require the assent of the Senate and the President on two separate pieces of legislation, rather than only on one. This, in turn, means that the Senate and President must go on record as supporting or opposing A and B, rather than both propositions at once. The House, by way of contrast, if it has used a deem-and-pass procedure under a special rule, may have taken a single vote to approve the content of both bills at the same time. Thus, although the House will have approved the content of a Senate approved bill, the Senate and House will actually have taken very different votes.

And, it is precisely at this point that the sledding gets particularly rough. Does the Constitution permit the House to vote on a set of propositions that differs from the separate votes taken by the Senate? Should it matter that the Senate and President must take political

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159. *See* *INS v. Chadha*, 462 U.S. 919, 956–59 (1983).

160. *See* *Clinton v. City of New York*, 524 U.S. 417, 437–40, 448–49 (1998).

responsibility for two independent sets of propositions, rather than the material equivalent of a combined bill? Or that the House did not vote on the same precise question as the Senate? Contra Professor Balkin,<sup>161</sup> I think that it should make a difference, at least when the deem-and-pass procedure is used to adopt a bill already enacted by the Senate.

When the House uses a deem-and-pass special rule to deem adopted a bill already passed in the Senate, it essentially is voting to adopt an amended version of the bill that the Senate did not enact.<sup>162</sup> Even so, only the House-initiated bill goes to the Senate for the Senate's consideration. The Senate bill goes to the President for his consideration. Thus, the Senate is effectively forced to vote separately for A and B. So too, the President must decide to sign A without even knowing whether B will advance from the Senate to his desk.<sup>163</sup> Thus, the use of the deem-and-pass procedure, at least with respect to a bill that has already passed the Senate, has the effect of permitting the House to vote simultaneously on a package of statutory effects, whereas the Senate and the President are forced to consider these measures separately.

One could take the view that nothing in the Constitution's text absolutely requires that the Senate and President ask and answer the same questions as the House when deciding whether to approve or reject a specific piece of legislation.<sup>164</sup> As Professor Linda Jellum notes, "[t]he

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161. See Balkin, *supra* note 11; see also Richey, *supra* note 11.

162. See McConnell, *supra* note 10, at A15.

163. The Constitution gives the president a limited amount of time in which to decide whether to sign or veto a bill presented to him after enactment by both houses of Congress. See U.S. CONST. art. I, § 7, cl. 2; Randall, *supra* note 74, at 507–16. Thus, if the House were to use a deem-and-pass rule to enact a bill already passed by the Senate, as well as a bill pending before the House, it is entirely possible that the President would have to act on bill A before knowing the fate of bill B in the Senate. If the President were to wait beyond the constitutionally provided deadline, the bill would either become a law without his signature after ten days (assuming Congress remains in session) or, if Congress had recessed, the bill would not become a law (a so-called "pocket veto").

164. See Balkin, *supra* note 11. Professor Balkin explains his position, which is thoroughly functionalist, as follows:

The structural constitutional reason for this requirement is that members of the House must not be able to avoid political accountability for passing the same bill as the Senate. The point of bicameralism and presentment is that all three actors (House, Senate and President) must agree to the legislation, warts and all, so that all three can be held politically accountable for it. They cannot point fingers at the other actors and deny responsibility for the policy choices made. The House cannot say, "oh we didn't pass X; that was the Senate's decision." If the House doesn't accept the same language as its own, even if that language is then immediately changed in an accompanying bill, there is no law.

*Id.* When one casts the language of Article I, Section 7 in purposive terms, however, one has made an unstated argument that the form of passage does not matter, provided that passage, in whatever form, takes place. Although the Supreme Court has not spoken to this precise question, it has construed the provisions of Article I, Section 7 in literal, rather than purposive, terms at least twice in the modern



functionalist approach emphasizes the need to maintain pragmatic flexibility to respond to modern government.”<sup>165</sup> Functionalists, as Professors Elizabeth Magill and Thomas Merrill observe, tend to “resolve structural disputes ‘not in terms of fixed rules but rather in light of an evolving standard designed to advance the ultimate purposes of a system of separation of powers.’”<sup>166</sup> Open-ended balancing tests, cost/benefit analysis, and a focus on the potential utility of novel administrative structures and procedures tend to matter more in functionalist analysis than strict adherence to enforcing the Framers’ system of carefully separated and divided government powers within the three branches of the

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era. See *Clinton v. City of New York*, 524 U.S. 417, 448 (1998) (“The Balanced Budget Act of 1997 is a 500-page document that became ‘Public Law 105-33’ after three procedural steps were taken: (1) a bill containing its exact text was approved by a majority of the Members of the House of Representatives; (2) the Senate approved precisely the same text; and (3) that text was signed into law by the President. The Constitution explicitly requires that each of those three steps be taken before a bill may ‘become a law.’” (quoting U.S. CONST. art. I, § 7)); *INS v. Chadha*, 462 U.S. 919, 958–59 (1983) (“The veto authorized by § 244(c)(2) doubtless has been in many respects a convenient shortcut; the ‘sharing’ with the Executive by Congress of its authority over aliens in this manner is, on its face, an appealing compromise. In purely practical terms, it is obviously easier for action to be taken by one House without submission to the President; but it is crystal clear from the records of the Convention, contemporaneous writings and debates, that the Framers ranked other values higher than efficiency.”). Thus, “[t]here is unmistakable expression of a determination that legislation by the national Congress be a step-by-step, deliberate and deliberative process.” *Chadha*, 462 U.S. at 959.

Professor Balkin’s argument, premised on the practical effect of a vote, rather than its precise form and structure, seems more consistent with the dissenting opinions of Mr. Justice White in *Chadha*, see *Chadha*, 462 U.S. at 967–68 (White, J., dissenting) (“The prominence of the legislative veto mechanism in our contemporary political system and its importance to Congress can hardly be overstated. It has become a central means by which Congress secures the accountability of executive and independent agencies.”); *id.* at 978–79 (“In my view, neither Art. I of the Constitution nor the doctrine of separation of powers is violated by this mechanism by which our elected Representatives preserve their voice in the governance of the Nation.”); *id.* at 994 (“The central concern of the presentment and bicameralism requirements of Art. I is that when a departure from the legal status quo is undertaken, it is done with the approval of the President and both Houses of Congress—or, in the event of a Presidential veto, a two-thirds majority in both Houses. This interest is fully satisfied by the operation of § 244(c)(2).”), and Mr. Justice Breyer in *Clinton*, 524 U.S. at 469–70 (Breyer, J., dissenting) (“In my view the Line Item Veto Act (Act) does not violate any specific textual constitutional command, nor does it violate any implicit separation-of-powers principle. Consequently, I believe that the Act is constitutional.”); *id.* at 473 (“The background circumstances also mean that we are to interpret nonliteral separation-of-powers principles in light of the need for ‘workable government.’ . . . If we apply those principles in light of that objective, as this Court has applied them in the past, the Act is constitutional.”). I am not suggesting that a functionalist perspective on these separation of powers issues is not plausible or defensible; I am suggesting that, in this context, the Supreme Court has steadfastly demonstrated a formalist approach that strictly enforces the literal terms of Article I, Section 7. See Ronald J. Krotoszynski, Jr., *On the Danger of Wearing Two Hats: Mistretta and Morrison Revisited*, 38 WM. & MARY L. REV. 417, 422–23, 475–85 (1997).

165. Jellum, *supra* note 22, at 854–55.

166. M. Elizabeth Magill, *The Real Separation in Separation of Powers Law*, 86 VA. L. REV. 1127, 1142 (2000) (quoting Thomas W. Merrill, *The Constitutional Principle of Separation of Powers*, 1991 SUP. CT. REV. 225, 231 (1991)).

federal government. Professor John Manning aptly notes that “functionalists view the Constitution as emphasizing the balance, and not the separation, of powers.”<sup>167</sup>

From a functionalist perspective, strictly reading the bicameralism requirement of Article I, Section 7 to require anything more than that both houses of Congress agree to adopt the same text represents an unduly formalistic approach. Provided that both houses agree to adopt the exact same text, the precise means used to manifest this agreement is, if not entirely irrelevant, then largely so. And, as noted earlier, Professor Balkin’s analysis of the deem-and-pass maneuver reflects and incorporates this perspective—and thus is thoroughly functionalist in character.<sup>168</sup>

However, from a formalist perspective, the legislative process set forth in the Constitution should be strictly enforced—meaning that the House, Senate, and President assent to the exact same set of propositions at the same time. This is so because otherwise the political accountability of the House would be different than the political accountability of the Senate and President. Members of the House, running for reelection, could truthfully state “I did not vote for bill A—I only voted for bill A as it would be amended by bill B.” Thus, if bill A becomes law (e.g., the House “deems passed” Senate-originated bill A and the President signs it upon presentment), but bill B fails to secure passage in the Senate and is not ultimately enacted, then the Senate and President are on the hook for a set of legislative outcomes that House members can fairly say that they did not agree to independently of bill B.

A functionalist argument may also be put forward in support of this approach, although I think Professor Balkin’s analysis constitutes the most obvious functionalist position.<sup>169</sup> Requiring identical *votes* in both houses of Congress advances the important values of accountability and transparency. Because the Constitution does not directly specify that congressional procedures must advance these values, one could argue that they are simply normative values loosely, but obviously, associated with the concept of democratic accountability through free and fair elections.

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167. John F. Manning, *Separation of Powers as Ordinary Interpretation*, 124 HARV. L. REV. 1939, 1952 (2011). Professor Manning also posits that “[f]unctionalists believe that the Constitution’s structural clauses ultimately supply few useful details of meaning.” *Id.* at 1950.

168. See *supra* note 164.

169. This is so because Balkin focuses on the fact that both houses adopted or “owned” the identical text, even if they did not do so by taking identical votes on the exact same propositions (no more, and no less); thus, for Balkin, the precise means used to enact a bill is entirely immaterial, so long as both houses of Congress adopt the same text and the President signs the bill or Congress successfully votes to override the President’s veto. See Balkin, *supra* note 11.

This functionalist argument focuses on advancing particular substantive values rather than on a clear directive regarding the placement of a particular governmental power or responsibility within a specific institution of the federal government.<sup>170</sup>

On the other hand, a pragmatic formalist could embrace these values under the rubric of Article I, Section 7's requirement of bicameralism. Indeed, I would argue that this reasoning is primarily *formalist*; this is so because formalism encompasses procedural rules and limits derived from (or implied by) structural limitations.<sup>171</sup>

For example, *Myers v. United States*,<sup>172</sup> an iconic formalist opinion, relies on implied limits on Congress's power to remove executive officers derived from the Vesting and Faithful Execution Clauses.<sup>173</sup> The *Myers* majority opinion embraces separation of powers limits that create a unitary executive officer, namely the President, and vest this person with a duty to oversee the execution of federal laws. Strictly speaking, the Constitution's text does not directly speak to whether Congress may reserve for itself some say in the removal of executive officers appointed with the Senate's advice and consent. Nevertheless, *Myers* draws reasonable implications from key provisions of Article II to disallow congressional efforts to claim a veto power over the President's ability to remove executive officers in whom he lacks confidence. *Myers* demonstrates quite clearly that implications derived from structure often serve as the basis for "formalist" arguments.

Thus, formalism *does not*, strictly speaking, require a text-based mandate for its rules and strictures. It encompasses logical implications derived from the Constitution's structure and allocation of powers among

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170. Compare *Myers v. United States*, 272 U.S. 52, 106, 119 (1926) (holding that "the President has the exclusive power of removing executive officers of the United States whom he has appointed by and with the advice and consent of the Senate") with *Humphrey's Executor v. United States*, 295 U.S. 602 (1935) (holding that limits on the President's removal power do not automatically violate the separation of powers, at least when Congress does not attempt to exercise the removal power directly, and when the office in question does not exercise a core executive power or function). Simply put, formalism is not necessarily limited or bound by strictly textualist arguments—implications from text and structure can create limits on novel administrative structures and practices.

171. See, e.g., *Free Enter. Fund v. PCAOB*, 130 S. Ct. 3138, 3147, 3153–56 (2010) (invalidating the good cause removal protection for members of the Public Company Accounting Oversight Board on formalist separation of powers grounds, despite the fact that the Constitution itself is entirely *silent* on the question of the removal power of executive branch officers and specifies only the means of *appointing* principal and inferior officers of the United States); cf. U.S. CONST. art. II, § 2, cl. 2; *id.* at art. I, § 2, cl. 5 & art. I, § 3, cls. 6–7 (providing a legislative means of removing executive and judicial officers through the impeachment power).

172. 272 U.S. 52 (1926).

173. *Id.* at 163–64.

the three branches of the federal government. Text can be one (or more) level removed from a formalist argument.<sup>174</sup>

Returning to the hypothetical enactment of Senate-initiated bill A as a function of floor passage of House-initiated bill B, the public can and should blame the House for enactment of bill A, if the bill proves to be unpopular. But, the members of the House of Representatives did not agree to pass bill A independently of bill B. If the legislative process in Congress requires that both houses enact the mirror image of a bill, deem-and-pass should be seen as objectionable because it permits the House to give its assent to a different package of outcomes than the Senate voted upon. Deem-and-pass, under this view, constitutes a kind of agreement between the two houses of Congress to adopt a bill into law but with the House of Representatives crossing its fingers behind its back. The House essentially says, “I agree to this *and* that,” rather than “I will only agree to this if that also gets incorporated into the bill via amendment (which would require the amended bill to return to the Senate for its consideration).” Through the deem-and-pass process, the House goes on record supporting legislative outcomes not yet considered by the Senate, but the legislation approved by the Senate goes directly to the White House.<sup>175</sup>

This outcome does a disservice to both the Senate and the President. The use of a deem-and-pass special rule to enact a bill previously passed in the Senate essentially tells the Senate “yes, but” and permits the House to claim, truthfully, that it voted on a different measure than the Senate while formally advancing the Senate bill to the President. Moreover, the President must make independent decisions on both bills should the House-initiated bill clear the Senate. Arguably, this violates a constitutional expectation that both houses of Congress ask and answer the same question when adopting a new law.<sup>176</sup> As Professor McConnell has noted, “[i]t is one thing for the Supreme Court to defer to Congress on questions of what Congress did, and quite another to defer to Congress on the meaning of the Constitution.”<sup>177</sup>

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174. For a discussion of the meaning of formalism and the contemporary Supreme Court’s embrace of formalism, see *The New Formalism*, *supra* note 90, at 1601, 1611–15.

175. See McConnell, *supra* note 10, at A15.

176. See *infra* notes 177 & 187; see also *supra* notes 154–62 and accompanying text.

177. McConnell, *supra* note 10, at A15. As Professor McConnell explains:

No one doubts that the House can consolidate two bills in a single measure; the question is whether, having done so, it may then hive the resulting bill into two parts, treating one part as an enrolled bill ready for presidential signature and the other part as a House bill ready for senatorial consideration. That seems inconsistent with the principle that the president may

There is, however, a significant difference in the position of the Senate and the President in all of this. The President will know the context of bill B and undoubtedly will have some sense of the probability of its enactment. If forced to act on bill A before the Senate votes on bill B, the President can speak directly to his reasons for choosing whether to sign bill A in light of the uncertainties associated with bill B.

The Senate's members, by way of contrast, took political accountability for the content of bill A on the assumption that their colleagues in the House of Representatives would vote on bill A's provisions and enact them, amend them (giving the Senate a clean chance to adopt or reject the amended bill), or reject them. Instead, the House advances bill A directly to the President, while at the same time sending the Senate a package of amendments for its consideration. The Senate, unlike the President, never has an opportunity to consider the linked propositions concurrently and prospectively. The Senate must take political accountability for a measure that it might not have passed in the first instance, had it known that the House would only give its assent if it could also contemporaneously enact changes to the bill in a separate piece of legislation.

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sign only bills in the exact form that they have passed both houses. A combination of two bills is not in "the same form" as either bill separately.

*Id.* Under this logic, Professor McConnell would presumably not object to the use of a self-executing rule to achieve two (or more) unrelated legislative actions—i.e., to pass a new House originated bill and also to send an unrelated Senate-passed bill to the president. His precise objection is that the House cannot pass a Senate-passed bill and, at the same time, enact a package of amendments to that bill, with one bill going to the President (the Senate-passed bill) and the other to the Senate (the House-initiated package of amendments). Indeed, one could think of this as a kind of inter-house delegation: the House essentially says "we approve the Senate bill," and in addition, delegates to the Senate the power to accept, or reject, a package of amendments to the Senate's bill without the Senate's rejection of the amendments bill precluding enrollment of the original Senate-passed bill.

A broader objection to the deem-and-pass procedure exists: one could reasonably argue that Article I, Section 7 requires not merely the enactment of the same text, but also both houses of Congress taking an *identical vote*. The question, at bottom, is whether the "mirror image" requirement should extend both to the text of the bill and also to the precise floor action used to enact it. From the perspective of securing political accountability, requiring identical floor action would be desirable, insofar as it would make it harder for members to disclaim responsibility for the entire package of legislative actions by saying "I voted yes, but only because I wanted to pass bill X, and not bill Y." See Frymer & Yoon, *supra* note 18, at 1018 ("Self-executing" rules have a similar ability to insulate members from controversial decisions."). As Professors Frymer and Yoon astutely note,

The key is that the party leadership wants to find a way to structure the choices offered to its members on the House floor so that members can vote with the party without deeply offending their constituents, and, if constituents are offended, to cover up their own involvement in the legislation's passage.

*Id.*

And, if Article I, Section 5 permits the House to adopt a special rule that allows a single floor vote to advance multiple, wholly-independent pieces of legislation, no good argument exists against the Senate following suit by incorporating this maneuver into its own standing rules. Were both houses of Congress to utilize the deem-and-pass procedure, the dangers inherent in logrolling would become acute. Both houses could take votes with plural effects, and members could disclaim responsibility for particular outcomes that they found politically objectionable.

What is more, logrolling would permit the enactment of multiple pieces of legislation lacking majority support.<sup>178</sup> By linking together unrelated propositions, each of which lacks majority support, it becomes possible to obtain a majority for an omnibus measure by obtaining the support of multiple minority factions.<sup>179</sup> At the federal level, Congress does not legislate under a single subject requirement, but that does not answer the question of whether the House may use a single vote to enact multiple bills while the Senate must consider each question separately without uniting into a single bill the multiple legislative objectives enjoying only minority support.<sup>180</sup>

Essentially, in this legislative free for all, a kind of legislative ping pong would ensue with some bills going to the President, others going to the other chamber, and laws being enacted even though neither chamber actually considered and assented to the particular propositions contained within the four corners a single bill. A bill would be “passed” even though both houses of Congress failed to agree to that bill, and that bill only. Such an outcome seems fundamentally inconsistent with the Supreme Court’s

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178. See Ruud, *supra* note 91, at 391 (“The primary and universally recognized purpose of the one-subject rule is to prevent log-rolling in the enactment of laws—the practice of several minorities combining their several proposals as different provisions of a single bill and thus consolidating their votes so that a majority is obtained for the omnibus bill where perhaps no single proposal of each minority could have obtained majority approval separately.”); see also Gilbert, *supra* note 91, at 813 (noting that preventing logrolling is a primary reason for adopting a single subject rule and title requirement). Gilbert describes the “three principal purposes” of single subject and title requirements as “(1) to prevent logrolling, (2) to prevent riding, and (3) to improve political transparency.” *Id.* Gilbert also posits a fourth possible rationale—protecting a governor’s veto power. *Id.*

179. Gilbert, *supra* note 91, at 813–15.

180. Of course, were the Senate to amend its standing rules to permit the use of the deem-and-pass procedure, it would be possible for bills to be enacted without any guaranty that any particular provision, or set of provisions, actually enjoys majority support within either the House or Senate. Obviously, this has the effect of severely undermining the checking effect created by the bicameralism requirement—a requirement that should entail that a bill, however broadly or narrowly framed, enjoys majority support in both houses of Congress.

enforcement of the bicameralism and presentment rules in decisions such as *Chadha*<sup>181</sup> and *Clinton*.<sup>182</sup>

If the deem-and-pass legislation is used outside the context of a Senate-enacted bill, however, the constitutional harm seems more attenuated.<sup>183</sup> If the House could enact an omnibus bill or amend a bill to combine various, unrelated pieces of legislation, and that omnibus or amended bill went to the Senate, the outcome would be no different than if the House had chosen to deem-and-pass three nominally separate House bills at the same time and send them to the Senate for its consideration. In that case, the Senate could combine all three bills into one through amendment. If the Senate did this, it would be voting on the same linked statutory provisions that the House enacted. Alternatively, the Senate could enact only one or two of the three independent bills, and could reject one or two of the bills passed by the House via a single vote. It is also entirely possible that the Senate might consider only some of the bills, and permit others to die in committee without formal action as a body.

This would have the effect of permitting the House to vote once on a linked set of propositions and allowing the Senate to decide whether it wishes to advance some or all of the provisions to the White House. The House, however, would have full knowledge that it might be voting on provisions that the Senate would either reject or fail to consider. To the extent that the House takes political accountability for passing measures that the Senate chooses not to adopt, it does so with full knowledge of that potential outcome; it is not subject to an ambush by the Senate. The House is essentially inviting the Senate to agree to some or all of the individual legislative proposals.

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181. See *INS v. Chadha*, 462 U.S. 919, 956–59 (1983).

182. *Clinton v. City of New York*, 524 U.S. 417, 438–47 (1998).

183. Of course, from a strictly formalist perspective, the degree of constitutional harm is not the relevant metric; any derogation from the Framers' design must be rejected in favor of strict observance of the separation of powers. See Jellum, *supra* note 22, at 861–70; The New Formalism, *supra* note 90, at 1612–13; see also Free Enter. Fund v. PCAOB, 130 S. Ct. 3138, 3154 (2010) (interpreting the Vesting and Faithful Execution Clauses of Article II to imply a presidential power of oversight and removal and arguing that unduly insulating executive branch officers from presidential control “violates the basic principle that the President ‘cannot delegate ultimate responsibility or the active obligation to supervise that goes with it,’ because Article II ‘makes a single President responsible for the actions of the Executive Branch’”); *Printz v. United States*, 521 U.S. 898, 928–33 (1997) (disallowing the “commandeering” of state executive officers to enforce federal laws under a formalist theory of the separation of state and federal power and asserting that such arrangements tend to undermine “political accountability”). Thus, if Article I, Section 7 requires both houses of Congress to vote on the same question as well as adopt the same legislative texts, the fact that a self-executing rule permits the House to take a different vote than the Senate is objectionable regardless of whether or not the procedure is used only to advance a group of House-originated bills to the Senate.

If any political accountability is lost, it is lost only by virtue of entirely voluntary decisions by the House and Senate. And, these decisions are made prospectively rather than retrospectively.<sup>184</sup> The use of the deem-and-pass procedure effectively delegates to the Senate the power to accept or reject any of the House-passed bills. This constitutes a kind of intra-branch delegation of the House's pre-approval of Senate amendments, albeit of a specified sort (i.e., "enact A, B, and/or C and we, the House, agree in advance to this outcome").

By way of contrast, when the House uses the deem-and-pass procedure on a bill already enacted by the Senate, the House gets to have its cake and eat it, too. The House members are able to adopt the Senate bill and also some additional legislative proposals, including amendments to the Senate bill itself. The House essentially agrees to adopt a different bill, but advances the Senate bill to the President by maintaining the formal separation of the Senate bill and House amendments. This leaves it up to the Senate to concur with or reject the House amendments and creates a possible presidential veto of the House amendments even if the Senate adopts the House bill amending the Senate's earlier work.<sup>185</sup>

To the extent that the political accountability arising from the votes differs, this effect takes place on a retrospective basis because the Senate finds itself effectively cornered by the House of Representatives. The "yes, but" effect of the deem-and-pass procedure means that even though the Senate and House agreed to different versions of the same bill, the House is able to advance the Senate's bill to the President while, simultaneously, proposing amendments to the same bill.<sup>186</sup> The Senate should be able to vote on pending legislation without having to wonder if the House will ask and answer a different legislative question even as it advances the nominally un-amended Senate bill to the President.

Of course, up to this point, the accountability analysis has focused almost exclusively on the relationship of the two houses of Congress to each other, rather than on the relationship of both houses of Congress to their constituents. Viewed from a broader perspective, the very use of a

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184. This is, admittedly, a somewhat functionalist argument. *But cf. Free Enter. Fund*, 130 S. Ct. at 3155 (arguing that "[t]he diffusion of [political] power carries with it a diffusion of accountability"). Although a thoroughly formalist decision, Chief Justice Roberts's majority opinion in *Free Enterprise Fund* does offer functional reasons, like accountability, in support of the outcome. *See* The New Formalism, *supra* note 90, at 1616–17 (observing that "practical concerns still animated the Chief Justice's analysis").

185. Arguably, this constitutes a kind of "logrolling." *See* Gilbert, *supra* note 91, at 813–15. One could also conceive of the House-initiated bill as a kind of "rider." *See id.* at 815–16.

186. *See* McConnell, *supra* note 10, at A15.



deem-and-pass special rule to enact multiple House-originated bills by a single floor vote might be seen as objectionable.<sup>187</sup> This is because the voters' ability to hold members accountable for each separate vote is diminished by linking together multiple, perhaps wholly unrelated, questions in separate legislation yet enacting everything concurrently with a single floor vote.<sup>188</sup> Voting to delegate to the Senate the authority to enact one, two, or three separate bills simply is not the same as voting separately on each bill or voting to enact a single bill containing the same content.

If the House sends three separate bills with multiple legislative effects to the Senate via a single vote, it empowers its members to claim that they supported only some of the measures, but not all three. A member might well claim that she felt constrained to pass all three bills and forward them to the Senate in order to achieve passage of the one bill about which she

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187. This absolutist approach seems more consistent with the Supreme Court's most recent articulations of formalist reasoning when deciding separation of powers questions, which do not seem to permit any room for *de minimis* violations. See *Free Enter. Fund*, 130 S. Ct. at 3153–55 (2011); *Stern v. Marshall*, 131 S. Ct. 2594, 2609, 2619 (2011); see also *The New Formalism*, *supra* note 90, at 1615–23. But see *Stern*, 131 S. Ct. at 2625–26 (Breyer, J., dissenting) (arguing that the Supreme Court should abjure “formalistic and unbending rules” in separation of powers analysis in favor of an open ended balancing approach that would encompass a thorough “examination of certain relevant factors”). Formalism relies on analysis of the *kind* of power at issue, and the Constitution's assignment of that power to a particular branch of the federal government, rather than on distinctions based on the *scope* of departure from the Framers' blueprint that a particular administrative structure reflects and incorporates. Accordingly, lines based on degrees of derogation from the Framers' design generally are the province of functionalists. See *The New Formalism*, *supra* note 90, at 1612–14. Here, the root of the formalist argument is the requirement of *bicameralism*, coupled with the requirement that members of the House and Senate be regularly *elected* by the people. See U.S. CONST. art. I, § 7, cl. 2; *infra* note 188 (citing and quoting the Constitution's requirements that members of the House of Representatives and Senate be elected by the people within the states). When the House votes on a different proposition than the Senate, it undermines the animating purpose of the bicameralism requirement, namely political accountability and the closely related value of political transparency. Attempting to avoid political responsibility for the enactment of unpopular legislation seems flatly inconsistent with the obvious implications of the Framers' design. To be clear, I recognize that from a hard-core functionalist perspective, efforts to “hide the ball” do not matter so long as the House owns the text of the bill even if it does so only indirectly or by implication. See Balkin, *supra* note 11.

188. One should note that accountability to the voters arises not only from Article I, Section 7, but also from Article I, Section 2 and the Seventeenth Amendment, which establish that members of the House and Senate must be elected by the people. See U.S. CONST. art. I, § 2, cl. 1 (“The House of Representatives shall be composed of Members chosen every second Year by the People of the several States, and the Electors in each State shall have the Qualifications requisite for Electors of the most numerous Branch of the State Legislature.”); U.S. CONST. amend. XVII, § 1 (“The Senate of the United States shall be composed of two Senators from each State, elected by the people thereof, for six years; and each Senator shall have one vote.”); see also *Printz v. United States*, 521 U.S. 898, 929–31 (1997) (emphasizing the importance of political accountability in the context of making and enforcing particular substantive legal policies, such as gun control measures); *New York v. United States*, 505 U.S. 144, 168–69, 178–79 (1992) (arguing that preserving political accountability precludes Congress from requiring states to enact legislation).

really cared.<sup>189</sup> If the House had enacted a single measure that incorporated the content of all three bills, however, the member would take clear political responsibility for the passage of the entire content of the bill. Passage by implication seeks to obfuscate that responsibility and thereby undermines political accountability.<sup>190</sup>

Independent of objections related to hiving what is really a single bill into multiple, independent bills, another non-delegation objection exists to the use of the deem-and-pass special rule. This objection relates to the political dynamics associated with such de facto delegations of lawmaking power to the Senate. The use of a single floor vote to advance multiple, independent bills involves the House essentially telling the Senate, “you have authority to pass all or none of these propositions without consulting us any further.” If a single bill contained three main titles, and the Senate wished to enact only one or two of the titles, it normally would have to amend the bill and return the amended bill to the House. The House, in turn, would have to enact the amended Senate version of the bill, meaning that members would have to pass a version of the bill that omits at least some of the content in the original bill. Obviously, the dynamics of holding independent votes on three separate pieces of legislation—or a unified single bill with multiple titles—would be different than a virtual vote on all the bills being piggybacked onto the single substantive floor vote by a deem-and-pass special rule.

In the end, the objection to the deem-and-pass special rule might be strongest where the House yokes a presidential veto override to some other piece of legislation, somewhat weaker in the context of using the procedure to enact a Senate-originated bill, and perhaps weakest with respect to the enactment of multiple House-initiated bills via a single floor vote. In all these cases, however, a strong argument exists that the use of deem-and-pass rules to advance legislation, whether to the Senate or the President, constitutes a derogation from Article I, Section 7, which should be read to require the House and Senate to take mirror image *votes* that have identical *legislative effects*.

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189. See Frymer & Yoon, *supra* note 18, at 1017–18.

190. See generally *New York*, 505 U.S. at 169 (“But where the Federal Government directs the States to regulate, it may be state officials who will bear the brunt of public disapproval, while the federal officials who devised the regulatory program may remain insulated from the electoral ramifications of their decision. Accountability is thus diminished when, due to federal coercion, elected state officials cannot regulate in accordance with the views of the local electorate in matters not pre-empted by federal regulation.”).

## VI. WOULD THE FEDERAL COURTS REACH THE MERITS OF A CHALLENGE TO A BILL ENACTED VIA A DEEM-AND-PASS SPECIAL RULE?

Regardless of the merits of the claim that House enactment of a bill by implication violates the requirements of Article I, Section 7, would the federal courts adjudicate such a claim? Or, instead, would the constitutional sufficiency of enactment by implication constitute a non-justiciable “political question”?<sup>191</sup> The problem, in this specific context, is somewhat compounded by the enrolled bill doctrine,<sup>192</sup> under which the federal courts specifically abjure considering whether Congress duly passed an enrolled statute because “the need for finality and certainty about the status of a statute contribute to judicial reluctance to inquire whether, as passed, it complied with all requisite formalities.”<sup>193</sup> Even assuming that a plaintiff with standing could be found,<sup>194</sup> the question of whether the deem-and-pass procedure violates Article I would have to overcome the argument that the issue presents a non-justiciable claim.

This answer is not obvious, and it might well be that some objections to use of a deem-and-pass special rule would be justiciable, whereas others might not. For example, suppose that the House of Representatives used the deem-and-pass procedure to consider overriding a presidential veto, and the override vote achieved the requisite two-thirds majority. The President might well object that the House failed to observe the procedure set forth in Article I, Section 7, Clause 2 by yoking the veto override vote to a wholly unrelated piece of legislation. Because the override vote was annexed to a vote on an unrelated piece of legislation, the President might well claim that members had evaded their constitutional responsibility to take a public, recorded vote on whether or not to sustain the veto.<sup>195</sup> To be sure, this illustration is merely hypothetical; a deem-and-pass special rule has never been used in this context. Nevertheless, if the House or Senate

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191. See *Baker v. Carr*, 369 U.S. 186, 215–17 (1962); see also Louis Henkin, *Is There a “Political Question” Doctrine?*, 85 *YALE L.J.* 597 (1976).

192. See *Field v. Clark*, 143 U.S. 649, 672, 676–77 (1892).

193. *Baker*, 369 U.S. at 214.

194. Cf. *Raines v. Byrd*, 521 U.S. 811 (1997) (holding that members of Congress lacked Article III standing to challenge the constitutional validity of the Line Item Veto Act and positing that such a challenge would not be ripe for adjudication until the President actually exercised a line item “veto” of the sort authorized by the act).

195. Members voting in favor of the combined question might claim that they did not wish to override the veto but nevertheless supported passage of the unrelated bill. Forced to choose between rejecting the veto and passing the annexed bill or rejecting both with the same negative vote, a member might claim to have voted in the affirmative notwithstanding a desire to sustain the veto.

rules permitted a veto override by implication, a good argument supports the claim that a justiciable question would exist, given the text of Article I.

However, suppose the use of a deem-and-pass procedure does not involve a presidential veto override vote—what then? For a court to consider the merits of the claim, the reviewing court would have to consider the procedural adequacy of the special rule itself. Such consideration, at least arguably, would transgress the rule against deciding non-justiciable political questions. Indeed, there are two relevant doctrines of non-justiciability. First, there is a specialized doctrine of non-justiciability applicable to enrolled bills and constitutional amendments declared ratified. Second, there is the more generic “political question” doctrine, and a prime example would be the “textually demonstrable constitutional commitment” of a particular question to Congress or the President.<sup>196</sup>

As a general matter, the federal courts will not inquire into the procedural adequacy of enactment of a statute, provided that the bill has been signed by the leadership of both houses of Congress and the President.<sup>197</sup> In *Field v. Clark*, Justice Harlan explains that:

The signing by the Speaker of the House of Representatives, and by the President of the Senate, in open session, of an enrolled bill, is an official attestation by the two houses of such bill as one that has passed Congress. It is a declaration by the two houses, through their presiding officers, to the President, that a bill, thus attested, has received, in due form, the sanction of the legislative branch of government, and that it is delivered to him in obedience to the constitutional requirement that all bills which pass Congress shall be presented to him. And when a bill, thus attested, receives his approval, and is deposited in the public archives, its authentication as a bill that has passed Congress should be deemed complete and unimpeachable.<sup>198</sup>

Accordingly, the federal courts typically will not consider whether an enrolled bill signed by the President was in fact properly passed in both houses of Congress.<sup>199</sup>

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196. See *Nixon v. United States*, 506 U.S. 224, 228–29 (1993).

197. See *Field v. Clark*, 143 U.S. 649 (1892).

198. *Id.* at 672.

199. See *id.* at 680 (holding that “it is not competent for the appellants to show, from the journals of either house, from the reports of committees or from other documents printed by authority of Congress, that [an] enrolled bill” was not properly enacted into law).

This rule reflects and incorporates the respect due to Congress, as well as a number of practical difficulties that would arise if the federal courts routinely required proof of passage of a bill beyond the signatures of the Speaker and President of the Senate.<sup>200</sup> Moreover, the Constitution itself does not specify how Congress must authenticate passage of a pending bill. No clause of the Constitution “either expressly or by necessary implication, prescribe[s] the mode in which the fact of the original passage of a bill by the House of Representatives and the Senate shall be authenticated, or preclude Congress from adopting any mode to that end which its wisdom suggests.”<sup>201</sup> Finally, practical difficulties would arise if courts routinely were required to inquire into the validity of all federal statutes.<sup>202</sup>

In sum, “[t]he respect due to coequal and independent departments requires the judicial department to act upon that assurance, and to accept, as having passed Congress, all bills authenticated in the manner stated: leaving the courts to determine, when the question properly arises, whether the act, so authenticated, is in conformity with the Constitution.”<sup>203</sup> Under this strong rule of non-justiciability, a serious question exists regarding whether the federal courts would reach the merits of a challenge to a law the House passed by implication using the deem-and-pass maneuver.<sup>204</sup> Under *Field*, the federal courts arguably should

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200. *See id.* at 670 (noting that “we cannot be unmindful of the consequences that must result if this court should feel obliged, in fidelity to the Constitution, to declare that an enrolled bill, on which depend public and private interests of vast magnitude, and which has been authenticated by the signatures of the presiding officers of the two houses of Congress, and by the approval of the President, and been deposited in the public archives, as an act of Congress, was not in fact passed by the House of Representatives and the Senate, and therefore did not become a law.” (emphasis in the original)).

201. *Id.* at 671.

202. *See id.* at 676–77 (noting that “[e]very suit before every court, where the validity of a statute may be called into question as affecting the right of a litigant, will be in the nature of an appeal or writ of error or bill of review for errors apparent on the face of the legislative records” and suggesting that “[i]f [a court] may go beyond the enrolled and signed bill and try its validity by the record contained in the journals, it must perform this task as often as called on, and every court must do it”).

203. *Id.* at 672.

204. Using the Lexis and Westlaw databases, I could not find any reported case involving an objection to the validity of a statute because the House used a self-executing rule to enact it. However, modern cases challenging the validity of a federal law based on the claim that the House and Senate passed different texts, even if inadvertently, do exist and the lower federal courts routinely have rejected such claims based on the enrolled bill doctrine. *See* Pub. Citizen v. U.S. Dist. Court, 486 F.3d 1342, 1351–52 (D.C. Cir. 2007); United States v. Pabon-Cruz, 391 F.3d 86, 99–101 (D.C. Cir. 2004); United States v. Sitka, 845 F.2d 43, 46–47 (2d Cir. 1988); Cal. Dep’t of Soc. Servs. v. Leavitt, 444 F. Supp. 2d 1088, 1096–97 (E.D. Cal. 2006), *aff’d in part, rev’d in part on other grounds*, 523 F.3d 1025 (9th Cir. 2008); *see also* U.S. Nat’l Bank of Or. v. Indep. Ins. Agents of Am., Inc., 508 U.S. 439, 455 n.7 (1993) (reaffirming the *Field* doctrine, noting that the “doctrine does not preclude us from asking whether the statute means something other than what the punctuation dictates,” and observing that,

accept the attestation of the Speaker, President of the Senate, and President of the United States, that a particular bill was enacted into law.

The Supreme Court has never overruled *Field* and has applied the presumption that official records are conclusive of legislative action in other contexts, such as when questions arise regarding the ratification of a constitutional amendment.<sup>205</sup> As recently as *Baker v. Carr*, the Supreme Court reiterated its commitment to this doctrine of non-justiciability.<sup>206</sup> If the rule remains good law, then a reviewing court might well refuse to consider the procedural validity of an enrolled bill, even if the House of Representatives passed a bill using a self-executing deem-and-pass rule.

The broader rule against considering political questions also might present difficulties for obtaining adjudication on the merits of an objection to enactment by implication through a self-executing rule. Writing in *Baker v. Carr*, Justice Brennan described cases that involve political questions:

Prominent on the surface of any case held to involve a political question is found a textually demonstrable constitutional commitment of the issue to a coordinate political department; or a lack of judicially discoverable and manageable standards for resolving it; or the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; or the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government; or an unusual need for unquestioning adherence to a political decision already made; or the potentiality of embarrassment from multifarious pronouncements by various departments on one question.<sup>207</sup>

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instead, the enrolled bill doctrine “concerns the nature of the evidence the Court [may] consider in determining whether a bill ha[s] actually passed Congress; it places no limits on the evidence a court may consider in determining the meaning of a bill that has passed Congress” (citations omitted) (internal quotation marks omitted)).

205. See, e.g., *Leser v. Garnett*, 258 U.S. 130, 137 (1922) (holding that federal courts will not inquire into the validity of a state's ratification of a constitutional amendment and that, instead, “official notice to the Secretary [of State], duly authenticated, that [a state had ratified an amendment] was conclusive upon him, and, being certified to by his proclamation, is conclusive upon the courts”). In *Leser* the Court further stated, “The rule declared in *Field v. Clark*, 143 U.S. 649, 669–673, [sic] is applicable here.”

206. *Baker v. Carr*, 369 U.S. 186, 214–15 (1962) (stating and citing with approval the doctrine that courts will not inquire into the procedural adequacy of enrolled bills signed into law by the President).

207. *Id.* at 217.

Certainly, a colorable argument exists that determining the rules for passage of a bill in either house of Congress falls within the scope of the “political question” doctrine.

First, the Constitution, by a “textually demonstrable constitutional commitment,”<sup>208</sup> gives each house the power to determine its own rules of procedure.<sup>209</sup> When considering whether a textually demonstrable commitment exists, however, a reviewing court “must, in the first instance, interpret the text in question and determine whether and to what extent the issue is textually committed.”<sup>210</sup> Moreover,

the concept of a textual commitment to a coordinate political department is not completely separate from the concept of a lack of judicially discoverable and manageable standards for resolving it; the lack of judicially manageable standards may strengthen the conclusion that there is a textually demonstrable commitment to a coordinate branch.<sup>211</sup>

In this instance, Article I, Section 5, Clause 2 seems to vest the power to make each house of Congress’s rules of procedure in the houses themselves. Moreover, for the federal courts to prescribe rules of procedure in Congress would seem incongruous with the level of respect that should be afforded a coordinate branch of the federal government. For example, would the Supreme Court accept as binding a statute that purported to govern the procedures used for granting a writ of certiorari? Or perhaps a rule that prescribes procedures for how the Justices conference on cases after oral argument? Thus, generic separation of powers concerns would seem to augur against reaching the merits of a challenge to the deem-and-pass maneuver.

The cases arising under the political question doctrine also seem to support this conclusion—at least to a point. *Nixon v. United States*,<sup>212</sup> for example, holds that the Constitution vests the “sole Power to try all impeachments” in the Senate, and that this language both vests the determination of an impeachment trial in the Senate alone and also “lacks sufficient precision to afford any judicially manageable standard of review

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208. *Id.*

209. U.S. CONST. art. I, § 5, cl. 2 (“Each House may determine the Rules of its Proceedings, punish its Members for disorderly Behaviour, and, with the Concurrence of two-thirds, expel a Member.”).

210. *Nixon v. United States*, 506 U.S. 224, 228 (1993).

211. *Id.* at 228–29.

212. 506 U.S. 224 (1993).

of the Senate's actions."<sup>213</sup> Thus, just as "[t]he commonsense meaning of the word 'sole' is that the Senate alone shall have authority to determine whether an individual should be acquitted or convicted,"<sup>214</sup> the power to establish rules of procedure would seem to give each house of Congress broad authority to adopt and enforce internal rules of operation.

On the other hand, the Supreme Court did find that an effort to exclude an elected member of Congress presented a justiciable question, notwithstanding the language of Article I, Section 5, which provides that "Each House shall be the Judge of the . . . Qualifications of its own Members."<sup>215</sup> The Court, in *Powell v. McCormack*, concluded that the House enjoyed broad discretion to enforce the eligibility requirements set forth in Article I, Section 2 and to exclude persons who failed to meet these specified qualifications, but also held that this clause did not empower the House to impose additional qualifications for office. "If examination of § 5 disclosed that the Constitution gives the House judicially unreviewable power to set qualifications for membership and to judge whether prospective members meet those qualifications, further review of the House determination might well be barred by the political question doctrine."<sup>216</sup>

Because resolution of the question presented was not exclusively vested in the House itself, and because "a determination of petitioner Powell's right to sit would require no more than an interpretation of the Constitution,"<sup>217</sup> the claim did not present a non-justiciable political question. Instead, the constitutional question at issue in *Powell* fell "within the traditional role accorded courts to interpret the law, and d[id] not involve a 'lack of the respect due [a] co-ordinate [branch] of government,' nor d[id] it involve an 'initial policy determination of a kind clearly for non-judicial discretion.'"<sup>218</sup>

Similarly, if a reviewing court focused on the language of Article I, Section 7,<sup>219</sup> the court could prove willing to determine what the word "pass" means. A focus on the word "pass" ought to be less susceptible to a

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213. *Id.* at 229–31.

214. *Id.* at 231.

215. U.S. CONST. art. I, § 5, cl. 1; *see Powell v. McCormack*, 395 U.S. 486 (1969).

216. *Powell*, 395 U.S. at 520.

217. *Id.* at 548.

218. *Id.* at 548–49 (quoting and citing *Baker v. Carr*, 369 U.S. 186, 217 (1962) (alterations in original)).

219. U.S. CONST. art. I, § 7, cl. 2 ("Every Bill which shall have passed the House of Representatives and the Senate, shall, before it become a Law, be presented to the President of the United States . . .").



political question objection than attempting to argue that the federal courts enjoy the power to superintend the procedural rules of the House of Representatives. The Supreme Court consistently has been willing to parse the requirements of Article I, Section 7, interpreting the bicameralism and presentment requirements and strictly enforcing these limits, even when Congress and the President agree to modify or suspend them.<sup>220</sup> If the Supreme Court was prepared to determine whether the legislative veto (*Chadha*) or the line item veto (*Clinton*) were consistent with Article I, Section 7, it should be no less willing to determine whether passage of a bill generally requires both houses of Congress to vote on the same question (rather than simply adopt the same text via non-identical votes). Simply put, identifying and enforcing a constitutionally required procedure does not involve second guessing the technicalities of procedure within either house of Congress.

My sense is that, given a specific abstention doctrine (the enrolled bill doctrine) and a strong argument under more general non-justiciability principles (under *Baker*), the federal courts probably would agree not to opine on the constitutional adequacy of the House using a self-executing rule to deem a bill “passed” without ever voting directly on the bill by itself. This is not to say that such a claim is undoubtedly non-justiciable. Certainly, the Supreme Court might well conclude that “passing” a bill requires that both houses hold votes on identical questions were it to reach the merits. In other words, it is not enough simply that both houses enact the exact same language in the same—literally identical—bill, instead both houses must actually vote on the same precise question.

Moreover, there are questions related to the enactment of a bill that might well prove to be justiciable because they fall on the *Powell* side of the line. This would be the case if the precise question at issue involved interpreting mandatory constitutional language, like the qualifications for service in the House, rather than ambiguous language that expressly vests a particular task or duty with either Congress or the President.

For example, suppose the House maintained a rule that made 100 members, rather than 218, a quorum to conduct business. The Constitution itself states that a majority of the House constitutes a quorum, and that only a quorum may conduct business.<sup>221</sup> Suppose that, under this rule,

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220. See *infra* notes 227–43 (discussing the holdings in *Chadha* and *Clinton*).

221. U.S. CONST. art. I, § 5, cl. 1 (“[A] Majority of each [House] shall constitute a Quorum to do Business; but a smaller number may adjourn from day to day, and may be authorized to compel the Attendance of absent Members, in such Manner, and under such Penalties as each House may provide.”).

fifty-one members, with 100 members present, vote in favor of passing a bill on the floor, and the Speaker, consistent with the House rule, signs the bill and forwards it to the Senate. Would the Supreme Court apply *Field* and *Baker* and hold that the question of the enactment's validity presents a non-justiciable political question?

*Powell* seems to suggest that, when a house of Congress violates a clear constitutional limitation, the courts will reach the merits of the question. Were the House openly to violate a clear constitutional prerequisite to legislating, there would be a strong institutional urge for the federal courts to step in and enforce the Constitution's plain text. It is, after all, "the responsibility of [the Supreme Court] to act as the ultimate interpreter of the Constitution."<sup>222</sup> This approach also would be consistent with Justice Powell's argument that "the existence of 'a textually demonstrable constitutional commitment of the issue to a coordinate political department' . . . turns on an examination of the constitutional provisions governing the exercise of the power in question."<sup>223</sup> Justice Powell argued that when the Constitution fails to provide a clear answer, and Congress and the President disagree about its meaning and reach an impasse, the federal courts have an absolute duty to resolve the question.<sup>224</sup>

Under this approach, at least one set of facts could lead to a justiciable challenge to the use of a self-executing rule: if the House were to "deem passed" an override of a presidential veto, the President might well object. The President could well argue that the House might have failed to achieve the requisite two-thirds supermajority had the sole question pending before the House been whether or not to sustain her veto. Moreover, the express language of the veto override procedure refers to "*the bill*," as opposed to the phrase "*every bill*" that describes the generic bicameralism requirement.<sup>225</sup> To be sure, this hypothetical represents a scenario without a historical precedent because the House has never used a self-executing rule to deem-and-override a presidential veto. The House rules prescribe very specific procedures to govern a veto override vote.<sup>226</sup> That said, nothing in the House rules seems to preclude the use of a special rule or

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222. *Powell*, 395 U.S. at 549; see also *Marbury v. Madison*, 5 U.S. 137, 177 (1803) ("It is emphatically the province and duty of the judicial department to say what the law is.").

223. *Goldwater v. Carter*, 444 U.S. 996, 998 (1979) (Powell, J., concurring).

224. See *id.* at 998–1001. As he stated the proposition, "If the President and the Congress had reached irreconcilable positions, final disposition of the question presented by this case would eliminate, rather than create, multiple constitutional interpretations." *Id.* at 1001.

225. U.S. CONST. art. I, § 7, cl.2 (emphasis added); see *supra* notes 81–83 and accompanying text.

226. See HOUSE PRACTICE, *supra* note 40, at 901–07.

order in the context of considering a presidential veto. In theory, a special rule or order should be capable of waiving *any* rule of the House, subject only to the requirement that the House adopt the special rule.

A reviewing court would, in my view, be very likely to reach the merits of the question where the validity of an override would turn on the validity of a single floor vote passing additional unrelated bills. In other contexts, however, the federal courts would probably be more inclined to apply the enrolled bill and political question doctrines to avoid reaching the merits of a potential challenge to this practice. Thus, federal courts would likely find non-justiciable our hypothetical where the House uses a self-executing rule to pass a Senate bill in addition to having other legislative effects.

Moreover, *INS v. Chadha*<sup>227</sup> clearly supports this analysis. In *Chadha*, Congress reserved for itself, through the vote of a single chamber, the right to rescind the Attorney General's decision to suspend Chadha's deportation from the United States.<sup>228</sup> The Supreme Court invalidated this legislative veto, and all other legislative veto provisions, because Congress cannot execute a law and the enactment of a bill (perhaps requiring Chadha to be deported) requires bicameral passage of the bill and presentment of the bill to the President. Writing for the majority, Chief Justice Burger explained that because "it is clear that the action by the House under § 244(c)(2) was not within any of the express constitutional exceptions authorizing one House to act alone, and equally clear that it was an exercise of legislative power, that action was subject to the standards prescribed in Art. I."<sup>229</sup> In particular, "[t]he bicameral requirement, the Presentment Clauses, the President's veto, and Congress's power to override a veto were intended to erect enduring checks on each Branch and to protect the people from the improvident exercise of power by mandating certain prescribed steps."<sup>230</sup> Moreover, these procedural steps, crucial to the maintenance of the separation of powers, "must not be eroded."<sup>231</sup>

Were the House of Representatives to deny the President a clean up-or-down vote when attempting to override a veto, a good argument exists that this action would deny the President a mandatory procedural protection

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227. 462 U.S. 919 (1983).

228. *See id.* at 925–28.

229. *Id.* at 956–57.

230. *Id.* at 957.

231. *Id.* at 958.

imposed by the text of Article I, Section 7.<sup>232</sup> Complicating a veto override vote by annexing legislative consideration of a wholly unrelated act would seem to alter a mandatory legislative procedure, particularly from a formalist perspective. From a functionalist perspective, however, it might well be that so long as the members of the House know that an “aye” vote will have the effect of re-passing a bill over a presidential veto, the fact that the vote would have other, perhaps entirely unrelated, legislative effects would not matter.<sup>233</sup> Regardless of how a particular judge or court would rule on the merits, however, the question itself would be justiciable.

Finally, although avoiding a decision on the merits in a challenge to the use of self-executing rules outside the context of a presidential veto would not involve a difficult judicial drafting exercise, it is also true that the Supreme Court would not be compelled to decline to reach the merits in a case involving the use of a single floor vote to pass multiple bills according to the prescriptions of *Field* and *Baker*.<sup>234</sup> For example, in *Clinton v. City of New York*,<sup>235</sup> the Supreme Court invalidated a statutory procedure that permitted the President to disallow “any dollar amount of discretionary budget authority,” “any item of new direct spending,” or “any limited tax benefit.”<sup>236</sup> The Supreme Court invalidated the Line Item Veto Act because “[i]n both legal and practical effect, the President has amended two Acts of Congress by repealing a portion of each” and repeal of a statute requires bicameral action by Congress.<sup>237</sup> “There is no

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232. See *supra* notes 76–77 and accompanying text.

233. See *Chadha*, 462 U.S. at 976–78 (White, J., dissenting) (arguing that “the constitutionality of the legislative veto is anything but clear-cut,” noting the frequent use of the legislative veto device “in nearly 200 separate laws over a period of 50 years,” and suggesting that the Supreme Court’s task “should be to determine whether the legislative veto is consistent with the purposes of Art. I and the principles of separation of powers which are reflected in that Article and throughout the Constitution”); *id.* at 986 (“If Congress may delegate lawmaking power to independent and Executive agencies, it is most difficult to understand Art. I as prohibiting Congress from also reserving a check of legislative power for itself.”).

234. Again, because the House could consider a new bill at will, it seems difficult to see any serious objection to the use of a self-executing rule to incorporate amendments or to structure the voting sequence on amendments on the floor of the chamber. This kind of activity would seem to lie at the very core of the Article I, Section 5 power to establish rules of procedure. On the other hand, when a self-executing rule vests a single floor vote with multiple legislative effects that involve sending a bill to the Senate or to the President, the procedure has the effect of essentially permitting the House of Representatives to adopt the same text as the Senate has adopted (or could adopt), but through a non-identical vote. If the passage of a bill in the House requires not merely an identical text, but also an identical vote, this use of the procedure might well be objectionable, even if not justiciable. See *supra* notes 215–25 and accompanying text.

235. 524 U.S. 417 (1998).

236. Line Item Veto Act, Pub. L. No. 104-130, § 1021, 110 Stat. 1200 (1996) (codified at 2 U.S.C. § 691(a)); *Clinton*, 524 U.S. at 436.

237. *Clinton*, 524 U.S. at 438.

provision in the Constitution that authorizes the President to enact, to amend, or to repeal statutes.”<sup>238</sup>

The Solicitor General argued that the Constitution’s silence on the question of whether Congress could create a line-item veto by statute should mean that if Congress wished to create such a power it could do so. Writing for the majority, however, Justice Stevens clearly rejected this reasoning, arguing that “[t]here are powerful reasons for construing constitutional silence on this profoundly important issue as equivalent to an express prohibition.”<sup>239</sup> He explained that “[t]he procedures governing the enactment of statutes set forth in the text of Article I were the product of the great debates and compromises that produced the Constitution itself.”<sup>240</sup> From this perspective, the “finely wrought and exhaustively considered” procedures set forth in Article I, Section 7 cannot be altered or amended in any way.<sup>241</sup> If these procedures impose not merely a duty to enact the same text, “line for line and jot for jot,”<sup>242</sup> but also a duty to vote on exactly the same question as the other house, the Supreme Court might find that the use of a self-executing rule that permits the House to avoid taking the same vote as the Senate took—or will take, in the case of a House-originated bill—violates the separation of powers. The Framers arguably intended that passage of a bill would require both chambers to take political responsibility for the same proposition.<sup>243</sup> When the House uses a self-executing rule to permit a single vote to pass multiple bills, however, the members of the House take responsibility for a different set of legislative outcomes than does the Senate.

In the end, then, the resolution of the question involves an inherent tension between the Constitution’s obvious grant of unilateral authority to

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238. *Id.*

239. *Id.* at 439; see also *Printz v. United States*, 521 U.S. 898, 905 (1997) (“Because there is no constitutional text speaking to this precise question, the answer to the CLEOs’ challenge must be sought in historical understanding and practice, in the structure of the Constitution, and in the jurisprudence of this Court.”).

240. *Clinton*, 524 U.S. at 439.

241. See *INS v. Chadha*, 462 U.S. 919, 951 (1983); see also *Clinton*, 524 U.S. at 439–40.

242. See *Duncan v. Louisiana*, 391 U.S. 145, 181 (1968) (Harlan, J., dissenting); see also *Adamson v. California*, 332 U.S. 46, 71–75 (1947) (Black, J., dissenting) (advocating total incorporation of the first eight amendments of the Bill of Rights against the states, but disclaiming any legitimate judicial power to recognize or enforce any additional non-textual rights against the state governments). For a discussion and critique of Justice Black’s strict textualist approach to defining constitutional rights and obligations, see Toni M. Massaro, *Reviving Hugo Black? The Court’s “Jot-for-Jot” Account of Substantive Due Process*, 73 N.Y.U. L. REV. 1086, 1115–19, 1121 (discussing the line-for-line, jot-for-jot approach to applying the doctrine of substantive due process).

243. See *supra* notes 169–80, 184 and accompanying text.

each house of Congress to establish its own rules of procedure,<sup>244</sup> and the Constitution's requirements regarding passage of a bill into law.<sup>245</sup> If one conceives of using a special self-executing rule as merely a matter of internal housekeeping, then the logical conclusion would be to find that the question is precluded by either the enrolled bill or political question doctrine. On the other hand, if one sees the use of a self-executing rule as a mere subterfuge adopted to avoid having the House vote on the same question as the Senate, the logical conclusion should be that the House procedure has the effect of amending Article I, Section 7's requirements for passage of a bill. The Supreme Court should disallow any efforts to modify the procedures used to pass a bill into law under the precedents set in *Clinton* and *Chadha*.

I suspect that the question of justiciability would be collapsed into the merits at the end of the day, and that the outcome would depend on whether one takes a formalist or functionalist view of the question presented.<sup>246</sup> A formalist would likely conclude that the House has created a new and unauthorized procedure that impermissibly departs from the legislative procedures set forth in Article I, Section 7, and that this goes well beyond the permissible scope of establishing procedural rules under Article I, Section 5. A functionalist, however, would likely conclude that a single floor vote could pass an unlimited number of bills, provided that the vote being used to link various separate and unrelated legislative effects secures the requisite majority and that the members of the House are clear on the effect of their floor vote.

## VII. CONCLUSION

Ultimately, the constitutionality of the use of a special self-executing rule to use a single floor vote to pass multiple bills—outside the context of overriding a veto—likely depends on whether one self-describes as a formalist or functionalist on separation of powers questions. For a formalist, a proper reading of Article I, Section 7 mandates that each house of Congress *vote* on the same question, and not merely adopt the same text

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244. See U.S. CONST. art. I, § 5, cl. 2.

245. See *id.* art. I, § 7.

246. See Krotoszynski, *supra* note 164, at 475–85. As I have noted before, “It is more than a little ironic that the Supreme Court has deployed formalist reasoning to strike down novel power-sharing arrangements between Congress and the President, but has relied on functional reasoning to permit the transfer of legislative and executive duties to Article III personnel.” *Id.* at 480; see Jellum, *supra* note 22, at 860–79; but cf. Magill, *supra* note 22, at 604–10, 650–51 (questioning the utility of the formalism/functionality dichotomy in separation of powers theory and practice).

via non-parallel or mirror-image votes. From a functionalist perspective, however, a decision to use a single vote to enact multiple bills probably would not present any fundamental objections. Provided that the members of the House are aware of the precise legislative effects of a “yes” or “no” vote—as would be the case if the members first adopt a special self-executing rule—the fact that the House uses a single vote to act on multiple bills should not be problematic.

Thus, it should not be surprising that Professor Balkin (a functionalist) and Professor McConnell (a formalist) would reach opposite and contradictory conclusions regarding the permissibility of the proposed “Slaughter Solution.” For a formalist, the House effort to use a single vote to advance a bill to the White House, while attempting to amend it incident to the same vote, transgresses the requirement that both houses act identically to adopt the same text. For a functionalist, the deem-and-pass self-executing rule does not raise any constitutional difficulties precisely because the House members are aware that the legislative effect of a “yes” vote will simultaneously send the Senate bill to the President and the House-initiated amendatory bill to the Senate.

In my view, the formalist solution appears more attractive because the objective of a self-executing rule is to obfuscate the nature of the vote, in the hope of attenuating political accountability for the full effects of the vote.<sup>247</sup> A parliamentary device used to render the legislative process less transparent has, on its face, little to recommend it. A federal court committed to strictly enforcing the Framers’ vision of democratically accountable self-government should be leery of the practice because the underlying purpose of the maneuver is to permit members to credibly disclaim responsibility for unpopular legislation. A strong presumption should exist against a procedure intended to reduce or impede accountability given that the whole *raison d’être* of the separation of powers, and the concomitant requirements of bicameralism and presentment, is to ensure full and complete political accountability for federal legislation.<sup>248</sup>

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247. See Frymer & Yoon, *supra* note 18, at 1017–18.

248. Moreover, if the House were to attempt to use the procedure to override a presidential veto, a compelling textual argument would exist against the constitutionality of the practice in this specific context. See *supra* notes 76–83 and accompanying text. Accordingly, even a committed functionalist, like Professor Balkin, should agree that, whatever the merits of deem-and-pass in the context of advancing a bill from the Senate or a House-originated bill concurrently with other legislation, the Constitution plainly anticipates that each house of Congress must take a stand-alone vote on whether to sustain or override a presidential veto.

The deem-and-pass special rule, like the legislative veto, constitutes a parliamentary invention of the New Deal Congress. Whether in 1933 or today, using a novel parliamentary practice in order to logroll votes undoubtedly can be highly politically useful and quite conducive to the efficient disposition of legislation in the House.<sup>249</sup> Nevertheless, the practice should be rejected because it renders political accountability more difficult and exists principally to achieve precisely this result.

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249. See Gilbert, *supra* note 91, at 813–15 (discussing the problem of logrolling and responses adopted to address these problems); Ruud, *supra* note 91, at 389–90 (same).