

## Lawmakers as Lawbreakers

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## LAWMAKERS AS LAWBREAKERS

ITTAI BAR-SIMAN-TOV\*

### ABSTRACT

*How would Congress act in a world without judicial review? Can lawmakers be trusted to police themselves? This Article examines Congress's capacity and incentives to enforce upon itself "the law of congressional lawmaking"—a largely overlooked body of law that is completely insulated from judicial enforcement. The Article explores the political safeguards that may motivate lawmakers to engage in self-policing and rule-following behavior. It identifies the major political safeguards that can be garnered from the relevant legal, political science, political economy, and social psychology scholarship, and evaluates each safeguard by drawing on a combination of theoretical, empirical, and descriptive studies about Congress. The Article's main argument is that the political safeguards that scholars and judges commonly rely upon to constrain legislative behavior actually motivate lawmakers to be lawbreakers.*

*In addition to providing insights about Congress's behavior in the absence of judicial review, this Article's examination contributes to the debate about judicial review of the legislative process, the general debate on whether political safeguards reduce the need for judicial review, and the burgeoning new scholarship about legislative rules.*

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## INTRODUCTION

How would Congress act in a world without judicial review? Can lawmakers be trusted to police themselves? When it comes to “the law of congressional lawmaking”—the constitutional, statutory, and internal rules that govern Congress’s legislative process<sup>1</sup>—this question is not merely theoretical. Federal courts have consistently refused to enforce this body of law,<sup>2</sup> leaving its enforcement entirely to Congress.<sup>3</sup> This largely overlooked area of law is therefore a useful laboratory for evaluating Congress’s behavior in the absence of judicial review.

This Article examines whether Congress has the capacity and incentives to enforce upon itself the law of congressional lawmaking. It explores the major “political safeguards”<sup>4</sup> that can be garnered from the legal, political science, political economy, and social psychology scholarship about self policing and rule following. It then evaluates each safeguard by drawing on a combination of theoretical, empirical, and descriptive studies about Congress. This Article’s main argument is that the political safeguards that scholars and judges commonly rely upon to constrain legislative behavior actually have the opposite effect: these “safeguards” in fact motivate lawmakers to be lawbreakers.

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1. For an overview of the rules that govern Congress’s legislative process, see *infra* Part I.A.

2. See, e.g., *Field v. Clark*, 143 U.S. 649, 670-71 (1892); *OneSimpleLoan v. U.S. Sec’y of Educ.*, 496 F.3d 197, 202 (2d Cir. 2007), *cert. denied sub nom. OneSimpleLoan v. Spellings*, 552 U.S. 1180 (2008); *Pub. Citizen v. U.S. Dist. Court*, 486 F.3d 1342, 1349 (D.C. Cir. 2007), *cert. denied*, 552 U.S. 1076 (2007); *Metzenbaum v. FERC*, 675 F.2d 1282, 1287 (D.C. Cir. 1982).

3. Ittai Bar-Siman-Tov, *Legislative Supremacy in the United States?: Rethinking the Enrolled Bill Doctrine*, 97 GEO. L.J. 323, 373 (2009) (stating that *Field v. Clark*’s enrolled bill doctrine “effectively insulates the legislative process from judicial review and, consequently, establishes Congress’s unfettered power to control this process”); see also Stanley Bach, *The Nature of Congressional Rules*, 5 J.L. & POL. 725, 731 (1989) (“No outside force compels Congress to abide by its rules. If these rules are enforced rigorously and consistently, it is only because Congress chooses to do so.”); Rebecca M. Kysar, *Listening to Congress: Earmark Rules and Statutory Interpretation*, 94 CORNELL L. REV. 519, 526 (2009) (“[A]t present, legislative rules rely wholly upon internal enforcement by Congress.”).

4. This phrase was famously coined in Herbert Wechsler, *The Political Safeguards of Federalism: The Role of the States in the Composition and Selection of the National Government*, 54 COLUM. L. REV. 543, 543 (1954).

This Article also explores Congress's capacity to enforce upon itself the law of congressional lawmaking by examining Congress's enforcement mechanisms and presenting three cases that demonstrate the circumstances under which these mechanisms can fail. The Article argues that congressional enforcement is fallible both in terms of lawmakers' capacity to police themselves and in terms of their incentives to do so.

This examination has crucial importance for at least three areas of legal scholarship. The first is the debate about judicial review of the legislative process. The question of whether courts should enforce the rules governing lawmaking and other principles of "due process of lawmaking" is "currently the subject of vigorous debate ... in the scholarly literature."<sup>5</sup> One of the prominent objections to judicial enforcement is "the argument that judicial review of the enactment process is not needed because Congress (coupled with the inherent check of the presidential veto power) can be relied upon to police itself."<sup>6</sup> Indeed, opponents of judicial oversight claim that Congress has "adequate incentives" and "numerous, effective techniques" to enforce compliance with the law of lawmaking.<sup>7</sup> This assumption is also at least partly responsible for the Supreme Court's reluctance to enforce this body of law.<sup>8</sup> In some states, this assumption even contributed to the enactment of constitutional amendments barring judicial review of the legislative process.<sup>9</sup> Hence, although this Article expresses no opinion on other argu-

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5. Glen Staszewski, *Rejecting the Myth of Popular Sovereignty and Applying an Agency Model to Direct Democracy*, 56 VAND. L. REV. 395, 465 (2003).

6. Bar-Siman-Tov, *supra* note 3, at 331.

7. Jesse H. Choper, *The Political Question Doctrine: Suggested Criteria*, 54 DUKE L.J. 1457, 1505-07 (2005).

8. See *United States v. Munoz-Flores*, 495 U.S. 385, 403-04 & n.2 (1990) (Stevens, J., concurring) (stating that courts should not enforce Article I, Section 7's Origination Clause because the House can be relied upon to protect its origination power); see also *infra* Part III.E; cf. *Field v. Clark*, 143 U.S. 649, 672-73 (1982) (assuming that because Congress's enrollment procedure involves the committees on enrolled bills, the presiding officers and the clerks of the two houses, and the President, this constitutes a sufficient institutional check against enactment of legislation in violation of constitutional lawmaking requirements).

9. See, e.g., *Geja's Cafe v. Metro. Pier & Exposition Auth.*, 606 N.E.2d 1212, 1221 (Ill. 1992) (suggesting that the framers of Illinois's 1970 Constitution "enacted the enrolled bill doctrine on the assumption that the General Assembly would police itself and judicial review would not be needed because violations of the constitutionally required procedures would be rare").

ments underlying the debate about judicial review of the legislative process, by refuting the prevalent underlying assumption of judicial review opponents, it contributes to a crucial aspect of this debate.

Second, this Article's examination also contributes to the debate about whether political safeguards can reduce or eliminate the need for judicial review in other areas. Assumptions about political safeguards and about Congress's incentives and capacities have long been influential in normative debates about federalism,<sup>10</sup> and are becoming increasingly influential in broader debates about judicial review, judicial supremacy, and congressional constitutional interpretation.<sup>11</sup> This Article's examination may be particularly helpful to these debates,<sup>12</sup> responding to the need for scholarship examining areas of congressional activity that are "outside the [s]hadow [c]ast by the [c]ourts."<sup>13</sup>

Third, this Article's examination is fundamental for the burgeoning new scholarship about legislative rules. After many years of largely neglecting the rules that govern the legislative process, legal scholars are increasingly realizing that these rules "are at least as important a determinant of policy outcomes and of the quality of legislative deliberation as are electoral rules, substantive legislative

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10. For an overview of this vast scholarship, see generally Saikrishna B. Prakash & John C. Yoo, *The Puzzling Persistence of Process-Based Federalism Theories*, 79 TEX. L. REV. 1459 (2001).

11. Examples of this burgeoning scholarship include Barbara Sinclair, *Can Congress Be Trusted with the Constitution? The Effects of Incentives and Procedures*, in CONGRESS AND THE CONSTITUTION 293 (Neal Devins & Keith E. Whittington eds., 2005) [hereinafter Sinclair, *Can Congress Be Trusted?*]; Mark Tushnet, *Interpretation in Legislatures and Courts: Incentives and Institutional Design*, in THE LEAST EXAMINED BRANCH: THE ROLE OF LEGISLATURES IN THE CONSTITUTIONAL STATE 355 (Richard W. Bauman & Tsvi Kahana eds., 2006) [hereinafter Tushnet, *Interpretation in Legislatures*]. For a recent overview of this debate, see generally Michael J. Gerhardt, *Judging Congress*, 89 B.U. L. REV. 525 (2009). Assumptions about congressional capacity are also important in arguments against judicial intervention in other areas of congressional activity. See, e.g., Josh Chafetz, *Executive Branch Contempt of Congress*, 76 U. CHI. L. REV. 1083, 1086, 1152-53 (2009) (arguing that legislative-executive disputes over the contempt power should be nonjusticiable, in part because Congress has sufficient tools to enforce compliance with its contempt findings); Josh Chafetz, *Politician, Police Thyself*, N.Y. TIMES, Dec. 2, 2006, at A15 (making a similar argument in favor of congressional, rather than legal, enforcement in the context of ethics rules).

12. With the caveat that political safeguards and legislators' motivations may operate somewhat differently in different areas of congressional activity. See *infra* Part IV.A.

13. Mark Tushnet, *Evaluating Congressional Constitutional Interpretation: Some Criteria and Two Informal Case Studies*, in CONGRESS AND THE CONSTITUTION, *supra* note 11, at 269, 271-73.

powers, and other subjects studied exhaustively by constitutional lawyers.”<sup>14</sup> Indeed, a flurry of recent scholarship lauds such rules as a solution to a wide array of pathologies in the legislative process and as a means to achieve procedural ideals as well as better substantive outcomes.<sup>15</sup> Given the lack of external enforcement, however, it is essential to evaluate Congress’s capacity and incentives to enforce these rules on its own in order to assess the viability of these solutions.

Part I provides a brief overview of the rules that regulate the legislative process. It then establishes the practical and normative importance of these rules, integrating the insights of political scientists, democratic theorists, legal philosophers, and social psychologists. Part II reveals the fallibility of congressional enforcement of these rules by examining Congress’s enforcement mechanisms and the circumstances under which they can fail.

Part III explores political safeguards and their projected impact on congressional compliance with the law of congressional lawmaking, arguing that these safeguards’ overall impact is in fact a motivation to violate the rules. Although the Article refutes several assumptions that are widely held by judges and scholars alike, it does not go so far as to argue that Congress will never follow the rules. Instead, Part IV offers some observations about the types of rules that are more susceptible to violations and the circumstances in which violations are more likely.

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14. Adrian Vermeule, *The Constitutional Law of Congressional Procedure*, 71 U. CHI. L. REV. 361, 362 (2004).

15. See, e.g., Aaron-Andrew P. Bruhl, *If the Judicial Confirmation Process Is Broken, Can a Statute Fix It?*, 85 NEB. L. REV. 960, 992 (2007) [hereinafter Bruhl, *Judicial Confirmation Process*]; Brannon P. Denning & Brooks R. Smith, *Uneasy Riders: The Case for a Truth-in-Legislation Amendment*, 1999 UTAH L. REV. 957, 962; Chad W. Dunn, *Playing by the Rules: The Need for Constitutions To Define the Boundaries of the Legislative Game with a One-Subject Rule*, 35 UWLA L. REV. 129, 131 (2003); Elizabeth Garrett, *Legal Scholarship in the Age of Legislation*, 34 TULSA L.J. 679, 687-88 (1999); Jacob E. Gersen & Eric A. Posner, *Timing Rules and Legal Institutions*, 121 HARV. L. REV. 543, 570-72 (2007); Anita S. Krishnakumar, *Representation Reinforcement: A Legislative Solution to a Legislative Process Problem*, 46 HARV. J. ON LEGIS. 1, 3, 15 (2009).

## I. THE LAW OF CONGRESSIONAL LAWMAKING

A. *The Rules Governing Lawmaking*

The congressional legislative process is governed by a variety of normative sources. The Constitution sets relatively sparse procedural requirements for lawmaking,<sup>16</sup> while authorizing each house to “determine the Rules of its Proceedings.”<sup>17</sup> The majority of the rules that govern the congressional legislative process are therefore enacted under this authority, either as statutory rules<sup>18</sup> or as standing rules by each chamber independently.<sup>19</sup> These enacted rules are complemented by the chambers’ formal precedents, which “may be viewed as the [chambers] ‘common law’ ... with much the same force and binding effect,”<sup>20</sup> and by established conventional practices.<sup>21</sup>

Although Congress may not alter the constitutional rules,<sup>22</sup> both chambers have procedures that allow for amendment of the nonconstitutional rules, as well as procedures to waive or suspend virtually any statutory or internal rule.<sup>23</sup> Nevertheless, the subconstitutional rules are also widely accepted as binding and enforceable law, in the sense that they have “come to be recognized as binding on the assembly and its members, except as it may be

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16. For an overview of the constitutional rules that govern the legislative process, see Matthew D. Adler & Michael C. Dorf, *Constitutional Existence Conditions and Judicial Review*, 89 VA. L. REV. 1105, 1145-50, 1172-81 (2003); Vermeule, *supra* note 14, at 386-427.

17. U.S. CONST. art. I, § 5, cl. 2.

18. See generally Aaron-Andrew P. Bruhl, *Using Statutes To Set Legislative Rules: Entrenchment, Separation of Powers, and the Rules of Proceedings Clause*, 19 J.L. & POL. 345 (2003) [hereinafter Bruhl, *Statutes To Set Legislative Rules*]; Elizabeth Garrett, *The Purposes of Framework Legislation*, 14 J. CONTEMP. LEGAL ISSUES 717 (2005) [hereinafter Garrett, *Purposes of Framework Legislation*].

19. See, e.g., Kysar, *supra* note 3, at 524-26.

20. Max Reynolds, Note, *The Impact of Congressional Rules on Appropriations Law*, 12 J.L. & POL. 481, 487 (1996) (quoting H.R. DOC. NO. 94-661, at vii (1977)).

21. See Bach, *supra* note 3, at 732-36.

22. *Clinton v. City of New York*, 524 U.S. 417, 446 (1998) (“Congress cannot alter the procedures set out in Article I, § 7, without amending the Constitution.”).

23. See Bach, *supra* note 3, at 737-39; Bruhl, *Statutes To Set Legislative Rules*, *supra* note 18, at 363-65.



varied by the adoption by the membership of special rules or through some other authorized procedural device.”<sup>24</sup>

This large body of constitutional, statutory, and internal rules regulating the congressional lawmaking process can be described as “the law of congressional lawmaking.” This Article focuses on a particular part of this law: the constitutional and various subconstitutional rules that set procedural *restrictions* on the legislative process.<sup>25</sup>

This includes rules that stipulate the procedural requirements that must be satisfied for a bill to become law, such as the constitutional bicameralism and presentment requirements,<sup>26</sup> the constitutional quorum requirement,<sup>27</sup> and the subconstitutional requirement that every bill receive three readings prior to passage.<sup>28</sup> It additionally includes rules that limit the pace of the legislative process, for example the House rule prohibiting floor consideration of a bill reported by a committee until the third calendar day after the committee report on that bill becomes available to House members.<sup>29</sup> Also included are rules that set more specific limitations, such as the constitutional rule that bills for raising revenue originate in the House<sup>30</sup> and the chamber rules that prohibit the enactment of substantive law through appropriation bills.<sup>31</sup>

All these rules impose restraints or create hurdles in the legislative process, thereby constraining Congress’s ability to pass

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24. WILLIAM HOLMES BROWN & CHARLES W. JOHNSON, *HOUSE PRACTICE: A GUIDE TO THE RULES, PRECEDENTS, AND PROCEDURES OF THE HOUSE* 825 (2003); *see also* Reynolds, *supra* note 20, at 487.

25. Hence, excluded from the present inquiry are rules that do not directly regulate the process of enacting legislation, budgetary rules, and rules that facilitate and accelerate the passage of legislation, such as “fast track” rules.

26. U.S. CONST. art. I, § 7, cl. 2 (stipulating that for proposed legislation to become law, the same bill must be passed by both houses of Congress and be signed by the President, or repassed by a supermajority over the President’s veto); *see also* *Clinton*, 524 U.S. at 448.

27. U.S. CONST. art. I, § 5, cl. 1; *see also* *United States v. Ballin*, 144 U.S. 1, 5-6 (1892).

28. RULES OF THE HOUSE OF REPRESENTATIVES, 111th CONG., R. XVI(8) (2009), *available at* <http://clerk.house.gov/legislative/rules111/111th.pdf> [hereinafter HOUSE RULES]; STANDING RULES OF THE SENATE, S. DOC. NO. 106-15, at R. XIV, cl. 2 (2000), *available at* <http://rules.senate.gov/public/index.cfm?p=RuleXIV> [hereinafter SENATE RULES].

29. HOUSE RULES, *supra* note 28, R. XIII(4)(a)(1). For other examples of rules that impose delay in the legislative process, *see* Gersen & Posner, *supra* note 15, at 553-55.

30. U.S. CONST. art. I, § 7, cl. 1; *United States v. Munoz-Flores*, 495 U.S. 385, 394-95 (1990).

31. HOUSE RULES, *supra* note 28, R. XXI(2)(b); SENATE RULES, *supra* note 28, R. XVI.

legislation.<sup>32</sup> Nevertheless, neither courts nor any other external body enforce any of these rules—whether constitutional, statutory, or internal.<sup>33</sup> These rules present, therefore, a particularly fascinating test case for Congress’s ability to police itself.

### *B. The Value of Lawmaking Rules*

Legal scholarship has traditionally overlooked the rules that govern the legislative process.<sup>34</sup> In recent years, however, legal scholars who heed the insights of political scientists are increasingly realizing that these rules have “immense practical importance.”<sup>35</sup> As political scientist Gary Cox explains, “[r]ules can change the set of bills that ... the legislature consider[s]; they can change the menu of amendments to any given bill considered[;] ... they can affect how members vote; and—putting the first three effects together—they can affect which bills pass.”<sup>36</sup> Indeed, a growing body of theoretical, experimental, and empirical research by political scientists demonstrates that legislative rules can significantly impact the policy outcomes of the legislative process.<sup>37</sup>

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32. For somewhat different overviews on procedural rules that make passage of legislation more difficult, see, for example, Jon Elster, *Don't Burn Your Bridge Before You Come to It: Some Ambiguities and Complexities of Precommitment*, 81 TEX. L. REV. 1751, 1765 (2003) (discussing “delay procedures that are intended to give passions time to cool down”); Garrett, *Purposes of Framework Legislation*, *supra* note 18, at 748-49 (discussing statutory procedural rules that are intentionally designed to make the passage of certain policies more difficult); Gersen & Posner, *supra* note 15, at 548-55 (discussing, *inter alia*, “delay rules” that forestall action in the legislative process).

33. To be sure, *Munoz-Flores* signaled the Court’s willingness to enforce at least one of these rules—the Origination Clause—but later district and appellate court cases indicate that federal courts will refuse to enforce even the constitutional rules. See Bar-Siman-Tov, *supra* note 3, at 352 (citing cases); see also *supra* notes 2-3 and accompanying text.

34. See Vermeule, *supra* note 14, at 363.

35. Bruhl, *Statutes To Set Legislative Rules*, *supra* note 18, at 393; see also Vermeule, *supra* note 14, at 362.

36. Gary W. Cox, *On the Effects of Legislative Rules*, 25 LEGIS. STUD. Q. 169, 170 (2000).

37. See BRYAN W. MARSHALL, *RULES FOR WAR: PROCEDURAL CHOICE IN THE US HOUSE OF REPRESENTATIVES* 87-103, 120-23 (2005); Cox, *supra* note 36, at 169, 174-88; Karl-Martin Ehrhart et al., *Budget Processes: Theory and Experimental Evidence*, 59 GAMES & ECON. BEHAV. 279, 293 (2007); Keith E. Hamm et al., *Structuring Committee Decision-Making: Rules and Procedures in US State Legislatures*, 7 J. LEGIS. STUD. 13, 13 (2001) (“The rediscovery of rules and procedures as an important element for understanding legislative decision-making has become very apparent in recent summaries of research on Congress and European Parliaments.”); Nathan W. Monroe & Gregory Robinson, *Do Restrictive Rules Produce*

In addition to their crucial impact on legislative outcomes, legislative procedures are also instrumental in ensuring the legitimacy of Congress and of the laws it produces. As proceduralist democratic theorists point out, legislative procedures are an especially important means to establish the legitimacy of law, because, in the current reality of a “great deal of substantive moral and ethical dissensus,” no normative substantive standard can appropriately be used in justifying collective political choices.<sup>38</sup> If, however, “justification for the force of law can be found in the generally accepted ... processes whence contested laws issue, then no number of intractable disagreements over the substantive merits of particular laws can threaten it.”<sup>39</sup>

Experimental and survey-based research by social psychologists and political scientists confirms that public perceptions about congressional procedure—particularly the belief that Congress employs fair decision-making procedures in the legislative process—significantly impact Congress’s legitimacy, as well as individual’s willingness to obey the law.<sup>40</sup> These studies show, moreover, that although there are widespread differences in evaluations of the

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*Nonmedian Outcomes? A Theory with Evidence from the 101st–108th Congresses*, 70 J. POL. 217, 228–29 (2008); Bjørn Erik Rasch, *Parliamentary Floor Voting Procedures and Agenda Setting in Europe*, 25 LEGIS. STUD. Q. 3, 4 (2000) (“Theoretical arguments as well as experimental results support the view that decision-making procedures and the details of legislative agendas to a large extent determine outcomes.”); Tim Westmoreland, *Standard Errors: How Budget Rules Distort Lawmaking*, 95 GEO. L.J. 1555, 1557 (2007) (“To a large extent, many legislative decisions are pre-ordained by their mode of congressional consideration.... [T]he process is the policy.”).

38. Frank I. Michelman, *The Not So Puzzling Persistence of the Futile Search: Tribe on Proceduralism in Constitutional Theory*, 42 TULSA L. REV. 891, 892 (2007); see also David Estlund, *Democratic Theory*, in THE OXFORD HANDBOOK FOR CONTEMPORARY PHILOSOPHY 208, 210–13 (Frank Jackson & Michael Smith eds., 2005); David Estlund, *Introduction to DEMOCRACY* 1, 6–7 (David Estlund ed., 2002).

39. Michelman, *supra* note 38, at 892; see also José Luis Martí Mármol, *The Sources of Legitimacy of Political Decisions: Between Procedure and Substance*, in THE THEORY AND PRACTICE OF LEGISLATION: ESSAYS IN LEGISPRUDENCE 259, 270–71 (Luc J. Wintgens ed., 2005).

40. See, e.g., John R. Hibbing & Elizabeth Theiss-Morse, *The Means Is the End*, in WHAT IS IT ABOUT GOVERNMENT THAT AMERICANS DISLIKE? 243, 243–45 (John R. Hibbing & Elizabeth Theiss-Morse eds., 2001); Amy Gangl, *Procedural Justice Theory and Evaluations of the Lawmaking Process*, 25 POL. BEHAV. 119, 135 (2003); Tom R. Tyler, *Governing Amid Diversity: The Effect of Fair Decisionmaking Procedures on the Legitimacy of Government*, 28 L. & SOC’Y REV. 809, 827 (1994); Stacy G. Ulbig, *Policies, Procedures, and People: Sources of Support for Government?*, 83 SOC. SCI. Q. 789, 793–96 (2002).

favorability or fairness of outcomes, “to a striking degree” there is common agreement across ethnic, gender, education, income, age, and ideological boundaries on the criteria that define fair decision-making procedures, as well as widespread agreement that such procedures are key to legitimacy.<sup>41</sup>

In addition to their practical and instrumental significance, the importance of the rules that regulate the legislative process also stems from their underlying democratic values and principles.<sup>42</sup> These rules embody, and are designed to ensure, essential democratic principles, such as majority rule, transparency and publicity, deliberation, procedural fairness, and participation.<sup>43</sup>

Furthermore, the rules that regulate the legislative process are an essential component of the rule of law. As Joseph Raz noted in one of the most influential formulations of the “rule of law,” “[i]t is one of the important principles of the doctrine that the making of particular laws should be guided by open and relatively stable general rules.”<sup>44</sup> The procedural rules that instruct lawmakers how to exercise their lawmaking power play a vital role in ensuring that “the slogan of the rule of law and not of men can be read as a meaningful political ideal.”<sup>45</sup>

To be sure, the rules that constrain the legislative process are not without cost: they hinder, and sometimes frustrate, the majority party’s ability to govern effectively and to translate its policy agenda

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41. Tyler, *supra* note 40, at 826, 829; *see also* Tom R. Tyler, *What is Procedural Justice?: Criteria Used by Citizens To Assess the Fairness of Legal Procedures*, 22 LAW & SOC’Y REV. 103, 132 (1988).

42. *See* Jeremy Waldron, *Legislating with Integrity*, 72 FORDHAM L. REV. 373, 376, 379-85 (2003).

43. *Id.*; *see also* Jeremy Waldron, *Principles of Legislation*, in THE LEAST EXAMINED BRANCH, *supra* note 11, at 15, 28-29, 31; *cf.* AMY GUTMANN & DENNIS THOMPSON, WHY DELIBERATIVE DEMOCRACY? 21-23 (2004) (arguing that a deliberative lawmaking process also has value in itself, because it respects the moral agency and individual autonomy of the participants and expresses “mutual respect between decision-makers and their fellow citizens”); Dennis F. Thompson, *Deliberative Democratic Theory and Empirical Political Science*, 11 ANN. REV. POL. SCI. 497, 498 (2008) (noting that proceduralist theorists also stress the values and benefits that are “inherent in the process, not a consequence of it”).

44. JOSEPH RAZ, *The Rule of Law and its Virtue*, in THE AUTHORITY OF LAW 213, 215-16 (1979) (emphasis omitted).

45. *Id.*; *see also* Frederick Schauer, *Legislatures as Rule-Followers*, in THE LEAST EXAMINED BRANCH, *supra* note 11, at 468, 468-69; Jeremy Waldron, *Legislation and the Rule of Law*, 1 LEGISPRUDENCE 91, 107-08 (2007).

into legislative action. Moreover, by creating multiple “vetogates” in the legislative process, these rules make defeating legislation easier than passing it,<sup>46</sup> thereby “systematically favor[ing] the legal status quo.”<sup>47</sup>

It appears, however, that the Framers were well aware of this cost. Alexander Hamilton, for example, acknowledged that bicameralism and presentment will sometimes frustrate the enactment of good legislation, but believed that “[t]he injury that may possibly be done by defeating a few good laws will be amply compensated by the advantage of preventing a few bad ones.”<sup>48</sup> Moreover, as the Court concluded in *INS v. Chadha*, “it is crystal clear from the records of the Convention, contemporaneous writings and debates, that the Framers ranked other values higher than efficiency.... There is unmistakable expression of a determination that legislation by the national Congress be a step-by-step, deliberate and deliberative process.”<sup>49</sup>

At the end of the day, “[m]ost participants and outside experts agree ... that, to function well, a legislative process needs to strike a balance between deliberation and inclusiveness, on the one hand, and expeditiousness and decisiveness, on the other, even if there is

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46. WILLIAM N. ESKRIDGE, JR. ET AL., *CASES AND MATERIALS ON LEGISLATION: STATUTES AND THE CREATION OF PUBLIC POLICY* 66-67 (3d ed. 2001).

47. Posting of Michael C. Dorf to Dorf on Law, <http://www.dorfonlaw.org/2009/11/cloture-constitution-and-democracy.html> (Nov. 23, 2009, 01:27 EST). Whether this impact of lawmaking rules in fact constitutes a cost or a benefit depends on one's view on the extent that the legislative process should facilitate or hinder the ability of changing majorities in the legislature to change the state of the law. For example, a Burkean view that “would be wary of any major change in our legal arrangements absent truly overwhelming popular support” would see such an impact as a virtue. *Id.* Contrary to a common misconception, however, this view is not contingent upon a particular view on the proper extent of federal government regulation of private autonomy, economic markets, or the states. Although the lawmaking rules do hinder the passage of federal legislation, these rules do not necessarily serve a libertarian view that eschews government regulation, nor do they necessarily operate to safeguard federalism. Rather, these rules equally restrict Democrats' attempts to pass regulation-increasing bills as they constrain Republicans' efforts to enact legislation rolling back government regulations when they are in the majority. Hence, the rules do not systematically favor conservatives or progressives; they systematically favor the status quo. *Id.*; see also Elizabeth Garrett, *Framework Legislation and Federalism*, 83 NOTRE DAME L. REV. 1495, 1496 n.7 (2008); Carlos Manuel Vazquez, *The Separation of Powers as a Safeguard of Nationalism*, 83 NOTRE DAME L. REV. 1601, 1604-07 (2008).

48. THE FEDERALIST NO. 73 (Alexander Hamilton).

49. 462 U.S. 919, 958-59 (1983).

no consensus about what the optimal balance is.”<sup>50</sup> Normative evaluations of the current body of rules that make up the law of congressional lawmaking, as well as evaluations of the optimal level of enforcement of these rules, may vary depending on one’s view about the appropriate balance between these competing values. What is clear, however, is that these rules are not mere formalities; they have crucial practical and normative significance, which merits a detailed evaluation of Congress’s ability to enforce them on itself.

## II. THE FALLIBILITY OF CONGRESSIONAL ENFORCEMENT

Opponents of judicial enforcement of the rules that govern the legislative process emphasize Congress’s “numerous, effective techniques” to enforce these rules.<sup>51</sup> This Part, however, reveals the fallibility of congressional enforcement.

### A. Congress’s *Enforcement Mechanisms*

The rules that govern the enactment process are not self-enforcing.<sup>52</sup> They must be actively invoked in order to be enforced, and consequently, in practice, “the House and Senate are free to evade their rules simply by ignoring them.”<sup>53</sup> The presiding officer of each chamber may take the initiative and rule that amendments, motions, or other actions are out of order.<sup>54</sup> Usually, however, the

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50. Barbara Sinclair, *Spoiling the Sausages? How a Polarized Congress Deliberates and Legislates*, in 2 RED AND BLUE NATION?: CONSEQUENCES AND CORRECTION OF AMERICA’S POLARIZED POLITICS 55, 83 (Pietro S. Nivola & David W. Brady eds., 2008) [hereinafter Sinclair, *Congress Deliberates and Legislates*]; see also Andrei Marmor, *Should We Value Legislative Integrity?*, in THE LEAST EXAMINED BRANCH, *supra* note 11, at 125, 137 (“[A] delicate balance ... needs to be maintained between too much and too little partisan political power. If the [majority party] is very flimsy and the government needs to compromise on every step it wants to take, governing itself might be seriously compromised. But ... [i]t does not follow that a good government is one which does not have to compromise with minority parties.... [I]n a pluralistic society compromise is not a regrettable necessity, but an important virtue of democratic decision procedures.”).

51. See, e.g., Choper, *supra* note 7, at 1505-07.

52. RICHARD S. BETH & MEGAN SUZANNE LYNCH, CONG. RESEARCH SERV., PARLIAMENTARY REFERENCE SOURCES: HOUSE OF REPRESENTATIVES 4 (2008), available at [http://www.rules.house.gov/lpp/resources/parl\\_ref\\_source.pdf](http://www.rules.house.gov/lpp/resources/parl_ref_source.pdf).

53. Bach, *supra* note 3, at 740.

54. *Id.* at 739-40.

presiding officers do not take the initiative to prevent rule violations.<sup>55</sup>

Instead, it is up to individual members to identify actions that violate the rules and raise a timely “point of order.”<sup>56</sup> In the House, the Speaker or the Chair rule on all points of order, while in the Senate certain questions of order are voted on by the Senators themselves.<sup>57</sup> In both chambers, almost all “[r]ulings of the [presiding officers] may be appealed by any member and usually reversed by a majority vote of the membership.”<sup>58</sup> In practice, however, such appeals are relatively rare, and very seldom successful, especially in the House, in which “the chair never loses.”<sup>59</sup>

With some exceptions, there are limitations in both chambers concerning when points of order may be raised.<sup>60</sup> When a point of order is not timely raised, it is “effectively waived,” and the violation of the rule can no longer be challenged.<sup>61</sup> In the Senate, unanimous consent may also preclude points of order.<sup>62</sup> In the House, points of order may be waived by unanimous consent, via suspension of the rules, or by a special rule reported from the Rules Committee.<sup>63</sup> In practice, many bills in the House are considered under special rules that expressly waive “one or more—or indeed all—points of order” against the entire bill or parts of it.<sup>64</sup> Hence, while points of order are Congress’s main mechanism for enforcing the rules that regu-

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55. VALERIE HEITSHUSEN, CONG. RESEARCH SERV., POINTS OF ORDER, RULINGS, AND APPEALS IN THE HOUSE OF REPRESENTATIVES 1 (2006), available at <http://www.rules.house.gov/Archives/98-307.pdf>; Bach, *supra* note 3, at 739-40.

56. HEITSHUSEN, *supra* note 55, at 1. A “point of order” is “a claim, stated by a Member from the floor, that the [chamber] is violating or about to violate some ... Rule, precedent, or other procedural authority.” BETH & LYNCH, *supra* note 52, at 4.

57. Bach, *supra* note 3, at 740.

58. *Id.*

59. Chris Den Hartog & Nathan W. Monroe, *Partisan Support for Chairs’ Rulings in the House and Senate* 10-11 (Oct. 23, 2009) (unpublished paper prepared for presentation at the Bicameralism Conference, Vanderbilt University), available at <http://faculty.ucmerced.edu/nmonroe2/Den%20Hartog%20and%20Monroe%20-%20Chairs%20Rulings.pdf>.

60. BROWN & JOHNSON, *supra* note 24, at 666-67; FLOYD M. RIDDICK & ALAN S. FRUMIN, RIDDICK’S SENATE PROCEDURE 993-96 (rev. ed. 1992), available at <http://www.gpoaccess.gov/riddick/browse.html>.

61. BROWN & JOHNSON, *supra* note 24, at 670.

62. RIDDICK & FRUMIN, *supra* note 60, at 987.

63. BROWN & JOHNSON, *supra* note 24, at 670.

64. *Id.* at 670, 827.

late lawmaking, at least in the House, this mechanism is severely limited.<sup>65</sup>

A less formal enforcement mechanism is legislators' power to refuse to vote in favor of a bill that is enacted in violation of the rules.<sup>66</sup> For example, if a bill for raising revenue originates in the Senate—thus violating the Origination Clause—the House always has the power to refuse to pass such a bill.<sup>67</sup> This power may be exercised by the majority in each chamber during the final vote on the bill, or by individual “gatekeepers” who have the power to block the passage of bills through their control over “vetogates” in the legislative process.<sup>68</sup>

Finally, the “enrollment process” provides the Speaker of the House and the President of the Senate—the legislative officers—with another opportunity to block procedural violations. After a bill passes both chambers in identical form, the final version of the bill, or the “enrolled bill,” is prepared for presentment to the President. The legislative clerks examine the accuracy of the enrolled bill and send it to the legislative officers for signature. The enrolled bill is then signed by the legislative officers in attestation that the bill has been duly approved by their respective houses, and presented to the President.<sup>69</sup> As “[t]here is no authority in the presiding officers ... to attest by their signatures ... any bill not [duly] passed by Congress,”<sup>70</sup> the presiding officers have the duty, and the opportunity, to refuse to sign such bills.

Once the presiding officers sign the enrolled bill, courts treat these signatures as “complete and unimpeachable” evidence that a bill has been properly enacted.<sup>71</sup> Consequently, a distinctive feature of the enforcement of lawmaking rules is that the enforcement takes place before the fact: all these congressional enforcement mechanisms are designed to prevent rules from being violated before the

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65. ESKRIDGE ET AL., *supra* note 46, at 442 (noting that in the House “points of order are often waived automatically in the special rule structuring the debate ... thus, House members cannot easily object to violations of congressional rules”).

66. Bach, *supra* note 3, at 746.

67. *United States v. Munoz-Flores*, 495 U.S. 385, 403-04 (1990) (Stevens, J., concurring).

68. For more on “gatekeepers” and “vetogates” in the legislative process, see ESKRIDGE ET AL., *supra* note 46, at 66-67.

69. For more on the enrollment process, see Bar-Siman-Tov, *supra* note 3, at 328, 336-38.

70. *Field v. Clark*, 143 U.S. 649, 669 (1892).

71. *Id.* at 672.



bill becomes a law.<sup>72</sup> Given the absence of judicial enforcement of these rules,<sup>73</sup> once the President signs the bill into law, or Congress passes the bill over his veto, no other enforcement mechanism exists.

Hence, the enforcement of rules that regulate lawmaking relies entirely on Congress's capacity and willingness to enforce these rules. In particular, in order for these rules to be enforced, two conditions must be met: (1) some participant in the legislative process, either individual legislators or legislative officers, must identify the rule violation in time; and (2) those participants who have the power to enforce the rule—the legislative officers, the majorities in each chamber, or other gatekeepers—must be willing to exercise their enforcement power. As the following cases demonstrate, when one of these conditions fails, congressional enforcement fails.

#### *B. Congressional Capacity To Enforce: The Farm Bill*

*"We haven't found a precedent for a congressional blunder of this magnitude."*<sup>74</sup>

*"What's happened here raises serious constitutional questions—very serious."*<sup>75</sup>

The enactment of the original \$300 billion Food, Conservation, and Energy Act of 2008 (better known as the Farm Bill) has prompted divergent reactions. The version of the bill presented to the President omitted a significant part from the version of the bill that was actually passed by both chambers of Congress. In fact, the bill that was presented to the President was missing an entire 34-page section—all of Title III of the bill.<sup>76</sup> And yet, this massive

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72. See also Bach, *supra* note 3, at 726 n.2.

73. See *supra* notes 2-3 and accompanying text.

74. Mary Clare Jalonick, *Congressional Error Snarls Effort To Override Bush's Farm Bill Veto*, STAR-LEDGER, May 22, 2008 (quoting Scott Stanzel, a White House spokesperson).

75. *Problems with Congress Override of Farm Bill*, CNN, May 22, 2008, <http://www.cnn.com/2008/POLITICS/05/22/farm.bill/index.html> (quoting Minority Leader John Boehner).

76. See *Validity of the Food, Conservation, and Energy Act of 2008*, 32 Op. Off. Legal Counsel (May 23, 2008), available at <http://www.justice.gov/olc/2008/validity-farm-bill-energy-act-2008.pdf>; Jalonick, *supra* note 74.

omission was discovered only after President Bush vetoed the bill and Congress passed it over his veto.<sup>77</sup>

This case is not the first in which provisions that passed both houses of Congress were omitted from the bill presented to the President; nor is it the first time in which breaches of constitutional requirements were discovered only after the faulty bill was approved and published as law.<sup>78</sup> It is also not the first case to illustrate that the length, scope, and complexity of omnibus bills (and the highly accelerated pace of their enactment) often make it impossible for legislators, or even legislative leaders, to be aware of all the provisions in the bill;<sup>79</sup> nor is it the first case to demonstrate that this reality often creates errors,<sup>80</sup> as well as enables individual members “to perpetuate a good deal of statutory mischief.”<sup>81</sup>

The Farm Bill is particularly interesting, however, because of the magnitude of the discrepancy in this case between the bill passed by Congress and the bill presented to the President. Indeed, the fact that no one in Congress—or the White House—was able to notice such a conspicuous discrepancy suggests that less noticeable procedural violations may often go undetected. Hence, this case clearly illustrates that massive omnibus bills increase the risk of violations of lawmaking rules, deliberate or inadvertent, and significantly undermine the ability of Congress to detect these violations.

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77. Consequently, Congress eventually had to enact the entire bill all over again, including another supermajority passage over a second presidential veto. *See Congress Passes Farm Bill Over Bush Veto*, CNN, June 18, 2008, <http://www.cnn.com/2008/POLITICS/06/18/farm.bill/index.html>.

78. *See* Bar-Siman-Tov, *supra* note 3, at 338; J.A.C. Grant, *Judicial Control of the Legislative Process: The Federal Rule*, 3 W. POL. Q. 364, 368 (1950). For other examples of such cases, see *Validity of the Food, Conservation, and Energy Act of 2008*, *supra* note 76.

79. *See, e.g.*, Dunn, *supra* note 15, at 137 (“[W]hen all the provisions are rolled into one bill, it is impossible for any member to know the contents of the bills voted on.... Indeed, many votes are for legislation in which the individual member has no idea what is contained therein.”); *see also* Denning & Smith, *supra* note 15, at 958-60, 971-76.

80. For example, in the case of a giant 2004 appropriations bill, only after the bill had passed was it discovered that a provision that would allow appropriations staff to access individual tax returns, and exempt the staff from criminal penalties for revealing the contents of those returns, was somehow inserted into the bill. The chair of the subcommittee in charge of the bill later admitted that even he had no idea that language was in the bill. THOMAS E. MANN & NORMAN J. ORNSTEIN, *THE BROKEN BRANCH: HOW CONGRESS IS FAILING AMERICA AND HOW TO GET IT BACK ON TRACK* 173-74 (2008).

81. Ronald A. Cass & Peter L. Strauss, *The Presidential Signing Statements Controversy*, 16 WM. & MARY BILL RTS. J. 11, 22 (2007); *see also* Bar-Siman-Tov, *supra* note 3, at 338-40.

More generally, this case suggests that a will to enforce lawmaking rules is a necessary but insufficient condition: even if Congress is genuinely motivated to enforce these rules, due to legislative practices such as omnibus legislation, its capacity to do so is limited.<sup>82</sup>

*C. Congressional Will To Enforce: The Deficit Reduction Act of 2005*

*"It's grade school stuff: To become law, a bill must pass both houses of Congress in identical form and be signed by the president or approved over his veto.... Unless, that is ... complying with the Constitution would be really, really inconvenient to President Bush and Republican congressional leaders."*<sup>83</sup>

The enactment of the Deficit Reduction Act of 2005 (DRA) has been described by some as "a conspiracy' to violate the Constitution,"<sup>84</sup> or as a "legally improper arrangement among certain representatives of the House, Senate, and Executive Branch to have the President sign legislation that had not been enacted pursuant to the Constitution."<sup>85</sup>

In this case, the House passed a bill that was identical to the bill passed by the Senate in all but one provision.<sup>86</sup> In budgetary terms, this seemingly minor difference had significant fiscal consequences, amounting to an estimated \$2 billion.<sup>87</sup> More importantly, this

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82. See Bar-Siman-Tov, *supra* note 3, at 339-40.

83. Editorial, *Not a Law: A Bill Passed by Only One House of Congress Just Doesn't Count*, WASH. POST, Apr. 1, 2006, at A16.

84. See Posting of Marty Lederman to Balkinization, <http://balkin.blogspot.com/2006/02/q-when-is-bill-signed-by-president-not.html> (Feb. 10, 2006, 10:33 EST) ("[The DRA case was] in fact, a 'conspiracy' to violate the Constitution. That is to say, [House Speaker] Dennis Hastert has violated his constitutional oath by attesting to the accuracy of the bill, knowing that the House version was different (and having intentionally avoided fixing the discrepancy when it came to his attention before the House vote). And [President pro tempore of the Senate] Stevens and the President are coconspirators, assuming they, too, knew about the problem before they attested to and signed the bill, respectively.").

85. *OneSimpleLoan v. U.S. Sec'y of Educ.*, 496 F.3d 197, 200-01 (2d Cir. 2007) (internal quotation marks omitted).

86. See Bar-Siman-Tov, *supra* note 3, at 331-32.

87. *Pub. Citizen v. Clerk*, U.S. Dist. Court for D.C., 451 F. Supp. 2d 109, 111 n.7 (D.D.C. 2006).

discrepancy constituted a violation of Article I, Section 7's bicameral requirement.

The Speaker of the House and the President pro tempore of the Senate were apparently well aware of this discrepancy.<sup>88</sup> Nevertheless, they allegedly chose to sign the enrolled bill in attestation that the bill was duly enacted by Congress, and to knowingly present to the President a bill that was never passed in identical form by both houses.<sup>89</sup> President Bush was also allegedly aware of this constitutional violation, but signed the bill into law nonetheless.<sup>90</sup>

The DRA is a clear example of a case in which Congress identified the rule violation in time, but those in the position to enforce the constitutional rule intentionally chose to ignore their obligation. It demonstrates that mechanisms and opportunities to enforce the rules may not suffice if the will to employ these enforcement mechanisms is lacking.

*D. When the Enforcers Are the Violators: The 2003 Medicare Bill*

*"Never have I seen such a grotesque, arbitrary, and gross abuse of power.... It was an outrage. It was profoundly ugly and beneath the dignity of Congress."*<sup>91</sup>

Under House rules, electronic voting is the preferred method to conduct record votes.<sup>92</sup> Generally, members may cast their votes through voting machines or manually, and may change their vote any number of times until the vote is closed.<sup>93</sup> The vote is directed and controlled by the Chair, who must exercise her power according

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88. See Bar-Siman-Tov, *supra* note 3, at 332.

89. See JOHN W. DEAN, *BROKEN GOVERNMENT: HOW REPUBLICAN RULE DESTROYED THE LEGISLATIVE, EXECUTIVE, AND JUDICIAL BRANCHES* 51-54 (2007); Bar-Siman-Tov, *supra* note 3, at 332 & n.44; Lederman, *supra* note 84.

90. See Bar-Siman-Tov, *supra* note 3, at 332.

91. MANN & ORNSTEIN, *supra* note 80, at 3.

92. HOUSE RULES, *supra* note 28, R. XX(2)(a).

93. For a much more detailed explanation, see SELECT COMMITTEE TO INVESTIGATE THE VOTING IRREGULARITIES OF AUGUST 2, 2007, FINAL REPORT AND SUMMARY OF ACTIVITIES, H.R. REP. NO. 110-885, at 3-5 (2008), available at [http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=110\\_cong\\_reports&docid=f:hr885.110.pdf](http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=110_cong_reports&docid=f:hr885.110.pdf) [hereinafter REPORT ON VOTING IRREGULARITIES].

to the applicable rules, precedents, and practices of the House and in a nonpartisan and impartial manner.<sup>94</sup>

One of the important powers of the Chair is the authority to close the vote and announce the vote's result.<sup>95</sup> The House rules state that there is a fifteen-minute minimum for most electronic votes;<sup>96</sup> and according to established House practice, once the minimum time for a vote has expired, the Chair should close the vote as soon as possible.<sup>97</sup> The Chair may hold the vote open for an additional minute or two to allow latecomers to cast a vote; however, since electronic voting began in 1973, it has been an established and clear norm that the Chair may not keep the vote open beyond fifteen minutes in order to change the outcome of the vote.<sup>98</sup> For over two decades, this norm was apparently breached only once.<sup>99</sup>

All this changed, however, in the enactment of the Medicare Prescription Drug, Improvement, and Modernization Act of 2003 (the Medicare Bill). When the time for debate on the Medicare Bill had ended, at 3 a.m., the Chair announced that "Members will have fifteen minutes to record their votes."<sup>100</sup> When the official time expired, at 3:15 a.m., it was clear that a majority of the House had voted against the bill.<sup>101</sup> Although the majority of the House clearly expressed its will, the Chair held the vote open for nearly three hours until the majority party's leadership was able to convince enough members to switch their votes.<sup>102</sup> At 5:53 a.m., after almost three hours in which the official tally of the votes had consistently shown a majority against the bill, the majority party was finally able to secure a majority in favor of the bill. At this point, "[t]he gavel came down quickly,"<sup>103</sup> and the Chair declared that the bill had passed.<sup>104</sup>

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94. *Id.* at 8-10.

95. *Id.* at 8.

96. HOUSE RULES, *supra* note 28, R. XX(2)(a).

97. MANN & ORNSTEIN, *supra* note 80, at 5.

98. *Id.*

99. *Id.*

100. *Id.* at 1.

101. *Id.* at 1-2.

102. *Id.*

103. *Id.* at 2.

104. 149 CONG. REC. 30855 (2003) (statement of Speaker pro tempore).

This case illustrates that even seemingly technical rules can serve important objectives, such as ensuring that the will of the chamber rather than the will of its legislative officer is enacted into law, and that violations of such rules can significantly impact the outcome of the legislative process. Indeed, although other process abuses occurred in the enactment process of the Medicare Bill,<sup>105</sup> it was this act that particularly outraged House members who opposed the bill. One member complained, “They grossly abused the rules of the House by holding the vote open. The majority of the House expressed its will, 216 to 218. It means it’s a dictatorship. It means you hold the vote open until you have the votes.”<sup>106</sup>

After this incident, stretching out the vote until the majority party “could twist enough arms to prevail” became a recurring problem.<sup>107</sup> To solve this problem, in January 2007 the new House majority amended the House rules, adding the following explicit rule: “[a] record vote by electronic device shall not be held open for the sole purpose of reversing the outcome of such vote.”<sup>108</sup>

Nevertheless, violations of this rule continued.<sup>109</sup> Furthermore, any real possibility of congressional enforcement was soon undermined. When minority party members tried to raise a point of order, the Chair held that this rule does not establish a point of order and does not have an immediate procedural remedy.<sup>110</sup> The rule was also

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105. Other abuses included, inter alia, exclusion of minority party members from the House-Senate conference committee, insertion of major provisions that were rejected during earlier floor debates into the conference report, and even allegations that the majority party tried to secure the necessary votes for passing the bill through threats and bribes. See MANN & ORNSTEIN, *supra* note 80, at 1-4, 6, 137-38; Oliver A. Houck, *Things Fall Apart: A Constitutional Analysis of Legislative Exclusion*, 55 EMORY L.J. 1, 11-12 (2006).

106. MANN & ORNSTEIN, *supra* note 80, at 3. Some majority party members argued, however, that holding votes open was not, “technically speaking,” a violation of the rules, because House rules do not state a formal maximum time for votes. *Id.* at 4.

107. *Id.* at 6-7.

108. RULES OF THE HOUSE OF REPRESENTATIVES, 110th CONG., R. XX(2)(a) (2008), available at <http://www.rules.house.gov/ruleprec/110th.pdf>.

109. See, e.g., MANN & ORNSTEIN, *supra* note 80, at 216; Committee on Rules-Republicans, *Democrats Break Their Own Rules, Refuse To Own Up*, Mar. 12, 2008, <http://rules-republicans.house.gov/ShortTopics/Read.aspx?ID=170>; Jackie Kucinich, *Rep. Gohmert Accuses Dems of Holding Vote Open*, HILL, May 24, 2007, <http://thehill.com/homenews/news/12029-rep-gohmert-accuses-dems-of-holding-vote-open>; Jim Mills, *Pelosi Admits To Breaking House Rules—Sorta*, HILL, Mar. 13, 2008, <http://thehill.com/blogs/pundits-blog/lawmaker-news/32935-pelosi-admits-to-breaking-house-rules-sorta>.

110. See REPORT ON VOTING IRREGULARITIES, *supra* note 93, at 23 (citing 76 CONG. REC.

interpreted as focusing entirely on the Chair's intent and as prohibiting only cases in which the Chair's *exclusive* motivation for holding the vote open was to change the outcome.<sup>111</sup> It was further stated that it would be inappropriate to require the Chair to declare her reasons for delaying a vote.<sup>112</sup> The practical result was that it became "impossible for the House to determine whether the Chair had the requisite intent necessary to find a violation of the rule."<sup>113</sup>

Eventually, following a case in which the Chair closed a vote before the required minimum time expired, allegedly to preclude the minority party from winning the vote,<sup>114</sup> a select committee, which investigated voting irregularities in the House, concluded that although the new rule "was enacted with a noble intent," it was "at best, difficult to enforce."<sup>115</sup> Consequently, in January 2009, the new House majority deleted this rule from the House rules.<sup>116</sup> The select committee emphasized that "striking the sentence in question" from the rules should not reduce the Chair's obligation to refrain from holding the vote open in order to change the outcome of the vote,<sup>117</sup> but seemed to conclude that ultimately "[t]he dignity and integrity of the proceedings of the House are dependent upon the dignity and integrity of its Speaker and those she appoints to serve in the Chair."<sup>118</sup>

The failure to enforce this rule, which was supposed to curb abuses by the Chair during votes, reveals the fallibility of Congress's enforcement mechanisms, especially with regard to rules

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H3193 (daily ed. May 8, 2008)).

111. *Id.*

112. *Id.*

113. *Id.*

114. Jonathan Weisman & Elizabeth Williamson, *House Forms Special Panel Over Alleged Stolen Vote*, WASH. POST, Aug. 4, 2007, <http://www.washingtonpost.com/wp-dyn/content/article/2007/08/03/AR2007080300878.html>.

115. REPORT ON VOTING IRREGULARITIES, *supra* note 93, at 22 (quoting *Investigative Hearing Regarding Roll Call 814, Day 1: Hearing Before the Select Comm. to Investigate the Voting Irregularities of August 2, 2007*, 111th Cong. 4 (2008) (opening statement of Rep. William Delahunt, Chairman of the Select Committee)). The Select Committee also found that the rule was a "catalyst" for other voting irregularities, such as prematurely closing the vote. *Id.* at 17-22.

116. See H.R. Res. 5, 111th Cong. § 2(h) (2009), available at [http://www.rules.house.gov/111/LegText/111\\_hres\\_ruleschnge.pdf](http://www.rules.house.gov/111/LegText/111_hres_ruleschnge.pdf).

117. REPORT ON VOTING IRREGULARITIES, *supra* note 93, at 23.

118. *Id.*

that are supposed to control the behavior of the presiding officers. Legislative officers are the primary and final enforcers of lawmaking rules.<sup>119</sup> This case illustrates that the legislative officers can also be the primary violators of these rules. When the legislative officers—or other chamber and committee leaders that are essential in enforcing lawmaking rules—are the ones perpetrating the rule violations, the congressional enforcement mechanisms are particularly likely to fail.<sup>120</sup>

In sum, enforcement of lawmaking rules is entirely contingent upon legislators' and legislative leaders' motivation to enforce these rules. Furthermore, because Congress's capacity to detect violations is limited, congressional compliance with these rules also largely depends on legislators' incentives to follow the rules in the first place. The crucial question, therefore, is: what are the political safeguards that may motivate legislators to engage in self-policing and rule-following behavior?<sup>121</sup>

### III. THE MYTH OF POLITICAL SAFEGUARDS

One of the dominant arguments against judicial review of the legislative process is that Congress has sufficient incentives to enforce the law of congressional lawmaking on its own.<sup>122</sup> Arguments that "legislators have greater incentives [to act as responsible constitutional decision makers] than scholars typically assert" are also prominent among critics of judicial review and judicial supremacy in other areas.<sup>123</sup> Their common argument is that legal

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119. See *supra* Part II.A.

120. Cf. Kysar, *supra* note 3, at 549 (making a similar argument in the "earmark rules" context that the "largest threat to the faithful adherence" to these rules is intentional violations by their enforcers).

121. Cf. Richard D. McKelvey & Peter C. Ordeshook, *An Experimental Study of the Effects of Procedural Rules on Committee Behavior*, 46 J. POL. 182, 201 (1984) ("[T]heoretical investigations that seek to uncover the effects of procedural rules and institutional constraints must take cognizance of incentives and opportunities for people to disregard those rules and constraints.").

122. See, e.g., Choper, *supra* note 7, at 1505-07.

123. Tushnet, *Interpretation in Legislatures*, *supra* note 11, at 356; see also, e.g., MARK TUSHNET, *TAKING THE CONSTITUTION AWAY FROM THE COURTS* 65-66 (1999); Philip P. Frickey & Steven S. Smith, *Judicial Review, the Congressional Process, and the Federalism Cases: An Interdisciplinary Critique*, 111 YALE L.J. 1707, 1708-09 (2002); Elizabeth Garrett & Adrian Vermeule, *Institutional Design of a Thayerian Congress*, 50 DUKE L.J. 1277, 1286-90 (2001);



scholarship tends to rely on the public choice theory's over-simplified and overly cynical assumption that legislators are self-interested, single-minded reelection seekers.<sup>124</sup>

This Article's inquiry begins, therefore, with the assumption that legislators are motivated by a combination of self-interest and public-regarding motivations,<sup>125</sup> and that they simultaneously pursue multiple goals, such as reelection, power and prestige in Washington, and ideology and desire to make good public policy.<sup>126</sup>

Based on this premise, and drawing on a combination of sources from a wide array of theoretical perspectives, including legal, political science, political economy, and social psychology scholarship, I have identified seven major political safeguards that are supposed to induce congressional self policing and rule following: (1) reelection motivations and electoral controls; (2) interest groups; (3) policy motivations; (4) political parties and party leaders; (5) institutional rivalry and institutional interests; (6) the threat of a presidential veto; and (7) ethical and noninstrumental motivations.<sup>127</sup>

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Sinclair, *Can Congress Be Trusted?*, *supra* note 11, at 294-97.

124. See sources cited *supra* note 123; see also Krishnakumar, *supra* note 15, at 39 (arguing that "ideology and a desire to make good policy play a far more significant role in determining legislators' voting behavior than public choice theory gives them credit for").

125. See Colin Jennings & Iain McLean, *Political Economics and Normative Analysis*, 13 NEW POL. ECON. 61, 66, 69-71 (2008) (noting that even political economists are increasingly acknowledging that politicians are not purely self-interested, and demonstrating greater willingness to include public-regarding motivations in political economics models).

126. See RICHARD F. FENNO, JR., CONGRESSMEN IN COMMITTEES 1 (1973); John W. Kingdon, *Models of Legislative Voting*, 39 J. POL. 563, 569-70 (1977); see also DANIEL A. FARBER & PHILIP P. FRICKEY, LAW AND PUBLIC CHOICE: A CRITICAL INTRODUCTION 21 & n.39 (1991) (arguing that Fenno's multiple-goal suggestion is "[s]urely closer to reality" than Mayhew's reelection model, and citing empirical studies that support Fenno's suggestion); Garrett & Vermeule, *supra* note 123, at 1287-88 (arguing that Fenno's multiple-goal view became "[t]he mainstream view in political science"). For a different view, emphasizing reelection above all other goals, see DAVID R. MAYHEW, CONGRESS: THE ELECTORAL CONNECTION 5-6, 13-17 (2d ed. 2004).

127. This list of safeguards is drawn from a combination of a wide array of sources, most notably GLENN R. PARKER, SELF-POLICING IN POLITICS: THE POLITICAL ECONOMY OF REPUTATIONAL CONTROLS ON POLITICIANS 26-27 (2004); ERIC SCHICKLER, DISJOINTED PLURALISM: INSTITUTIONAL INNOVATION AND THE DEVELOPMENT OF THE U.S. CONGRESS 5-12 (2001); TOM R. TYLER, WHY PEOPLE OBEY THE LAW 117-23 (2d ed. 2006); Aaron-Andrew P. Bruhl, *Return of the Line Item Veto? Legalities, Practicalities, and Some Puzzles*, 10 U. PA. J. CONST. L. 447, 472-75 (2008) [hereinafter Bruhl, *Return of the Line-Item Veto*]; Bruhl, *Judicial Confirmation Process*, *supra* note 15, at 1011-13; Cox, *supra* note 36, at 170; C. Lawrence

Part III systematically evaluates each of these safeguards' projected impact on Congress's compliance with the rules that set procedural restrictions on the legislative process,<sup>128</sup> in light of theoretical, empirical, and descriptive studies about Congress and its legislative process.

Close consideration of these safeguards is crucial for rebutting a number of misconceptions about legislative rule following. The following examination refutes the widely held assumption that political safeguards can obviate the need for judicial enforcement of lawmaking rules. It argues that some of these political safeguards actually induce lawbreaking rather than law-following behavior, whereas others are too weak to outweigh this impact.

#### *A. Reelection Motivations and Electoral Controls*

There is widespread agreement in the congressional decision-making literature, even among scholars who hold the multiple-goal view, that reelection is an important goal for legislators.<sup>129</sup> The connection between legislators' reelection motivation and rule following is straightforward: legislators will refrain from violating rules if such violations increase the likelihood of electoral defeat.<sup>130</sup> Of course, the reelection motivation is an ineffective control mechanism over legislators who are seeking retirement and are not interested in reelection.<sup>131</sup> However, Part III.A argues that even for reelection-seeking legislators there are significant obstacles in harnessing their strong reelection motivation into an effective control mechanism over their behavior in the legislative process.

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Evans, *Politics of Congressional Reform*, in THE LEGISLATIVE BRANCH 490, 493-94 (Paul J. Quirk & Sarah A. Binder eds., 2006) [hereinafter Evans, *Politics of Congressional Reform*]; Garrett & Vermeule, *supra* note 123, at 1286-90; Schauer, *supra* note 45, at 473-75; Sinclair, *Can Congress Be Trusted?*, *supra* note 11, at 294-97; Tushnet, *Interpretation in Legislatures*, *supra* note 11.

128. For more on the type of rules covered by this inquiry, see *supra* Part I.A.

129. See Susan Block-Lieb, *Congress' Temptation To Defect: A Political and Economic Theory of Legislative Resolutions to Financial Common Pool Problems*, 39 ARIZ. L. REV. 801, 831 (1997).

130. See Schauer, *supra* note 45, at 474-75; Tushnet, *Interpretations in Legislatures*, *supra* note 11, at 361.

131. PARKER, *supra* note 127, at 27.

### 1. Voters' Inattention and (Rational) Ignorance

In order for violations of lawmaking rules to increase the likelihood of electoral defeat, voters must be aware of these violations. However, most rule violations in the legislative process are likely to escape voters' attention.

Due to the high cost of obtaining the relevant information, voters' negligible incentive to obtain it, and free-rider problems, it is rational for voters to remain largely ignorant of legislators' behavior in the legislative process.<sup>132</sup> Political economists term this phenomenon voters' "rational ignorance."<sup>133</sup> Notwithstanding other disagreements over political economists' assumptions about voters,<sup>134</sup> political scientists seem to agree that there is indeed "widespread voter inattention" to the legislative process.<sup>135</sup> "The vast majority of voters do not pay much attention to most of the roll calls that occur on Capitol Hill; much less the more insulated activities that occur in committee. As a result, House members and Senators have significant discretion about how to conduct their legislative work."<sup>136</sup>

Surveys consistently confirm that the vast majority of the public does not regularly "follow what's going on in government and public affairs,"<sup>137</sup> and that people are largely unaware of congressional actions.<sup>138</sup> In fact, one study found that people were rarely aware of even a single policy position taken by their district representa-

132. See Block-Lieb, *supra* note 129, at 820 & n.93, 821 & nn.94-95; Peter T. Leeson, *How Much Benevolence is Benevolent Enough?*, 126 PUB. CHOICE 357, 360, 363 (2006).

133. Leeson, *supra* note 132, at 360.

134. For criticism of economic theories' assumptions about voters, see, for example, FARBER & FRICKEY, *supra* note 126, at 24-33; Daniel Shavero, *Beyond Public Choice and Public Interest: A Study of the Legislative Process as Illustrated by Tax Legislation in the 1980s*, 139 U. PA. L. REV. 1, 77-80 (1990).

135. C. Lawrence Evans, *The One Thing You Need To Know about Congress: The Middle Doesn't Rule 20* (Nov. 3, 2007) (unpublished manuscript), available at <http://www.wmpeople.wm.edu/asset/index/clevan/niemi> [hereinafter Evans, *Middle Doesn't Rule*].

136. *Id.* at 7-8.

137. AM. NAT'L ELECTION STUDIES, THE ANES GUIDE TO PUBLIC OPINION AND ELECTORAL BEHAVIOR tbl.6D.5 (2008), [http://www.electionstudies.org/nesguide/toptable/tab6d\\_5.htm](http://www.electionstudies.org/nesguide/toptable/tab6d_5.htm) [hereinafter ANES GUIDE]; see also *id.* tbl.5B.1, [http://www.electionstudies.org/nesguide/toptable/tab5b\\_1.htm](http://www.electionstudies.org/nesguide/toptable/tab5b_1.htm) (finding that roughly 60 to 70 percent of respondents consistently agree that "[s]ometimes politics and government seem so complicated that a person like me can't really understand what's going on").

138. John R. Hibbing, *Images of Congress*, in THE LEGISLATIVE BRANCH, *supra* note 127, at 461, 482.

tives,<sup>139</sup> and there is reason to believe that voters' knowledge of their representatives' performance in procedural matters is even lower.<sup>140</sup>

Surveys have consistently shown, moreover, that voters' ignorance is not limited to specific congressional actions.<sup>141</sup> For example, 45 percent of American adults cannot name either of their state's U.S. senators;<sup>142</sup> and, "at any given time, approximately 40 to 65 percent do not know which party is in control of the House of Representatives,"<sup>143</sup> which is particularly remarkable, given that "50 percent should be able to get this answer correct merely by guessing."<sup>144</sup> Ignorance about the rules that govern the legislative process is even greater.<sup>145</sup> A recent survey found, for example, that 74 percent of the public do not know that it takes sixty votes to break a filibuster in the Senate, perhaps the most well-known and hotly-debated of all legislative rules.<sup>146</sup> These findings significantly undermine the assumption that the public can hold lawmakers accountable for violating lawmaking rules.

## 2. Voters' Electoral Choices

Even if some rule violations do receive public attention, legislators would not be deterred from rule violations unless such viola-

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139. *Id.* at 474.

140. Evans, Middle Doesn't Rule, *supra* note 135, at 12 (arguing that "few people outside the Capitol Beltway pay attention to procedural votes"); *see also* Amber Wichowsky, Throw the Bums Out: Competition and Accountability in Congressional Elections 2 (Feb. 16, 2009) (unpublished manuscript), *available at* [http://users.polisci.wisc.edu/apw/archives/APW\\_wichowsky.pdf](http://users.polisci.wisc.edu/apw/archives/APW_wichowsky.pdf) (citing several studies that confirm that "citizens know little to nothing about their legislator's roll-call votes and about the policy process more generally").

141. Hibbing, *supra* note 138, at 471.

142. *Id.* Furthermore, 75 percent do not know the length of a senator's term, 45 percent do not know that each state has two senators, and 56 percent cannot name even a single branch of government. *Id.*

143. *Id.*

144. *Id.* at 471-72. Furthermore, these findings probably overestimate people's knowledge, because politically unknowledgeable people are more likely to refuse to participate in political surveys. *Id.* at 472.

145. PEW RESEARCH CTR. FOR THE PEOPLE & THE PRESS, SENATE LEGISLATIVE PROCESS A MYSTERY TO MANY 1, 3 (Jan. 28, 2010), <http://people-press.org/report/586/>; *see also* Posting of Jennifer Agiesta to The Washington Post: Behind the Numbers, [http://voices.washingtonpost.com/behind-the-numbers/2010/03/the\\_public\\_on\\_procedure.html](http://voices.washingtonpost.com/behind-the-numbers/2010/03/the_public_on_procedure.html) (Mar. 17, 2010, 12:28 EST).

146. PEW RESEARCH CTR. FOR THE PEOPLE & THE PRESS, *supra* note 145, at 3.

tions significantly influence their constituency's voting decision.<sup>147</sup> It is highly unlikely, however, that a significant percentage of voters use conformity with lawmaking rules as a key criterion in their electoral choice.<sup>148</sup>

To be sure, studies by social psychologists and political scientists suggest that people do care about process and procedural fairness in the legislative process;<sup>149</sup> and yet, this does not mean that legislators' procedural performance will significantly determine voters' decisions. As two of the leading scholars in the field explain:

[I]t would be erroneous to expect process perceptions to help people decide whether they are Democrat or Republican or whether to support candidate A or candidate B.... [P]rocess factors are of little use in such tasks as voting decisions.... Assessments of individual officeholders also are not likely to be affected by process concerns .... We expect process concerns to play a much larger part in such broad variables as whether people approve of government and whether they view it as legitimate and therefore are willing to comply with the laws it produces.<sup>150</sup>

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147. Sinclair, *Can Congress Be Trusted?*, *supra* note 11, at 294.

148. *Cf.* Schauer, *supra* note 45, at 474 n.21 (arguing that "there may be little reason to believe that the electorate will punish legislators for violating legislature-constraining rules" in the passage of policies that voters perceive as "wise and popular"); Frederick Schauer, *The Questions of Authority*, 81 GEO. L.J. 95, 104-10, 114 (1992) (presenting anecdotal evidence that citizens do not always expect officials to blindly follow the law); Sinclair, *Can Congress Be Trusted?*, *supra* note 11, at 294 (arguing that it is "certainly a heroic assumption" to think that "constituents use conformity with the Constitution as a key criterion of electoral choice," and suggesting that it is unlikely that there are enough such voters to make a difference); Emily Badger, *It's Not About Process, Stupid*, MILLER-MCCUNE, Mar. 25, 2010, <http://www.miller-mccune.com/politics/its-not-about-process-stupid-11524/> (suggesting that voters care little about the legislative process surrounding health care reform).

149. *See supra* Part I.B. *But see* Agiesta, *supra* note 145 (noting that recent polls suggest the public's take on parliamentary procedure is based more on the result and partisan affiliation than the process).

150. John R. Hibbing & Elizabeth Theiss-Morse, *Process Preferences and American Politics: What the People Want Government To Be*, 95 AM. POL. SCI. REV. 145, 150 (2001); *see also* Tyler, *supra* note 40, at 818, 820-21 (finding that the use of fair decision-making procedures significantly enhances the legitimacy of Congress; but on the question of whether people will be more willing to vote for members of Congress who support a procedurally fair policy decision that the voters disagree with, conceding that the primary direct influence on willingness to vote is agreement with the outcome).

That voters do care about the integrity of the legislative process but are nevertheless unlikely to base their voting decisions on this preference underscores the weakness of elections as an enforcement mechanism. In making their voting decisions, voters must make up their mind based on a complex combination of potentially competing considerations, such as the candidates' records, party affiliations, personalities, and other qualities, as well as their policy positions on a variety of different issues.<sup>151</sup> At the same time, however, "[e]ach voter has just one vote per election.... There is simply no way for a voter to vote for Smith on the economy and health reform while voting for Jones on [his rule-following performance]."<sup>152</sup> Consequently, voting "is simply too blunt an instrument to be an effective means for" punishing legislators for rule violations in the legislative process.<sup>153</sup>

### 3. *Uncompetitive Elections and Incumbents' Electoral Security*

Even if voters were fully informed about legislators' rule violations and had strong rule-following preferences that influenced their voting decisions, other factors in the contemporary political system significantly hinder "voters' ability to strip incumbents of their power."<sup>154</sup>

Over the past several decades, a combination of factors has dramatically increased incumbents' electoral advantages in congressional elections, and created progressively rising barriers to

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151. Richard Briffault, Campaign Finance Disclosure 2.0, at 37 (Jan. 20, 2010) (unpublished manuscript), available at [http://www.law.columbia.edu/null/download?&exclusive=filemgr.download&file\\_id=163372](http://www.law.columbia.edu/null/download?&exclusive=filemgr.download&file_id=163372) [hereinafter Briffault, Campaign Finance]; see also PARKER, *supra* note 127, at 106-11 (discussing the factors that influence electoral choice in congressional voting).

152. Briffault, Campaign Finance, *supra* note 151, at 36-38 (making this argument in the campaign finance context: "the idea that the voter can use the election to hold candidates accountable for accepting donations the voter finds troublesome fails to recognize how voting works").

153. *Id.* at 37; see also James D. Fearon, *Electoral Accountability and the Control of Politicians: Selecting Good Types Versus Sanctioning Poor Performance*, in DEMOCRACY, ACCOUNTABILITY, AND REPRESENTATION 55, 56-60 (Adam Przeworski et al. eds., 1999) (arguing that voting is more about selecting "good types" of politicians, in terms of their perceived character and policy positions, than about disciplining incumbents' past behavior).

154. PATRICK BASHAM & DENNIS POLHILL, CATO INST., UNCOMPETITIVE ELECTIONS AND THE AMERICAN POLITICAL SYSTEM (2005), available at <http://www.cato.org/pubs/pas/pa547.pdf>.

electoral competition.<sup>155</sup> Some scholars have noted, for example, that the dramatic growth in the costs of running for Congress and the increasing financial advantages of incumbents have undermined the financial competitiveness of challengers.<sup>156</sup> Other scholars highlight advantages that derive from holding office, such as increasing governmentally funded resources for constituency-service and constituency-contact activities<sup>157</sup> or the introduction of television cameras in the legislature, which affords incumbents television exposure that would be expensive for political challengers to replicate.<sup>158</sup> Others argue that computer-driven gerrymandering has made the vast majority of districts noncompetitive.<sup>159</sup> Finally, some studies emphasize demographic changes, including growing partisan polarization within the electorate<sup>160</sup> and voters' increasing reliance on incumbency as a voting cue.<sup>161</sup>

At any rate, there seems to be significant agreement that the result of these factors "is a pattern of reinforcing advantages that leads to extraordinarily uncompetitive elections."<sup>162</sup> In fact, only 11

155. Glenn R. Parker & Jun Young Choi, *Barriers to Competition and the Effect on Political Shirking: 1953-1992*, 126 PUB. CHOICE 297, 297-99 (2006).

156. Alan I. Abramowitz et al., *Incumbency, Redistricting, and the Decline of Competition in U.S. House Elections*, 68 J. POL. 75, 82-84, 87 (2006) [hereinafter Abramowitz et al., *Incumbency*].

157. Parker & Choi, *supra* note 155, at 298-99.

158. Franklin G. Mixon, Jr. & Kamal P. Upadhyaya, *Legislative Television as an Institutional Entry Barrier: The Impact of C-SPAN2 on Turnover in the U.S. Senate, 1946-1998*, 112 PUB. CHOICE 433, 434, 444-45 (2002).

159. Neal Devins, *Presidential Unilateralism and Political Polarization: Why Today's Congress Lacks the Will and the Way To Stop Presidential Initiatives*, 45 WILLAMETTE L. REV. 395, 408 (2009); Samuel Issacharoff, *Gerrymandering and Political Cartels*, 116 HARV. L. REV. 593, 624 (2002). *But see* Richard Briffault, *Defining the Constitutional Question in Partisan Gerrymandering*, 14 CORNELL J.L. & PUB. POL'Y 397, 410-11 (2005) ("The threat gerrymandering poses to competitiveness comes not from districting per se, but from the interplay of gerrymandering with a host of other political factors. The extent to which district-level competition is in decline or that gerrymandering is responsible is debatable."). For more on this debate, compare, for example, Michael P. McDonald, *Drawing the Line on District Competition*, 39 PS: POL. SCI. & POL. 91 (2006) (contending that redistricting has reduced the number of competitive congressional districts), with Alan Abramowitz et al., *Drawing the Line on District Competition: A Rejoinder*, 39 PS: POL. SCI. & POL. 95 (2006) (concluding that redistricting is not responsible for declining competition in House elections).

160. Abramowitz et al., *Incumbency*, *supra* note 156, at 77, 86-87.

161. Parker & Choi, *supra* note 155, at 298.

162. Abramowitz et al., *Incumbency*, *supra* note 156, at 86; *see also* BASHAM & POLHILL, *supra* note 154, at 2-7; Parker & Choi, *supra* note 155, at 298. *But see* Nathaniel Persily, *In Defense of Foxes Guarding Henhouses: The Case for Judicial Acquiescence to Incumbent-*

percent of the congressional races in 2008 had a sufficiently small victory margin—10 percent or lower—that could be categorized as competitive.<sup>163</sup> In 2002, only 8.7 percent of the races were competitive;<sup>164</sup> in 2004, only 5.2 percent of the races were competitive;<sup>165</sup> and even in the 2006 congressional elections, which were the most competitive in a decade, only 13.7 percent were competitive.<sup>166</sup>

Empirical studies about “incumbency advantage” show that incumbency significantly raises the probability of electoral success, with some studies finding that congressional incumbents enjoy an 11 percent increase in expected vote share merely for being an incumbent candidate.<sup>167</sup> Reelection data also confirms that members of Congress in both houses enjoy significant electoral safety, with over 90 percent reelection rates for incumbents in recent years,<sup>168</sup> and with the vast majority of incumbents winning by a landslide.<sup>169</sup> In fact, in each of the recent congressional elections, dozens of incumbents went completely unchallenged.<sup>170</sup> With such levels of electoral safety and lack of electoral competition in Congress,

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*Protecting Gerrymanders*, 116 HARV. L. REV. 649, 653-65 (2002) (arguing that “[c]oncentrating on district-level competition ... distracts attention from abundant evidence of competition in the political system as a whole,” and that the indisputable high rates of incumbent reelection and large margins of victory, as well as the declining number of marginal districts, tell only part of the story).

163. Center for Voting and Democracy, *Dubious Democracy 2008: Overview and Data*, <http://www.fairvote.org/overview-and-data> (last visited Nov. 12, 2010).

164. BASHAM & POLHILL, *supra* note 154, at 3.

165. Center for Voting and Democracy, *Dubious Democracy 2007: U.S. National Profile*, <http://www.archive.fairvote.org/?page=2113> (last visited Nov. 12, 2010).

166. *Id.*

167. BASHAM & POLHILL, *supra* note 154, at 2-3, 15 nn.12-13, 16 nn.15-16.

168. Wichowsky, *supra* note 140, at 1. In each of the 2000, 2002, and 2004 congressional elections, for example, the reelection rate for House incumbents was over 98 percent. BASHAM & POLHILL, *supra* note 154, at 3. Even in the 2006 congressional election—in which an unusually high number of seats changed hands, and despite polls indicating that only 16 percent of Americans believed most members of Congress deserved reelection—voters reelected 95 percent of the incumbent Representatives who ran in the election. Christopher M. Straw, *The Role of Electoral Accountability in the Madisonian Machine*, 11 N.Y.U. J. LEGIS. & PUB. POL’Y 321, 322-23 & nn.4-5 (2008). For more on senators’ reelection rates, see Persily, *supra* note 162, at 665. *See also* Gautam Gowrisankaran et al., *Why Do Incumbent Senators Win? Evidence from a Dynamic Selection Model* 17-21 (Nat’l Bureau of Econ. Research, Working Paper No. 10748, 2004), available at <http://www.nber.org/papers/w10748>.

169. *See* BASHAM & POLHILL, *supra* note 154, at 3; sources cited *supra* note 163.

170. *See* sources cited *supra* note 163.



especially in the House, some have argued that “[a]s a general matter, congressional accountability appears to be dead.”<sup>171</sup>

Some scholars maintain, however, that the indisputably high levels of electoral safety in Congress do not necessarily undermine the “electoral connection” theory of congressional behavior.<sup>172</sup> They claim that “[m]embers of Congress do not behave as if they are invulnerable to electoral defeat ... because they subscribe to the idea that they are ... ‘unsafe at any margin.’”<sup>173</sup> The argument, in effect, is that congressional behavior is less determined by the objective measures of electoral safety, but rather by legislators’ subjective feelings of electoral insecurity.<sup>174</sup> Consequently, they claim that notwithstanding objective electoral safety, legislators are in fact attentive to constituent preferences and potential electoral consequences in their policy decisions.<sup>175</sup>

However, even if we accept the argument that congressional behavior is mostly influenced by legislators’ subjective beliefs about electoral insecurity, it appears that when it comes to lawmaking rules, members of Congress feel relatively secure from electoral retribution. As political scientist Gary Cox suggests, “[i]n a world in which the effects of [lawmaking] rules on final outcomes are obscure to voters, members fear electoral retribution from their constituents less than they would on straightforward votes on substance.”<sup>176</sup>

This claim is confirmed by empirical evidence that “members increasingly act very differently when they vote on procedure and when they vote on substance.”<sup>177</sup> Thus, for example, legislators often

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171. Straw, *supra* note 168, at 323.

172. See Persily, *supra* note 162, at 659-60; David A.M. Peterson et al., *Congressional Response to Mandate Elections*, 47 AM. J. POL. SCI. 411, 412-13 (2003); Wichowsky, *supra* note 140, at 1-2.

173. Persily, *supra* note 162, at 659-60; Peterson et al., *supra* note 172, at 412.

174. See generally Jeffrey E. Cohen, *Perceptions of Electoral Insecurity Among Members Holding Safe Seats in a U.S. State Legislature*, 9 LEGIS. STUD. Q. 365 (1984).

175. Peterson et al., *supra* note 172, at 412-13. At least one empirical study challenges this claim, however, by demonstrating that the objective decline in electoral competition in fact correlates with an increase in “shirking,” that is, deviation from constituent preferences, in legislators’ roll-call decisions. See Parker & Choi, *supra* note 155, at 310-11.

176. Cox, *supra* note 36, at 187; see also Monroe & Robinson, *supra* note 37, at 218 (noting that “members have less reason to fear being held accountable by their constituents for votes they make on the procedural maneuvers of their party leadership ... than for votes on the substance of policy”).

177. Sean M. Theriault, *Procedural Polarization in the U.S. Congress* 16 (Mar. 24, 2006) (unpublished manuscript), available at <http://users.polisci.wisc.edu/apw/archives/theriault>

vote in favor of a procedure that facilitates the passage of a bill—such as restrictive rules that sharply curtail the ability to offer amendments on the floor—and then vote against the bill itself.<sup>178</sup> The explanation to this seemingly puzzling behavior is that “members increasingly listen to their party on procedure and to their constituents on substance,”<sup>179</sup> based on their widely held belief that “few people outside the Capitol Beltway pay attention to procedural votes.”<sup>180</sup> Indeed, many legislators, political consultants, and candidates share the belief that most voters do not care about procedural issues and that procedural votes are much less visible to voters.<sup>181</sup>

The bottom line is that from both the perspective of objective electoral safety and legislators’ subjective perceptions of electoral security, violations of lawmaking rules are largely insulated from electoral accountability. Hence, the prospect that voters will effectively police legislators’ rule-following behavior in the legislative process, or induce reelection-minded legislators to police themselves, seems grim. Furthermore, as Parts III.B-H explain, to the extent that the reelection goal motivates legislators to satisfy special interest groups, to make public policy, or to follow their party leaders’ instructions, all of these considerations may in fact induce rule violations.

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178. Cox, *supra* note 36, at 183-84; Evans, *Middle Doesn’t Rule*, *supra* note 135, at 12.

179. Theriault, *supra* note 177, at 16.

180. Evans, *Middle Doesn’t Rule*, *supra* note 135, at 12; Theriault, *supra* note 177, at 11-12, 15-16 (finding support for the “parties care about procedures; constituents care about substance” explanation for this behavior); *see also* Cox, *supra* note 36, at 183-84; Monroe & Robinson, *supra* note 37, at 218.

181. DEAN, *supra* note 89, at 4-5, 8-9. Admittedly, there may be a limited exception to this assumption, namely, when the bill in question receives wide public attention and the impact of the procedural vote on the final outcome is relatively transparent. The best example is probably the House’s final procedural votes in passing President Obama’s health care legislation. Even in this exceptional case of rare public attention to the legislative process, however, it was highly debatable whether the public actually understood or cared about the procedural rules. *See* Agiesta, *supra* note 145; Badger, *supra* note 148; Amy Goldstein, *House Democrats’ Tactic for Health-Care Bill is Debated*, WASH. POST, Mar. 17, 2010, at A1; Adam Nagourney, *Procedural Maneuvering and Public Opinion*, N.Y. TIMES, Mar. 19, 2010, at WK1. At any rate, for the vast majority of procedural votes, legislators can safely assume that their vote will not have significant electoral consequences.

*B. Interest Groups*

Although political unawareness and organization problems plague the vast majority of voters, there are subsets of the constituency, such as organized advocacy groups, that are politically aware and relatively well organized.<sup>182</sup> Political scientists James Snyder and Michael Ting argue that some “activist groups,” such as the Sierra Club or NAACP, “have the attention of large numbers of voters in many constituencies,” and therefore may potentially provide “the link between desired punishment strategies and voter actions.”<sup>183</sup> They argue that “[b]y coordinating voting behavior through publications, advertisements, or endorsements, such groups can tune the responses of voters to incumbent behavior over multiple elections.”<sup>184</sup> Undeniably, activist groups may solve some electoral accountability deficiencies—particularly, voters’ political unawareness, indifference, and coordination problems—in certain areas, and legislators do seem to pay attention to such groups.<sup>185</sup>

However, activist groups are unlikely to serve as a significant force in the lawmaking rules context. First, it is unlikely that there are many activist groups whose agendas focus on ensuring compliance with the procedural rules constraining the legislative process. Because organized voter groups are highly susceptible to free-rider problems that can undermine their effectiveness, activist groups tend to be most effective when focused on specific, narrow issues.<sup>186</sup> As examples like the National Education Association, the Sierra Club, and the NAACP illustrate, these narrow issues are more likely to revolve around specific ideological and policy issues.<sup>187</sup>

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182. Evans, *Middle Doesn't Rule*, *supra* note 135, at 5-6.

183. James M. Snyder Jr. & Michael M. Ting, *Interest Groups and the Electoral Control of Politicians*, 92 J. PUB. ECON. 482, 483 (2008).

184. *Id.*

185. Evans, *Middle Doesn't Rule*, *supra* note 135, at 7 (arguing that members of Congress “pay particular attention to the preferences of issue publics,” advocacy groups, “and organized interests because they are an important source of campaign resources,” and because “[a]dvocacy groups engage in grassroots mobilization efforts that potentially can sway the attitudes of less politically aware constituents”).

186. Block-Lieb, *supra* note 129, at 822-23.

187. *Cf.* Evans, *Middle Doesn't Rule*, *supra* note 135, at 6-7 (suggesting that the organized advocacy groups tend to form around specific policy areas). This conclusion is also corroborated by research about the forces that influence congressional reform, which indicates that “advocacy organizations are activated by reform initiatives that directly affect the ability

Even activist groups such as Common Cause or the Center for Responsive Politics that are more generally interested in the political process typically focus on areas such as elections, lobbying, and campaign finance, rather than on floor procedures and procedural rule following in the legislative process.<sup>188</sup>

Second, as public choice scholars argue—in a different context —“voters’ ignorance of politicians’ behavior is not exclusively a function of their negligible incentive to obtain such information .... It is also a function of the cost of obtaining the relevant information, which may be prohibitive even for [those] who have a much higher benefit of obtaining this information.”<sup>189</sup> Unlike special interest groups that represent industries, activist groups typically have relatively limited financial resources.<sup>190</sup> Furthermore, due to the prevalence of legislative practices such as omnibus legislation, monitoring procedural rule violations may require particularly high monitoring costs.<sup>191</sup>

The combination of monitoring costs, limited financial resources, and narrow policy interests inevitably means that activist groups are likely to focus their resources on monitoring legislators’ policy votes, and in only a limited set of policy areas.<sup>192</sup> It is therefore unlikely that activist groups will spend their scarce monitoring resources on detecting violations of procedural rules in the legislative process.

Special interest groups representing corporate business interests, for example, Pharmaceutical Research and Manufacturers of America,<sup>193</sup> tend to have greater resources to monitor legislators’ behavior, but are also unlikely to solve the monitoring problems

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of individual groups to achieve their political and policy goals.” See Evans, *Politics of Congressional Reform*, *supra* note 127, at 516.

188. See Evans, *Politics of Congressional Reform*, *supra* note 127, at 494-516; see also Center for Responsive Politics, Mission, <http://www.opensecrets.org/about/index.php> (last visited Nov. 12, 2010); Common Cause, About Common Cause, <http://www.commoncause.org/site/pp.asp?c=dkLKN1MQIWG&b=4764181> (last visited Nov. 12, 2010).

189. Leeson, *supra* note 132, at 363.

190. Snyder & Ting, *supra* note 183, at 483.

191. See *supra* Part II.B; see also Garrett & Vermeule, *supra* note 123, at 1300.

192. Given that good-government groups, such as Common Cause, the Center for Responsive Politics, and Taxpayers for Common Sense, often focus on money in politics, it is possible that other types of congressional rules, such as budgetary rules and some ethics rules, attract somewhat higher activist-group monitoring.

193. See Snyder & Ting, *supra* note 183, at 483.

regarding rules governing lawmaking. On the contrary, such special interest groups are more likely to favor less transparency and electoral accountability in the legislative process.<sup>194</sup> Indeed, to the extent that reelection-minded legislators need to cater to the demands of these interest groups,<sup>195</sup> this circumstance creates a powerful incentive to engage in procedural rule violations. In fact, a number of case studies and significant anecdotal evidence suggest that rent-seeking interest groups are often the primary beneficiaries of stealth legislation and irregularities in the legislative process.<sup>196</sup>

To be sure, the extent to which interest groups dominate the legislative process, and the extent to which activist groups and special interest groups may cancel each other out, are matters of intense debate in the political science and political economy literature.<sup>197</sup> This Article expresses no opinion on this larger question. Rather, it argues that, in the context of the rules regulating lawmaking, interest groups are generally more likely to create an incentive to violate rules than to solve monitoring problems and induce rule following.<sup>198</sup>

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194. See Block-Lieb, *supra* note 129, at 825-27 (discussing the aspects of the legislative process, such as omnibus legislation, that serve the interests of special interest groups); Evans, *Politics of Congressional Reform*, *supra* note 127, at 494, 516 (noting that special interest groups have been major opponents to congressional reforms in areas such as committee jurisdiction).

195. See Block-Lieb, *supra* note 129, at 824, 831-32.

196. See MANN & ORNSTEIN, *supra* note 80, at 217-18 (arguing that deviation from "regular order in Congress creates greater opportunities for parochial, special interest provisions to be added to legislation out of public view" and providing several examples); see also Seth Grossman, *Tricameral Legislating: Statutory Interpretation in an Era of Conference Committee Ascendancy*, 9 N.Y.U. J. LEGIS. & PUB. POL'Y 251, 272-88 (2006); Andrew J. Schwartzman et al., *Section 202(h) of the Telecommunications Act of 1996: Beware of Intended Consequences*, 58 FED. COMM. L.J. 581, 582-84 (2006); Charles Tiefer, *How To Steal a Trillion: The Uses of Laws About Lawmaking in 2001*, 17 J.L. & POL. 409, 442-47 (2001); Victor Goldfeld, Note, *Legislative Due Process and Simple Interest Group Politics: Ensuring Minimal Deliberation Through Judicial Review of Congressional Processes*, 79 N.Y.U. L. REV. 367, 368-69 (2004); Reynolds, *supra* note 20, at 508-09, 513-14, 518-19; E. Bolstad, *Earmark Tampering Suggested*, ANCHORAGE DAILY NEWS, Aug. 10, 2007, at B1.

197. For overviews of these debates, see, for example, FARBER & FRICKEY, *supra* note 126, at 17-33; Block-Lieb, *supra* note 129, at 819-27, 830-38; Shaviro, *supra* note 134, at 42-45, 55-56, 87-92.

198. Cf. Evans, *Politics of Congressional Reform*, *supra* note 127, at 516 (concluding that, for the most part, the interest-group community has been an impediment to congressional reforms).

*C. Policy Motivations*

Advocates of greater trust in Congress's aptitude to act as a responsible constitutional decision maker often base their claim primarily on legislators' incentive to pursue good public policy.<sup>199</sup> This Article accepts the argument that legislators' policy motivations have an important impact on congressional decision making.<sup>200</sup> It argues, however, that at least in the lawmaking rules context, this incentive is more likely to produce rule violations than rule following.

Legislators' motivation to create policy is derived from a wide range of personal goals.<sup>201</sup> In addition to ideology and a desire to make good public policy, the motivation to create policy is also induced by a desire to be an influential policymaker, to exhibit institutional power and increase one's prestige, to claim credit and satisfy constituents, and to attract financial support from interest groups.<sup>202</sup> All these interests combine into a powerful incentive to create policy and to pass legislation.<sup>203</sup> The question, therefore, is how this strong incentive interacts with lawmaking rules.

Research by political scientists suggests that lawmaking rules can significantly impact policy outcomes.<sup>204</sup> There is evidence, moreover, that members of Congress themselves are well aware of the important impact of legislative rules on legislative outcomes.<sup>205</sup> Representative John Dingell, the longest-serving member of the

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199. See, e.g., TUSHNET, *supra* note 123, at 65-66; Garrett & Vermeule, *supra* note 123, at 1288; Sinclair, *Can Congress Be Trusted?*, *supra* note 11, at 294-96.

200. See Andrew D. Martin, *Congressional Decision Making and the Separation of Powers*, 95 AM. POL. SCI. REV. 361, 361-62 (2001); Shaviro, *supra* note 134, at 82, 85-86.

201. Martin, *supra* note 200, at 362.

202. Edward B. Hasecke & Jason D. Mycoff, *Party Loyalty and Legislative Success: Are Loyal Majority Party Members More Successful in the U.S. House of Representatives?*, 60 POL. RES. Q. 607, 607, 609 (2007); Martin, *supra* note 200, at 362; Shaviro, *supra* note 134, at 85-86, 93-94; Sinclair, *Can Congress Be Trusted?*, *supra* note 11, at 294-96.

203. See sources cited *supra* note 202.

204. See *supra* Part I.B.

205. Cox, *supra* note 36, at 183-84; see also Bruhl, *Statutes To Set Legislative Rules*, *supra* note 18, at 397 ("Legislators realize that voting rules and other procedural details determine outcomes, and that is why they wrangle over such matters so fiercely, much to the befuddlement of outsiders."); Theriault, *supra* note 177, at 11 ("Party leaders, who are primarily concerned with the outcome of a substantive vote, establish the best possible set of procedures to arrive at their preferred substantive outcome. The leaders use procedure to hardwire the final outcome.").

House, has expressed—albeit in a slightly different context—a cognizance about the impact of procedures perhaps most bluntly: “I’ll let you write the substance ... and you let me write the procedure, and I’ll screw you every time.”<sup>206</sup> Indeed, scholarship on congressional design of lawmaking rules suggests that “[w]hen lawmakers make decisions between rule alternatives, they typically consider the implications for policy.”<sup>207</sup> Empirical research confirms, moreover, that the majority party indeed uses lawmaking rules, such as rules that restrict adding amendments during floor debate, to achieve more favorable policy outcomes, and that this strategy is often successful.<sup>208</sup>

The combination of the factors discussed thus far—legislators’ strong incentive to pass policy, the significant impact of lawmaking rules on policy outcomes, and legislators’ knowledge of this impact—leads to the conclusion that policy incentives should have considerable influence on Congress’s enforcement of these rules. When it comes to the lawmaking rules that constrain the legislative process, which by their very nature limit legislators’ ability to translate their policy preferences into legislation, the impact of policy motivations is clear: they create a strong incentive to deviate from the rules.<sup>209</sup>

Descriptive congressional scholarship suggests that this impact of policy interests on rule following may be particularly strong in the modern Congress.<sup>210</sup> As some congressional scholars suggest, in a different context, with “the ever-growing ideological polarization in Congress[,] [m]ore than ever before, lawmakers may have hard-and-fast views about the rightness of their policy agenda. The

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206. *Regulatory Reform Act: Hearing on H.R. 2327 Before the Subcomm. on Admin. Law and Governmental Regulations of the H. Comm. on the Judiciary*, 98th Cong. 312 (1983) (statement of Rep. John Dingell) (discussing the impact of procedures imposed on agencies).

207. SCHICKLER, *supra* note 127, at 10, 261-63 (finding that policy considerations impact Congress’s decisions about designing and altering formal procedural rules); C. Lawrence Evans, *Legislative Structure: Rules, Precedents, and Jurisdictions*, 24 LEGIS. STUD. Q. 605, 605, 627 (1999) [hereinafter Evans, *Legislative Structure*].

208. See generally Monroe & Robinson, *supra* note 37.

209. Cf. McKelvey & Ordeshook, *supra* note 121, at 201 (“[I]nstitutions and rules ... are designed to attain some preferred set of outcomes. And, when such outcomes cannot be attained under them and when some set of persons possesses the appropriate means, those institutions and rules will either be modified or bypassed.”).

210. MANN & ORNSTEIN, *supra* note 80, at 7.

question of whether their policy agenda is constitutional may matter less to today's lawmakers."<sup>211</sup>

Even more germane for present purposes is congressional scholars Thomas Mann and Norman Ornstein's observation that "[s]harp partisan differences on policy created an atmosphere [in Congress, and especially in the House,] in which the legislative ends could justify any procedural means,"<sup>212</sup> and in which procedural values are viewed as "impediments to the larger goal of achieving political and policy success."<sup>213</sup>

In short, legislators' policy goals—even if they originate from purely ideological and public-regarding motivations—produce a strong incentive to violate lawmaking rules when such rules stand in the way of their policy preferences.<sup>214</sup> Notwithstanding the central impact of policy motivations on rule following, however, Part III.D argues that other powerful forces both exacerbate and complicate the influence of legislators' policy motivations.

#### *D. Parties and Leaders*

Some scholars argue that the most promising enforcers of the rules that govern lawmaking are the majority party and its leaders.<sup>215</sup> This Article accepts the claim that political parties are a powerful force in Congress, especially in the House,<sup>216</sup> and that parties have an impact both on congressional decision making<sup>217</sup> and

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211. Keith E. Whittington et al., *The Constitution and Congressional Committees: 1971-2000*, in *THE LEAST EXAMINED BRANCH*, *supra* note 11, at 396, 408 (suggesting that this may be one explanation for the steady decline in the number of constitutional hearings by all congressional committees but the judiciary committees).

212. MANN & ORNSTEIN, *supra* note 80, at 7.

213. *Id.* at 170-71.

214. McKelvey & Ordeshook, *supra* note 121, at 201.

215. Cox, *supra* note 36, at 172 ("If party leaders can expel members from legislative caucuses, deny them renomination, or deny them future office opportunities, then the majority party (or coalition) may be able externally to enforce a given set of rules."); Philip Norton, *Playing by the Rules: The Constraining Hand of Parliamentary Procedure*, 7 J. LEGIS. STUD. 13, 29 (2001) (making a similar argument regarding the British parliament and noting that "[w]hen Labour MPs have appeared to challenge or, worse still, disobey the rules of the House, they have been slapped down by their leaders").

216. See, e.g., Larry D. Kramer, *Putting the Politics Back into the Political Safeguards of Federalism*, 100 COLUM. L. REV. 215, 281 & n.263 (2000) (arguing that "the consensus today is that parties ... have, in fact, come back strong").

217. For more on the political science scholarship about the effects of parties on



on congressional design of procedural rules.<sup>218</sup> It also agrees that party leaders have significant tools to enforce party discipline and to influence members' behavior,<sup>219</sup> and that this influence is particularly evident in members' procedural votes.<sup>220</sup> This Article concedes, therefore, that party leaders can potentially induce compliance with lawmaking rules even when rules conflict with individual legislators' policy preferences.<sup>221</sup> Furthermore, as explained in Part II, the chambers' presiding officers, who are always members of the majority party, have a crucial role both in the application—or violation—of the rules and in Congress's enforcement mechanisms.<sup>222</sup> Thus, the majority party leaders in Congress, especially in the House, are arguably the most influential figures in determining Congress's compliance with lawmaking rules. The question, however, is how parties and their leaders use this power.

Just like individual legislators, congressional parties also pursue multiple goals.<sup>223</sup> These include passing items on the party's agenda, helping members accomplish individual goals, achieving and maintaining majority status, and enhancing the party's image.<sup>224</sup> All

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congressional decision making, see, for example, Cary R. Covington & Andrew A. Bagen, *Comparing Floor-Dominated and Party-Dominated Explanations of Policy Change in the House of Representatives*, 66 J. POL. 1069, 1074, 1084-85 (2004); Cox, *supra* note 36, at 180-82; Steven S. Smith, *Positive Theories of Congressional Parties*, 25 LEGIS. STUD. Q. 193, 199 (2000).

218. See, e.g., Evans, *Legislative Structure*, *supra* note 207, at 631-32; Evans, *Politics of Legislative Reform*, *supra* note 127, at 494, 508-11, 516. But cf. SCHICKLER, *supra* note 127, at 25, 259-61, 263 (conceding that, since the 1970s, party interests returned to prominence, but arguing that the importance of partisan interests to institutional design is greater in the House than in the Senate and that "even when majority party interests are important, these interests are rarely alone"); Sarah A. Binder, *Parties and Institutional Choice Revisited*, 31 LEGIS. STUD. Q. 513, 514 (2006) (suggesting that, "while it is premature to reject party-based accounts of procedural change, no single account best explains the politics of institutional change").

219. See Hasecke & Mycoff, *supra* note 202, at 609-10; William Hixon & Bryan W. Marshall, *Agendas, Side Issues, and Leadership in the US House*, 19 J. THEORETICAL POL. 83, 83-84, 85-88 (2007); Evans, *Middle Doesn't Rule*, *supra* note 135, at 10-12.

220. See Cox, *supra* note 36, at 183-84; Evans, *Middle Doesn't Rule*, *supra* note 135, at 12; Theriault, *supra* note 177, at 16.

221. See Evans, *Middle Doesn't Rule*, *supra* note 135, at 12; Theriault, *supra* note 177, at 16.

222. Hartog & Monroe, *supra* note 59, at 2 (noting that "in the modern House and Senate, the Presiding Officer is always a member of the majority party").

223. See Hasecke & Mycoff, *supra* note 202, at 609.

224. *Id.*

of these goals lead to a powerful motivation to pass legislation. In addition to the obvious collective party goal of passing the party agenda, rank-and-file members often pressure their leaders to enact legislation because it serves their personal policy and reelection goals.<sup>225</sup> The party goals of maintaining majority status and enhancing party image also depend, to a significant extent, upon the party's success in enacting the legislative program on which it was elected and on fostering a distinct "party label" in terms of the policies for which the party stands.<sup>226</sup>

The combination of these goals creates strong pressures on majority party leaders to pass legislation and to push through the party's legislative agenda.<sup>227</sup> These pressures result not only from incentives that parties create to induce their leaders to internalize the collective goals of the party,<sup>228</sup> but also from party leaders' personal goals.<sup>229</sup> Although legislative leaders have the same personal goals that motivate other legislators, the desire for power and prestige tend to be particularly pronounced in congressional and party leaders.<sup>230</sup> Much more than in the case of rank-and-file members, legislative leaders' personal prestige often hinges on winning legislative victories.<sup>231</sup> These leaders' goal to appear effective and successful in passing the party policy agenda creates a strong incentive to pass legislation, which often overshadows other considerations.<sup>232</sup>

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225. John E. Owens & J. Mark Wrighton, *Procedural Control and Majority Party Entrenchment in the U.S. House: An Explanation of Rules Restrictiveness Over Time* 11 (Apr. 12, 2007) (unpublished manuscript), available at [http://www.wmin.ac.uk/ssh/pdf/csd\\_owens\\_MPSA07\\_19Mar07.pdf](http://www.wmin.ac.uk/ssh/pdf/csd_owens_MPSA07_19Mar07.pdf).

226. *Id.*; see also Cox, *supra* note 36, at 187-88.

227. Owens & Wrighton, *supra* note 225, at 11.

228. *Cf.* SCHICKLER, *supra* note 127, at 10 (noting that parties create "leadership posts that are both attractive and elective, thereby inducing [their] leaders 'to internalize the collective electoral fate of the party'" (quoting GARY W. COX & MATHEW D. MCCUBBINS, *LEGISLATIVE LEVIATHAN: PARTY GOVERNMENT IN THE HOUSE* 132-33 (1993))).

229. Shaviro, *supra* note 134, at 83-84.

230. *Id.* at 102 ("Congressional leaders, including both party leaders and committee chairpersons, face stronger prestige ... incentives than rank and file members.").

231. *Id.* at 83-84.

232. *Id.* (arguing, for example, that "Wilbur Mills, the Chairman of the Ways and Means Committee from 1958 to 1974, who never lost a tax bill on the House floor, seemingly regarded his 'aura of invincibility' as more important than the content of legislation").

Majority party leaders have several tools to secure the passage of their party's legislative agenda,<sup>233</sup> but a chief tool, particularly in the House, is the party leaders' control over legislative procedures.<sup>234</sup> As John Owens and Mark Wrighton put it:

[M]ajority parties have well-earned reputations for crafting rules designed to protect their legislative agendas on the floor. Majority leaders can manipulate the consideration of legislation in any way that a majority of votes on the floor will support, and they have become very creative in writing rules that protect elements of their legislative agenda and/or provide cover for caucus members.<sup>235</sup>

Indeed, significant literature on congressional parties documents the means by which majority parties and their leaders manipulate procedural rules to facilitate the passage of their party's agenda.<sup>236</sup>

Legislative leaders can also advance the majority party's agenda through the enforcement, or lack of enforcement, of legislative rules.<sup>237</sup> Decisions about the enforcement of lawmaking rules in the House appear to be particularly influenced by partisan considerations. Recent empirical research suggests that, in the House, "perhaps without exception, the chair rules [on points of order] in a way favored by the majority party," and that in the relatively few cases in which the Chair's rulings are appealed, the majority party always prevails.<sup>238</sup> Furthermore, points of order—Congress's chief

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233. See Hixon & Marshall, *supra* note 219, at 85.

234. *Id.* at 85-86.

235. Owens & Wrighton, *supra* note 225, at 9.

236. Cox, *supra* note 36, at 180; Hixon & Marshall, *supra* note 219, at 85-86; Monroe & Robinson, *supra* note 37, at 217-20; Evans, *Middle Doesn't Rule*, *supra* note 135, at 12.

237. Hartog & Monroe, *supra* note 59, at 1-2 (arguing that "Presiding Officers' rulings [on points of order] in the House and Senate ... can play an important role in both chambers' legislative processes, sometimes having major impacts on legislative outcomes," and that "in both chambers, chairs' rulings have important implications for parties' agendas").

238. *Id.* at 12. Partisan influence on the Chair's enforcement of procedural rules in the Senate is less clear. *Compare, e.g., id.* at 2 (suggesting that "substantial partisanship is also at play in Senate chair's rulings"), with Michael S. Lynch & Tony Madonna, *The Vice President in the U.S. Senate: Examining the Consequences of Institutional Design* 29 (Jan. 25, 2010) (unpublished manuscript), available at <http://ajmadonn.myweb.uga.edu/VicePresident.pdf> (finding that "[i]n the post-parliamentarian era, senators [serving in the Chair] were likely to issue favorable rulings to majority party members 73.6 percent of the time.... [T]he predicted probability of the vice president issuing a favorable ruling to the majority party was [roughly 60] percent"), and Anthony J. Madonna, *Informational*

enforcement mechanism for lawmaking rules—are often waived in the House by special rules written by the Rules Committee.<sup>239</sup> Since the 1970s, the Rules Committee has increasingly served as an “agent” of the majority party,<sup>240</sup> including granting waivers that circumvent House rules in order to serve the majority party’s policy agenda.<sup>241</sup> These special rules are typically approved on the floor “on a strictly party line vote.”<sup>242</sup>

Legislative leaders have strong incentives to enforce the types of rules, such as restrictive rules, that serve the majority party’s policy and political interests, and they often succeed in doing so.<sup>243</sup> In this regard, scholars who argue that majority party leaders can ensure compliance with lawmaking rules are correct.<sup>244</sup> At the same time, however, these scholars seem to overlook the fact that party leaders also have considerable power and incentives to violate rules that impede the passage of the majority party’s agenda.<sup>245</sup> In fact, the same incentives that make party leaders vigorously enforce rules that serve their party’s interests become powerful incentives to violate rules that stand in the way of party interests.

The 2003 Medicare Bill is a clear example. This bill was the major social policy initiative of President Bush,<sup>246</sup> and Republican leaders in Congress “hoped that adoption of the measure would reduce or even neutralize the long-term Democratic advantage on health

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Asymmetries, the Parliamentarian, and Unorthodox Procedural Choice in the United States Senate 2, 19 (Mar. 4, 2010) (unpublished manuscript), *available at* <http://ajmadonn.myweb.uga.edu/Parliamentarian.pdf> (arguing that the emergence of the Senate’s parliamentarian in the 1920s decreased the impact of partisanship in presiding officers’ rulings).

239. See MARSHALL, *supra* note 37, at 108-09.

240. *Id.* at 49-59, 77-82, 118-21.

241. *Id.* at 108-09, 112-14, 121.

242. Monroe & Robinson, *supra* note 37, at 218-19.

243. See, e.g., Cox, *supra* note 36, at 187 (“Typically, the effect of rules is most visible in conjunction with a majority party or coalition’s efforts to push through its legislative agenda against opposition.”).

244. See *id.* at 172.

245. Theoretically, party leaders may have an incentive to enforce procedural rules, even when these rules do not facilitate the passage of the majority party’s agenda, if they believe that procedural violations will jeopardize the party image and risk their chances of maintaining majority status. See Norton, *supra* note 215, at 21-22 (providing anecdotal evidence from England). As Part III.A already established, however, because most procedural violations are relatively insulated from electoral accountability, it is unlikely that fear from voters’ punishment can override the powerful motivation to pass the party’s agenda.

246. MANN & ORNSTEIN, *supra* note 80, at 1.

issues with the public.”<sup>247</sup> Passing this bill was therefore a top priority for the majority party and its leaders.<sup>248</sup> Consequently, they employed a variety of more or less legitimate strategies to pass the bill, including exclusion of minority party members from the House-Senate conference committee and insertion of major provisions that were rejected during earlier floor debates into the conference report.<sup>249</sup> There were even allegations that the majority party leaders tried to secure the necessary votes for passing this bill through threats and bribes.<sup>250</sup> Finally, as Part II.D elaborated, when following the established norm that limits votes to fifteen minutes would have meant defeat of the bill, House leaders simply, and blatantly, breached it.<sup>251</sup>

As the DRA example from Part II.C suggests, moreover, party interests may create strong incentives to violate even constitutional rules when compliance would mean defeat of a bill that is important to the majority party.<sup>252</sup> The DRA’s passage was highly contentious.<sup>253</sup> It passed the Senate through Vice President Cheney’s tie-breaking vote<sup>254</sup> and the House by a 216-214 vote through heavy pressure by majority party leaders.<sup>255</sup> Hence, when it was discovered that the bill did not pass both chambers in the same form, majority party leaders did not want to take the chance that the bill would not pass another vote in the House.<sup>256</sup> Instead, the legislative leaders simply ignored the constitutional bicameralism requirement and signed the enrolled bill in attestation that the bill had duly passed both houses, despite their knowledge that the bill was never passed in identical form by both chambers.<sup>257</sup>

Admittedly, the instances of both the DRA and the Medicare Bill occurred during Republican control of Congress, but significant

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247. Evans, *Middle Doesn’t Rule*, *supra* note 135, at 11.

248. MANN & ORNSTEIN, *supra* note 80, at 1.

249. *See id.* at 1-4, 6, 137-38; Houck, *supra* note 105, at 11-12.

250. *See* MANN & ORNSTEIN, *supra* note 80, at 1-4, 6.

251. *See id.* at 1-4; Evans, *Middle Doesn’t Rule*, *supra* note 135, at 11-12; *see also supra* Part II.D.

252. *See supra* Part II.C.

253. *See* Michael Gilfix & Bernard A. Krooks, *Asset Preservation and Long-Term Care: Assault in the Name of Deficit Reduction*, 20 PROB. & PROP. 34, 34 (2006).

254. DEAN, *supra* note 89, at 51.

255. *Id.* at 52.

256. *Id.* at 52-53.

257. *See id.*; *supra* Part II.C.

evidence confirms that the procedural “maneuvering behind the Medicare ... legislation was neither unique to [this bill] nor to the 108th Congress,”<sup>258</sup> and that since the 1980s both parties have been increasingly guilty of deviations from lawmaking rules and process abuses when they controlled Congress.<sup>259</sup> Indeed, the recent history of Congress suggests that “the inclination to pass bills important to the majority party quickly trumps previous assurances of openness and fairness made by the incoming majority.”<sup>260</sup>

### *E. Institutional Rivalry and Institutional Interests*

The assumption about institutional competition and institutional interests is illustrated by the government’s argument in *United States v. Munoz-Flores*. In that case, the government argued that courts should not review Origination Clause<sup>261</sup> challenges because “the House has the power to protect its institutional interests by refusing to pass a bill if it believes that the Origination Clause has been violated.”<sup>262</sup> Although the full Court did not embrace this position,<sup>263</sup> this argument was essentially accepted by Justice Stevens in his concurring opinion. Justice Stevens opined that “the House is

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258. Houck, *supra* note 105, at 14.

259. For a detailed account, see MANN & ORNSTEIN, *supra* note 80, at 7-9, 67-95, 100-07, 169-75, 212-16, 253-62 (detailing process abuses by both parties between the late 1980s and 2008). For more on process abuses by the Democratic majority that controlled Congress in the early 1990s, see Kimberly Coursen et al., *Restoring Faith in Congress*, 11 YALE L. & POL’Y REV. 249, 263-64, 266, 269-70 (1993); 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, 321-22, 349, 351-63 (1994). For more on process abuses by the Republican majority that controlled Congress between 1994 and 2006, see HOUSE RULES COMM. MINORITY OFFICE, 108TH CONG., BROKEN PROMISES: THE DEATH OF DELIBERATIVE DEMOCRACY: A CONGRESSIONAL REPORT ON THE UNPRECEDENTED EROSION OF THE DEMOCRATIC PROCESS IN THE 108TH CONGRESS 1-2 (2005), available at <http://web.archive.org/web/20050511221002/http://www.democrats.house.gov/docs/brokenpromises.pdf>; Sinclair, *Congress Deliberates and Legislates*, *supra* note 50, at 55-56, 59-67, 72, 75-76. Finally, for more on process abuses by the Democratic majority that controlled Congress from 2007 to 2010, see Committee on Rules-Republicans, <http://rules-republicans.house.gov/ShortTopics/Default.aspx?id=1> (last visited Nov. 12, 2010) (website of the minority members of the House Rules Committee that details the majority’s procedural abuses).

260. Owens & Wrighton, *supra* note 225, at 11.

261. U.S. CONST. art. I, § 7, cl. 1 (“All Bills for raising Revenue shall originate in the House of Representatives.”).

262. *United States v. Munoz-Flores*, 495 U.S. 385, 392 (1990).

263. *Id.* at 401.

in an excellent position to defend its origination power,”<sup>264</sup> and that “there is every reason to anticipate that Representatives ... will jealously guard [this] power.”<sup>265</sup> While acknowledging that “the House has an interest in upholding the entire Constitution, not just those provisions that protect its institutional prerogatives,” Justice Stevens added that “even if the House should mistake its constitutional interest generally, it is unlikely to mistake its more particular interest in being powerful.”<sup>266</sup>

Justice Stevens’s concurrence was carefully limited to only the Origination Clause and did not address other lawmaking requirements.<sup>267</sup> However, some opponents of judicial review of the legislative process argue that the assumption that institutional rivalry provides Congress sufficient incentives to police itself applies to most other constitutional and nonconstitutional lawmaking rules as well.<sup>268</sup> Jesse Choper, for example, argues that lawmaking rules “ordinarily concern protections for one house of Congress,” and that the Senate and House have sufficient incentives to protect their interests against each other.<sup>269</sup>

Part III.E argues, however, that institutional interests and institutional rivalry are not an effective mechanism to ensure rule following in the legislative process. First, while the Origination Clause and bicameralism requirement indeed implicate the House’s prerogatives vis-à-vis the Senate, many other rules have no bearing on the division of powers between the two chambers. The violation of rules such as voting and quorum and the three-reading require-

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264. *Id.* at 403 (Stevens, J., concurring).

265. *Id.* at 404.

266. *Id.* at 404 n.2 (internal quotations omitted). Justice Stevens agreed with the Court that “the possibility of legislative enforcement does not supply a prudential, nonconstitutional justification for abstaining from constitutional interpretation,” but argued that “this possibility is relevant to the substantive task of interpreting § 7 itself.” *Id.*

267. *Id.* at 404, 406. Interestingly, in many of his other decisions Justice Stevens has been “the most ardent proponent of a ‘due process of lawmaking’ philosophy” in the Court. Dan T. Coenen, *The Rehnquist Court, Structural Due Process, and Semisubstantive Constitutional Review*, 75 S. CAL. L. REV. 1281, 1286, 1385 (2002); see, e.g., *Bowsher v. Synar*, 478 U.S. 714, 757 n.23 (1986) (Stevens, J., concurring); *Fullilove v. Klutznick*, 448 U.S. 448, 548-554 & nn.24 & 26-28 (1980) (Stevens, J., dissenting); *Ill. Bd. of Elections v. Socialist Workers Party*, 440 U.S. 173, 189-90 (1979) (Stevens, J., concurring); *Del. Tribal Bus. Comm. v. Weeks*, 430 U.S. 73, 97-98 (1977) (Stevens, J., dissenting); Goldfeld, *supra* note 196, at 405-08.

268. Choper, *supra* note 7, at 1505-07.

269. *Id.*

ment in one chamber does not impact the prerogatives and institutional interests of the other chamber. Hence institutional rivalry cannot ensure compliance with these rules.

The major problem with the institutional rivalry argument, however, is that it too often treats legislative chambers as an “it” rather than a “they.”<sup>270</sup> The argument assumes that the Senate and the House each act as a “personified rational actor,” rather than a large multi-member body, whose members’ interests “often, and perhaps systematically,” diverge from their chamber’s institutional interests.<sup>271</sup>

To be sure, institutional concerns sometimes do converge with individual legislators’ interests.<sup>272</sup> A motivation that may potentially reinforce legislators’ interest in protecting their chamber’s institutional prerogatives is their interest in personal power and prestige. This Article does not dispute that personal power is an important goal for legislators;<sup>273</sup> nor does it deny that legislators’ interest in greater personal influence and prestige may theoretically translate into an interest in belonging to a stronger, more influential legislative chamber.

The problem, however, is that although all of the 435 Representatives and 100 Senators have some stake in their chamber’s institutional standing, they also have more direct and powerful personal interests that are often in conflict with their institutional

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270. See generally Kenneth A. Shepsle, *Congress is a “They,” Not an “It”: Legislative Intent as Oxymoron*, 12 INT’L REV. L. ECON. 239 (1992).

271. Eric A. Posner & Adrian Vermeule, *Constitutional Showdowns*, 156 U. PA. L. REV. 991, 1034-35 (2008) (making this claim in a slightly different context and noting that “this is a standard assumption in constitutional theory”). To be fair, Justice Stevens did relate his argument to legislators’ personal interests, noting that taxes “rarely go unnoticed at the ballot box,” and therefore assuming that “Representatives subject to reelection every two years will jealously guard their power over revenue-raising measures.” *Munoz-Flores*, 495 U.S. at 404. However, this Section argues that reelection motivations—and other legislators’ motivations—are more likely to conflict with institutional interests than reinforce them. Moreover, even if Justice Stevens is correct that taxes are the exception to voters’ general ignorance and indifference, his argument applies only to the Origination Clause.

272. See Devins, *supra* note 159, at 398, 404, 413-14 (arguing that the Watergate era was a rare exception in which “members of Congress gained personal advantage by standing up for legislative prerogatives,” because “[v]oters wanted Congress to check a too powerful President—to prevent future Watergates and Viet Nams,” but that today “members of Congress see little personal gain” in defending Congress’s institutional turf).

273. See, e.g., Shaviro, *supra* note 134, at 82.



interests.<sup>274</sup> Motivations, such as pursuing policy and reelection, often conflict with institutional interests.<sup>275</sup> Because it is unlikely that voters reward legislators for aggressively protecting their chamber's power vis-à-vis the other chamber,<sup>276</sup> legislators are unlikely to block the passage of a law that advances their, or their constituents', interests in order to defend their chamber's prerogatives.<sup>277</sup>

Furthermore, legislators have powerful incentives to prefer party loyalty over institutional loyalty because parties significantly impact legislators' ability to pursue their personal goals. Due to party leaders' control over the legislative agenda, parties are particularly instrumental to lawmakers' ability to pursue their policy goals, and there is evidence that party leaders do in fact schedule members' bills to reward party loyalty.<sup>278</sup> By providing campaign funds and other essential campaign resources, parties are also important for legislators' reelection, and party leaders use their influence over these resources as well to ensure party loyalty.<sup>279</sup> Furthermore, "in the highly polarized two-party system currently dominating national politics, a member's political success depends

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274. Devins, *supra* note 159, at 400; Daryl J. Levinson, *Empire-Building Government in Constitutional Law*, 118 HARV. L. REV. 915, 926-32 (2005); cf. Donald L. Davison et al., *The Behavioural Consequences of Institutional Rules: Republicans in the US House*, 11 J. LEGIS. STUD. 38, 43-44 (2005) (asking legislators about their goals and finding that the vast majority of legislators favor other goals, such as solving national policy problems or servicing their constituents, over "restoring public confidence in Congress").

275. Davison et al., *supra* note 274, at 43-44.

276. If voters today are unlikely to reward lawmakers for defending Congress's prerogatives vis-à-vis the President, Devins, *supra* note 159, at 414, it is even less likely that voters care about the separation of powers between the two chambers.

277. Cf. *id.* at 400 (noting that "members of Congress regularly tradeoff their interest in Congress as an institution for their personal interests—most notably, reelection and advancing their (and their constituents') policy agenda").

278. See Hasecke & Mycoff, *supra* note 202, at 610, 615; Evans, *Middle Doesn't Rule*, *supra* note 135, at 11-12.

279. See Kramer, *supra* note 216, at 281-82; Evans, *Middle Doesn't Rule*, *supra* note 135, at 11-12. But cf. Richard Briffault, *The Political Parties and Campaign Finance Reform*, 100 COLUM. L. REV. 620, 627-33, 644-47 (2000) (discussing parties' growing role in funding campaigns and noting that parties could seek to leverage their funds to induce a legislator to take certain positions on pending legislative issues, but arguing that "in practice, those who argue that party money does not present a serious danger of undue party influence over candidates may be right").

more on the fortunes of her particular party than on the stature of Congress.”<sup>280</sup>

Even from the perspective of their personal power and prestige goals, lawmakers have a strong motivation to prefer party loyalty over institutional loyalty. Legislators’ personal power goals are more directly, and more often, translated into a personal interest in committee assignments and leadership positions in their chamber than into concerns about their chamber’s power.<sup>281</sup> In the modern Congress, assignments to committees and to committee leadership positions are very much controlled by party leaders, who use party loyalty as a major assignment criterion.<sup>282</sup> Finally, as Part III.D established and as the DRA case illustrates, even chamber leaders have strong incentives to prefer party loyalty over protecting their chamber’s prerogatives. All this leads to the conclusion that “party loyalty [often] trumps institutional concerns.”<sup>283</sup>

Indeed, in addition to individual legislators’ interests, parties and partisan interests also complicate and undermine the institutional rivalry argument. As Daryl Levinson and Richard Pildes argue—in a slightly different context, “[i]ntraparty cooperation ... smoothes over branch boundaries.”<sup>284</sup> This, in turn, suppresses “the political dynamics that were supposed to provide each branch with a ‘will of its own,’” and undermines the Madisonian assumption that departmental “[a]mbition [will] counteract ambition.”<sup>285</sup> The exceptionally

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280. William P. Marshall, *Eleven Reasons Why Presidential Power Inevitably Expands and Why It Matters*, 88 B.U. L. REV. 505, 518 (2008).

281. Levinson, *supra* note 274, at 927-29. On legislators’ strong interest in committee assignments, see Davison et al., *supra* note 274, at 42 (presenting results of a survey finding that members from both parties see their specific committee and subcommittee assignments as important instruments that enable them to achieve their personal goals, and wish to be either the chair or ranking member on a committee in order to advance their goals); Elizabeth Garrett, *Preferences, Laws, and Default Rules*, 122 HARV. L. REV. 2104, 2118-19 (2009) (book review) (“Members of Congress vie for assignments to committees with jurisdiction over policy in which they take a strong interest, either because of personal preferences, constituent interests, the potential for influence within the legislature, or some combination.”).

282. Cox, *supra* note 36, at 181; Hasecke & Mycoff, *supra* note 202, at 610; Evans, *Middle Doesn’t Rule*, *supra* note 135, at 11-12.

283. Marshall, *supra* note 280, at 518.

284. Daryl J. Levinson & Richard H. Pildes, *Separation of Parties, Not Powers*, 119 HARV. L. REV. 2311, 2329 (2006).

285. *Id.* at 2313 (internal quotation marks omitted); see also Kramer, *supra* note 216, at 268-87 (similarly arguing that party cooperation transcends federal-state institutional boundaries, and that this undermines the traditional “political safeguards of federalism”

strong, cohesive, and polarized parties of the modern Congress make the likelihood of cross-chamber, intra-party cooperation that undermines chamber rivalry even more likely, at least when both chambers are controlled by the same party.<sup>286</sup> Furthermore, even under a divided government, the sharp partisan polarization in Congress makes intra-chamber bipartisan cooperation, which is often necessary to assert the chamber's prerogatives vis-à-vis other government branches, much less likely.<sup>287</sup>

Admittedly, not everyone agrees with Levinson and Pildes's strong claim that the current American system of separation of powers is more properly characterized as "separation of parties, not powers,"<sup>288</sup> or with Neal Devins's even bolder conclusion that "[f]or those who embrace a constitutional design in which ... 'ambition must be made to counteract ambition,' today's system of checks and balances is an abject failure."<sup>289</sup> However, there is strong support in the congressional scholarship at least to the more modest claim that legislators' willingness to protect their institutional prerogatives is relatively weak in the modern Congress,<sup>290</sup> and that institutional interests "usually play second fiddle to more parochial goals, that is,

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assumption); Fabrice E. Lehoucq, *Can Parties Police Themselves? Electoral Governance and Democratization*, 23 INT'L POL. SCI. REV. 29, 29 (2002) (similarly arguing, in the electoral governance context, "that the classical theory" about separating powers between the executive and the legislature "breaks down when the same party controls the executive and the legislature").

286. Levinson & Pildes, *supra* note 284, at 2315-16, 2332-38.

287. Devins, *supra* note 159, at 406-15.

288. Levinson & Pildes, *supra* note 284, at 2311, 2315-16, 2329.

289. Devins, *supra* note 159, at 415; see Posner & Vermeule, *supra* note 271, at 1035-36 (agreeing that "the separation of powers system functions differently in times of unified or divided government," but arguing that "it goes too far to claim that the American constitutional system displays 'separation of parties, not powers'; rather, it displays both separation of powers and parties in a complicated interaction"); Richard A. Epstein, *Why Parties and Powers Both Matter: A Separationist Response to Levinson and Pildes*, 119 HARV. L. REV. F. 210, 210, 213 (2006), <http://www.harvardlawreview.org/media/pdf/epstein.pdf> (conceding that "[i]t is futile to argue that political parties do not influence relations between the legislative and executive branches" and that "[t]he greater the political cohesion, the less critical separation of powers becomes," but arguing that "Professors Levinson and Pildes have too much faith that party unity renders structural obstacles unimportant").

290. See MANN & ORNSTEIN, *supra* note 80, at xi-xii, 146-49, 215; Devins, *supra* note 159, at 408-15; Louis Fisher, *Congressional Abdication: War and Spending Powers*, 43 ST. LOUIS U. L.J. 931, 931-32 (1999); Levinson, *supra* note 274, at 926-32, 951-59; Marshall, *supra* note 280, at 518-19, 521; Patricia Wald & Neil Kinkopf, *Putting Separation of Powers into Practice: Reflections on Senator Schumer's Essay*, 1 HARV. L. & POL'Y REV. 41, 43-52 (2007).

to partisanship or the narrow interests of particular members and constituencies.”<sup>291</sup>

In short, whenever the passage of a bill serves legislators’ individual or party interests, it is unlikely that institutional interests and institutional rivalry are sufficiently strong to ensure rule following in the congressional legislative process. Furthermore, as Part III.F argues, some institutional rivalry—namely, of Congress vis-à-vis the President—may in fact create an incentive to violate lawmaking rules.

#### *F. Presidential Veto Power*

While this Article focuses on Congress, the President also has the potential power to enforce the law of congressional lawmaking. At least as far as the constitutional rules are concerned, the President arguably has a duty to refuse to sign bills that were enacted in violation of these rules.<sup>292</sup> Hence, Part III.F examines whether fear of a presidential veto might serve as a potential motivation for legislators to avoid procedural rule violations. It argues that the presidential veto power is unlikely to induce congressional rule following, and may in fact have the opposite effect in certain circumstances.

Presidential enforcement of lawmaking rules rests on a single, crude enforcement mechanism: the President’s power to veto the bill. This enforcement mechanism is contingent upon the President’s ability to detect the rule violation before signing the bill and on the President’s willingness to veto an entire bill merely for procedural violations in its enactment process. Both of these conditions for presidential enforcement can be easily manipulated by Congress.

First, by enacting massive omnibus bills through expedited procedures, legislators can significantly reduce the President’s capacity to detect violations in the legislative process. This possibility is

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291. Evans, *Politics of Congressional Reform*, *supra* note 127, at 494, 511, 516.

292. See *Field v. Clark*, 143 U.S. 649, 669 (1892). *But cf.* Cass & Strauss, *supra* note 81, at 21-25 (arguing, in a different context, that the President is not obliged to veto legislation that has one or two provisions he believes to be unconstitutional, and that the President falls short of his obligation to the Constitution only when he “signs a law that he believes, in its core provisions, so fundamentally violates the Constitution that he cannot with a straight face declare its constitutional merits outweigh its flaws”).

clearly illustrated by the Farm Bill example in which the President failed to notice that the bill presented to him was missing an entire 34-page section.<sup>293</sup>

Second, as the DRA example illustrates, even when the President is well aware of the procedural rule violation, the President may lack the will to use her veto power to ensure compliance with lawmaking rules.<sup>294</sup> As long as the bill's content serves the President's policy and political interests, it is unlikely that the President will choose to veto a bill merely for procedural violations.<sup>295</sup> Scholarship about presidential vetoes suggests that while a variety of factors influence Presidents' veto decisions, one of the most important is the extent to which the President finds the legislation's content objectionable.<sup>296</sup> As one empirical study found, "[t]o a substantial degree, presidential vetoes are a direct and predictable consequence of congressional behavior and of the kind of legislation Congress passes."<sup>297</sup> Thus, by making the content of legislation more attractive to the President, legislators can undercut the President's will to enforce procedural lawmaking rules.<sup>298</sup>

Furthermore, even if legislators fail to undermine the President's capacity or will to enforce lawmaking rules, the impact of presidential enforcement is also limited by the congressional power to override the President's veto by a supermajority vote.<sup>299</sup>

It appears, therefore, that the presidential veto power is not likely to create a significant incentive for legislators to avoid procedural rule violations. Instead, the existence of the presidential veto power may motivate legislators to create legislative practices that undermine the President's ability to veto their preferred legislation, whether on content or procedural grounds. These practices, in turn, often entail deviating from the rules governing the legislative

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293. *See supra* Part II.B.

294. *See supra* Part II.C.

295. Gersen & Posner, *supra* note 15, at 579.

296. John B. Gilmour, *Institutional and Individual Influences on the President's Veto*, 64 J. POL. 198, 202, 212, 216 (2002).

297. *Id.* at 212.

298. Gersen & Posner, *supra* note 15, at 579 ("[E]ven if the President were (somehow) fifty percent more likely to veto legislation that failed to satisfy relevant [lawmaking] rules, Congress could simply adjust the content of legislation to make it more attractive to the President.").

299. *Id.*

process.<sup>300</sup> A prime example is lawmakers' "propensity" for inserting nongermane, substantive riders into omnibus appropriations bills,<sup>301</sup> despite the long-standing rules that prohibit attaching such provisions to appropriations bills.<sup>302</sup> Because a presidential veto of omnibus appropriation bills poses "the specter of government shutdown," and is therefore much less likely, legislators have long been using nongermane riders as a means to circumvent the President's power to veto objectionable legislation.<sup>303</sup> Hence, the desire to avoid a presidential veto may actually create an incentive to violate lawmaking rules.

### *G. Ethical and Noninstrumental Motivations*

Parts III.A-F focused mainly on instrumental or goal-seeking motivations; however, some scholars argue that legislators' "willingness to play by the rules also has an ethical underpinning" because legislators "are constrained by a belief system as well as by a purely rational assessment of political cost."<sup>304</sup> Others have suggested that internalization is an additional noninstrumental force that may potentially influence legislators' compliance with rules.<sup>305</sup> The argument is that, over the course of time, some legal constraints become so internalized that "the necessity of enforcement may, except to guard against outliers, disappear."<sup>306</sup> A related noninstrumental force mentioned in the scholarship is canonization. A certain text becomes canonical when the relevant community—in this case, the legislature—has "a certain positive and reverential

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300. Cf. Cass & Strauss, *supra* note 81, at 22 ("The practical political reality is that Congress, ignoring common precepts like 'single subject' rules, frequently deploys statutory complexity as a weapon against the veto.").

301. Diane-Michele Krasnow, *The Imbalance of Power and the Presidential Veto: A Case for the Item Veto*, 14 HARV. J.L. & PUB. POL'Y 583, 584 (1991).

302. Sandra Beth Zellmer, *Sacrificing Legislative Integrity at the Altar of Appropriations Riders: A Constitutional Crisis*, 21 HARV. ENVTL. L. REV. 457, 505-06 (1997).

303. Krasnow, *supra* note 301, at 584, 597, 606, 612; Zellmer, *supra* note 302, at 527; see also J. Gregory Sidak & Thomas A. Smith, *Four Faces of the Item Veto: A Reply to Tribe and Kurland*, 84 NW. U. L. REV. 437, 449 (1990) ("Legislators often incorporate nongermane bills into larger legislative proposals, knowing that the impracticality of vetoing the entire bill may ensure that nongermane provisions become law.").

304. Norton, *supra* note 215, at 29.

305. Schauer, *supra* note 45, at 475.

306. *Id.* at 475 & n.22.

attitude toward that text such that it is largely unthinkable to imagine its modification or violation.”<sup>307</sup>

This Article does not deny that ethical and noninstrumental motivations also influence legislators, and that such considerations may induce rule following in the legislative process. In fact, this view finds support in social psychology research on rule following that argues that people’s compliance with rules is not merely a function of sanctions and incentives.<sup>308</sup> This research suggests that noninstrumental factors, rooted in social relationships and ethical judgments, may also induce people to become self-regulatory and to take responsibility for rule following onto themselves.<sup>309</sup> The question, however, is whether these ethical and noninstrumental forces are powerful enough to override legislators’ competing motivations to violate lawmaking rules.

One problem with noninstrumental forces such as canonization and internalization is that it is unlikely that most lawmaking rules reach a degree of internalization and reverence that secures them from violation temptations. As for canonization, the only lawmaking rules that may arguably achieve such a sacred status are the constitutional bicameralism and presentment requirements.<sup>310</sup> Internalization also probably occurs only with the most time-honored rules, such as the constitutional procedural rules or the filibuster in the Senate.<sup>311</sup>

In England, for example, arguments about legislators internalizing the parliamentary rules are based on the fact that parliamentary procedures have been a well-entrenched feature of the British political system for many centuries.<sup>312</sup> For example, England’s three-reading rule has been considered “an old-established practice” since the sixteenth century.<sup>313</sup> Furthermore, a distinct feature of the

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307. *Id.* at 473.

308. For a good overview of this scholarship, see TYLER, *supra* note 127, at 269-94.

309. *Id.* at 270-71.

310. *Cf.* Schauer, *supra* note 45, at 473 (suggesting that in the United States, the Constitution, or at least the First Amendment, might have such a canonized status).

311. *Cf.* Bach, *supra* note 3, at 755 (“Senators may be willing to ignore, waive, or violate most of their rules, but they give up their cherished right to unlimited debate only in return for certain knowledge of what they are gaining in return. Some rules are more important than others, and the debate rules are most important of all.”).

312. Norton, *supra* note 215, at 18-21.

313. *Id.* at 19.

British parliamentary system is that legislators “are socialised into existing procedures. New entrants to a legislature, as various studies have shown, undertake a period of apprenticeship and learning, a process inculcating support for institutional rules.”<sup>314</sup> And yet, there is evidence that even in the “mother of parliaments” the rules are not so internalized as to make them invulnerable to partisan, ideological, or personal temptations.<sup>315</sup>

If this is the case in the British Parliament, it is hard to believe that the situation is much better in the younger, sharply polarized, and partisan U.S. Congress. The House, in particular, is currently characterized, as we have seen, by “an atmosphere in which the legislative ends could justify any procedural means.”<sup>316</sup> In the Senate as well, when Senators have to decide whether a lawmaking rule has been violated, “most Senators appear to base their votes more on policy and political considerations than on a concern for procedural consistency and regularity.”<sup>317</sup>

Even the filibuster procedure, which is perhaps the most venerated and internalized of all Senate rules,<sup>318</sup> is far from immune to instrumental considerations.<sup>319</sup> One study has found, for example, that “the votes of Senators on proposals to alter Senate Rule XXII [the provision specifying cloture requirements for ending filibusters] are driven by short-term policy considerations, rather than by

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314. *Id.* at 21, 27.

315. See Donald D. Searing, *Rules of the Game in Britain: Can the Politicians Be Trusted?*, 76 AM. POL. SCI. REV. 239, 240, 255 (1982) (examining the views of more than six hundred members of Parliament and candidates toward the most fundamental democratic “rules of the game,” and finding that “politicians’ attitudes towards the rules of the game ... are based on political values and partisan advantage.... In sum, rules of the game are pushed and pulled by political forces that shape politicians’ responses to the rules while having the potential to undermine the politicians’ commitments”). For recent examples of grave violations of parliamentary rules in the British Parliament, see, for example, *Lords Vote To Suspend Two Peers*, BBC NEWS, May 21, 2009, [http://news.bbc.co.uk/2/hi/uk\\_news/politics/8060003.stm](http://news.bbc.co.uk/2/hi/uk_news/politics/8060003.stm) (reporting a case in which House of Lords members were found to be willing to change laws in exchange for cash); cf. John F. Burns, *Beneath a Scandal, Deeper Furies*, N.Y. TIMES, May 24, 2009, at WK1 (arguing that the recent expense abuses in the House of Commons are only the tip of the iceberg in the contemporary British Parliament and describing other problems, including in the legislative process).

316. MANN & ORNSTEIN, *supra* note 80, at 7.

317. Bach, *supra* note 3, at 741.

318. *Id.* at 755.

319. See Evans, *Politics of Congressional Reform*, *supra* note 127, at 510 (arguing that Senators’ views toward changing the cloture rule to end filibusters are mostly driven by partisan imperatives and, to a lesser extent, by individual members’ power goals).



broader principles about the deliberative benefits of extended debate.”<sup>320</sup>

Moreover, as the DRA example from Part II suggests, even the constitutional bicameralism requirement is vulnerable when the motivation for violation is sufficiently strong.<sup>321</sup> Congress’s repeated efforts to create lawmaking procedures that circumvent the constitutional bicameralism and presentment requirements, such as the legislative veto and the line-item veto, also cast doubt as to the extent that these rules are internalized and canonized in Congress.<sup>322</sup> Undeniably, there is a difference between a direct, flagrant violation of the rules, such as in the DRA example, and a formal statutory attempt to modify the constitutional structure of the legislative process, such as in the legislative veto and the line-item veto cases.<sup>323</sup> However, both types of cases illustrate that even the constitutional lawmaking rules have not achieved a canonized status in Congress “such that it is largely unthinkable to imagine [their] modification or violation.”<sup>324</sup>

Admittedly, adherents to a “functional approach” to separation of powers may disagree with the Court’s conclusion that the legislative veto and the line-item veto violated the Constitution.<sup>325</sup> This Section’s argument, however, does not depend on one’s position on whether *Chadha* and *Clinton v. City of New York* were correctly decided,<sup>326</sup> or on whether Congress may adopt different constitutional interpretations of Article I, Section 7 than the Court.<sup>327</sup> As

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320. Evans, *Legislative Structure*, *supra* note 207, at 627.

321. See *supra* Parts II.C, III.D.

322. For an overview of these and other cases in which Congress tried to circumvent the constitutional requirements for lawmaking, see Bradford R. Clark, *Separation of Powers as a Safeguard of Federalism*, 79 TEX. L. REV. 1321, 1379-91 (2001).

323. I thank Richard Briffault for this point.

324. Schauer, *supra* note 45, at 473, 470 & n.9.

325. See, e.g., William N. Eskridge, Jr. & John Ferejohn, *Making the Deal Stick: Enforcing the Original Constitutional Structure of Lawmaking in the Modern Regulatory State*, 8 J.L. ECON. & ORG. 165 (1992); Peter L. Strauss, *Was There a Baby in the Bathwater? A Comment on the Supreme Court’s Legislative Veto Decision*, 1983 DUKE L.J. 789; see also Peter L. Strauss, *Formal and Functional Approaches to Separation-of-Powers Questions—A Foolish Inconsistency?*, 72 CORNELL L. REV. 488 (1987).

326. *Clinton v. City of New York*, 524 U.S. 417 (1998); *INS v. Chadha*, 462 U.S. 919 (1983).

327. See Tushnet, *Interpretations in Legislatures*, *supra* note 11, at 356-60 (advocating a non-court-based evaluative standard to examine Congress’s constitutional performance). For recent reviews of the different academic views on whether Congress may or even must adopt its own interpretation of the Constitution, see generally Michael C. Dorf, *Fallback Law*, 107

case studies about the legislative process of the Line Item Veto Act of 1996 and the enactment process of a pre-*Chadha* legislative veto provision suggest, the real problem in these cases was not that Congress asserted its right to form an independent, informed constitutional judgment.<sup>328</sup> On the contrary, scholars' main criticism in both cases was that Congress failed to do so.<sup>329</sup>

More importantly for present purposes, the case studies of the legislative processes in both cases reveal that although Congress was well aware that the legislative proposal may violate Article I, Section 7, constitutional concerns were apparently not a decisive factor in Congress's decision making.<sup>330</sup> Hence, regardless of one's view about the legislative veto and the line-item veto, the legislative process in these cases suggests, at the very least, that constitutional considerations do not necessarily trump policy and partisan considerations in Congress.<sup>331</sup>

Although not focusing on procedural rules, Mitchell Pickerill's study is also illustrative.<sup>332</sup> Based on case studies and on interviews

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COLUM. L. REV. 303, 342-52 (2007); Trevor W. Morrison, *Suspension and the Extrajudicial Constitution*, 107 COLUM. L. REV. 1533, 1579 & n.227, 1580-82 (2007).

328. See Elizabeth Garrett, *The Story of Clinton v. City of New York: Congress Can Take Care of Itself*, in ADMINISTRATIVE LAW STORIES 47, 57-83 (Peter L. Strauss ed., 2006) [hereinafter Garrett, *Story*] (discussing the legislative process of the Line Item Veto Act of 1996); Abner J. Mikva, *How Well Does Congress Support and Defend the Constitution?*, 61 N.C. L. REV. 587, 593-600 (1983) (discussing the enactment process of a legislative veto provision in the period between the lower court's *Chadha* decision and the Supreme Court's *Chadha* decision).

329. Garrett, *Story*, *supra* note 328, at 48-49, 91-98; Mikva, *supra* note 328, at 597-600; see also Neal Devins & Michael A. Fitts, *The Triumph of Timing: Raines v. Byrd and the Modern Supreme Court's Attempt to Control Constitutional Confrontations*, 86 GEO. L.J. 351, 351, 355-61 (1997); Neal Devins, *Congress as Culprit: How Lawmakers Spurred on the Court's Anti-Congress Crusade*, 51 DUKE L.J. 435, 441-45 (2001).

330. Garrett, *Story*, *supra* note 328, at 98 ("[T]he debate [on the Line Item Veto Act] does not demonstrate that constitutional concerns are the deciding factor in any lawmaker's vote, nor do constitutional arguments appear to change the decision that members would [make] on policy or partisan grounds."); Mikva, *supra* note 328, at 600 ("[T]he constitutionality of the provision was only one factor that was considered in the Senate's vote on the amendment and ... it may not have been the most important.").

331. *Supra* note 330; cf. Sinclair, *Can Congress Be Trusted?*, *supra* note 11, at 296 (defending the legislative veto as a congressional attempt "to come up with a politically and substantively sensible policy solution to a complex problem," but seeming to concede that this example illustrates that constitutionality is only one consideration for members of Congress and that other competing considerations sometimes prevail).

332. J. MITCHELL PICKERILL, CONSTITUTIONAL DELIBERATION IN CONGRESS 8-9, 133-45 (2004).

with legislators, congressional staff, and others involved in the legislative process, Pickerill concludes that “[p]olitics and policy dominate congressional decision making, and members of Congress do not systematically consider the constitutional authority for their actions.”<sup>333</sup> As one Senator ranked the considerations in the congressional legislative process, “[p]olicy issues first, how [to] get a consensus to pass the bill, six other things, then constitutionality.”<sup>334</sup>

In sum, ethical and noninstrumental motivations to follow rules surely play some part in the legislative process, especially with regard to constitutional rules. However, it is unlikely that such motivations will prevail whenever strong incentives to violate rules exist.

#### *H. Summary*

The following table briefly summarizes the insights gained from analysis in Part III of the political safeguards that potentially impact congressional compliance with the rules that constrain the legislative process.

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333. *Id.* at 144.

334. *Id.* at 134.

<b>Safeguards</b>	<b>Projected Impact on Procedural Rule Following</b>
A. Electoral Controls	Very weak impact.
B. Interest Groups	Good-government groups are unlikely to have an impact; rent-seeking interest groups create incentive to violate rules in order to insert special-interest provisions into legislation.
C. Policy Motivations	Very strong impact. Creates strong incentive to violate rules that hinder passage of legislators' policy.
D. Party and Leaders	Very strong impact. Creates strong incentive to violate rules that impede the majority party's policy and political interests (as well as strong incentive to enforce rules that serve majority party policy and political interests).
E. Institutional Interests	Weak impact on procedural rule following (may be slightly stronger when divided government). Applies only to rules that implicate institutional rivalry.
F. Presidential Veto	Unlikely to induce procedural rule following. Creates incentive to violate rules in order to circumvent the President's veto power.
G. Ethical and Noninstrumental Motivations	Weak to medium impact. Creates some incentive to follow rules, particularly constitutional rules (and perhaps other internalized, time-honored rules, such as filibuster).

As the table illustrates, the most influential forces on Congress's compliance with the rules that regulate lawmaking are legislators' policy motivations and the majority party and its leaders. Although these forces' effects do not completely overlap, the combination of the two creates a very strong incentive to violate lawmaking rules that impede the majority party's ability to pass its policy agenda. Electoral controls and good-government groups are expected to have little to no impact on procedural rule following, while special interest groups create an incentive to violate the rules. Institutional interests and institutional rivalry are also expected to have

relatively little influence on procedural rule following. Furthermore, institutional interests influence only those rules that implicate institutional rivalry, such as bicameralism and the Origination Clause. The threat of a presidential veto is also expected to have a limited impact and may in fact motivate rule violations. The only real safeguard that may induce rule following is legislators' ethical and noninstrumental motivations. Such motivations are expected to have some positive impact on rule following, particularly on constitutional rules, but it is doubtful that they can counterbalance strong policy and partisan interests.

Hence, the overall impact of the "political safeguards" is in fact to induce violations of the procedural rules that constrain lawmaking. Nevertheless, this Article does not argue that lawmaking rules will never be followed in Congress. Rather, as Part IV briefly explains, Congress's enforcement of these rules depends both on the rule in question and on the circumstances.

#### IV. WHEN WILL LAWMAKERS BE LAWBREAKERS?

Part IV draws on the insights from the previous Parts to offer some brief tentative observations about the types of lawmaking rules that are more susceptible to violations, the circumstances in which violations are more likely, and the incidence of violations.

##### *A. Which Rules Are More Susceptible to Violation?*

The likelihood of rule violations depends, to a large extent, on the rule in question. This Article focuses on rules that impose procedural restrictions on the legislative process.<sup>335</sup> Accordingly, its analysis of the political safeguards that impact congressional rule following is tailored to this category of lawmaking rules. It is important to recognize, however, that the same safeguards may operate differently with regard to other types of congressional rules.

For example, legislators' policy motivations and the majority party's interests are chief forces that induce lawmakers to be lawbreakers of the lawmaking rules discussed by this Article.<sup>336</sup>

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335. See *supra* Part I.A.

336. See *supra* Parts II, III.C, III.D, III.H.

However, these same powers are likely to lead to relatively strong enforcement of other types of rules, such as “fast track” rules, which are statutory rules that are intentionally designed to expedite the legislative process and to curtail the minority party’s ability to obstruct the passage of legislation.<sup>337</sup> The same is true for special rules that are intentionally written by the House Rules Committee to facilitate the majority party’s ability to pass legislation and to protect party interests.<sup>338</sup>

Even within the subgroup of lawmaking rules discussed in this Article, some rules are probably more vulnerable to violation than others. To be sure, all the rules in this group hinder the majority party’s ability to pass its policy agenda and therefore are susceptible to violation, but the extent to which they hamper the majority party’s agenda varies from rule to rule. The above analysis suggests that this difference should have an important impact on the likelihood of violation, since the dominant forces that motivate violations of these rules are legislators’ policy motivations and the majority party’s interests.<sup>339</sup>

The degree to which the rule obstructs the majority party’s ability to pursue its agenda is not the sole determinant of the likelihood of violations, however. For example, as the discussion about non-instrumental, rule-following motivations suggests, some rules, such as constitutional rules and the Senate rules for ending debate, are more internalized and revered than others and may therefore be less vulnerable.<sup>340</sup> The discussion of institutional interests also suggests that rules that implicate one chamber’s prerogatives vis-à-vis the other chamber, bicameralism and the Origination Clause, may be slightly less susceptible to violation than rules that do not involve inter-chamber rivalry—including three-reading, quorum and voting, and amendment rules.<sup>341</sup> In short, the vulnerability of a certain rule to violation depends on the specific way in which each

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337. On fast track rules, see Bruhl, *Statutes To Set Legislative Rules*, *supra* note 18, at 345-48, 358-60; Garrett, *Purposes of Framework Legislation*, *supra* note 18, at 727-28, 748.

338. Perhaps the most important example is restrictive rules that shield the bill from floor amendments. On restrictive rules, see, for example, Owens & Wrighton, *supra* note 225, at 1-5.

339. See *supra* Parts II, III.C, III.D, III.H.

340. See *supra* Part III.G.

341. See *supra* Part III.E.

of the safeguards relates to that rule, and on the overall combined effect of these safeguards with regard to that particular rule.<sup>342</sup>

This conclusion fits nicely with a larger point in recent political science research about institutional change in Congress: congressional behavior is not determined by a single motivating force, such as reelection motivations or party interests, but rather, by a combination of potentially conflicting forces, whose overall impact varies across areas of congressional activity.<sup>343</sup> This point does not undercut this Article's general claim that the overall impact of the political safeguards is a motivation to violate rules that set procedural restrictions on the legislative process. Rather, it suggests that although much of this Article's analysis and many of its claims can contribute to discussions about other types of rules and other areas of congressional activity, each area requires individualized analysis that will examine how the safeguards discussed in this Article operate in that specific context.

### *B. When Are Violations More Likely?*

Some of the circumstances that impact the likelihood of violations are case-specific, but this Article's analysis does provide some insights as to the type of bills that are more likely to produce rule violations, the type of violations that are more likely, and more general circumstances that impact the likelihood of violations.

Perhaps the most influential circumstances are the extent to which the bill's passage is a priority for the majority party and its leaders, and the strength of the opposition that the majority party faces in passing the bill. As the discussion of the DRA and Medicare Bill examples illustrated, when the bill is particularly important for the majority party, and its passage would be particularly difficult or impossible without breaking the rules, the probability of violations is, of course, much higher.<sup>344</sup>

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342. It is possible, for example, that the filibuster procedure is relatively resilient despite its clear negative impact on the majority party's ability to pursue its policy agenda due to a rare combination of other safeguards, such as the fact that it is relatively internalized and revered; that it is the most important rule for the minority party, which has more power in the Senate than in the House; and—perhaps most importantly—that more than any other rule it serves each Senator's individual goal of personal power and influence.

343. SCHICKLER, *supra* note 127, at 4-5; Evans, *Politics*, *supra* note 127, at 493-94, 515.

344. See *supra* Part III.D.

Furthermore, the likelihood of violations also depends on the means or types of violation. Some violations can be easily carried out by an individual legislator, committee chair, or chamber leader without the need for other legislators' collaboration;<sup>345</sup> whereas other violations may require the cooperation, or at least acquiescence, of a large group of legislators and are therefore harder to accomplish.<sup>346</sup> Similarly, violations that occur in the final stages of the legislative process, and especially in the enrollment stage, are likely to be more successful simply because they occur after the stage that most enforcement—points of order or refusal to pass the bill—can take place.

Some features of the legislative process can also influence the likelihood of violations. For example, as the Farm Bill illustrated, omnibus legislation makes violations, deliberate or unintentional, more likely.<sup>347</sup> Generally, as Congress's use of unorthodox legislative practices such as omnibus legislation increases, its capacity to avoid procedural violations diminishes.<sup>348</sup> While the normative debate about the advantages and disadvantages of omnibus legislation is beyond the scope of this Article,<sup>349</sup> this conclusion contributes to the debate by revealing an additional cost of this legislative device.

Finally, the likelihood of violations depends on the degree of partisan and ideological polarization.<sup>350</sup> As long as the intense partisanship and ideological polarization in Congress, and especially in the House, persist, rule violations and procedural abuses are likely to be prevalent.

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345. An individual legislator slipping a substantive rider into an omnibus appropriation bill at the last minute is a good example. See, e.g., Goldfeld, *supra* note 196, at 368 & n.4, 369; Bolstad, *supra* note 196.

346. See Bach, *supra* note 3, at 756; Kenneth A. Shepsle & Barry R. Weingast, *When Do Rules of Procedure Matter?*, 46 J. POL. 206, 208-20 (1984) (arguing that "procedures will prove more binding and less susceptible to evasion when the costs of negotiating, policing, and enforcing agreements to circumvent procedural restrictions are high").

347. See *supra* Part II.B.

348. *Id.*

349. See generally GLEN S. KRUTZ, *HITCHING A RIDE: OMNIBUS LEGISLATING IN THE U.S. CONGRESS* 135-42 (2001); MANN & ORNSTEIN, *supra* note 80, at 170-75.

350. See *supra* Parts III.C, III.D.



### C. *The Incidence of Violations*

In the absence of systematic and current empirical data,<sup>351</sup> it is admittedly difficult to assess how often Congress violates the rules in practice. Nevertheless, several rough observations in descriptive congressional scholarship suggest that there were indeed *numerous* cases in which Congress, especially the House, flagrantly ignored lawmaking rules in recent years.<sup>352</sup>

This descriptive scholarship indicates, moreover, that the two houses “do not enforce all their rules with the same rigor [or] abide by them with the same consistency”:<sup>353</sup> some rules are apparently

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351. There is at least one earlier study about Senate compliance with its legislative rules, but that study examined a much earlier era (1965-1986) and rested on debatable proxies—the frequency with which the Senate decided questions of order, and the frequency with which it upheld points of order and sustained rulings of the Chair—as indications of compliance with the rules. See Stanley Bach, *The Senate's Compliance with Its Legislative Rules: The Appeal of Order*, 18 CONGRESS & PRESIDENCY 77-78 (1991) [hereinafter Bach, *Senate's Compliance*].

352. See, e.g., DEAN, *supra* note 89, at 25 (claiming that the Republican-controlled Congress between 1994 and 2006 “has demonstrated a conspicuous inability, unwillingness, or incompetence to operate according to ‘regular order’—which means by long-established traditions, norms, rules, and laws—not to mention the Constitution itself”); MANN & ORNSTEIN, *supra* note 80, at 7 (arguing that procedures guaranteeing adequate time for discussion, debate, and votes are “routinely ignored to advance the majority agenda”); Edward R. Becker, *Of Laws and Sausages: There is a Crying Need for a Better Process in the Way Congress Makes Laws*, 87 JUDICATURE 7-9 (2003) (arguing that “[t]he bottom line is that the formal Rules of the House of Representatives are extensive and detailed, but the key rules are all too frequently ignored in practice,” and providing several examples of rule violations); Bruhl, *Return of the Line-Item Veto*, *supra* note 127, at 473-74 (arguing that “Congress has on numerous occasions decided not to follow statutized rules” and sometimes simply flouted these rules); see also Grossman, *supra* note 196, at 262-70 (describing violations of rules that govern conference committees); Zellmer, *supra* note 302, at 486-99 (describing deviations from rules that prohibit substantive legislation through appropriations bills); David Heath & Christine Willmsen, *Congress Hides \$3.5B in Earmarks*, SEATTLE TIMES, Oct. 14, 2008, [http://seattletimes.nwsources.com/html/localnews/2008265781\\_apwaearmarkreform.html](http://seattletimes.nwsources.com/html/localnews/2008265781_apwaearmarkreform.html) (arguing that “time after time, Congress exploited loopholes or violated [earmark disclosure] rules,” finding over 110 violations in a single bill). But cf. Barbara Sinclair, *Question: What's Wrong with Congress? Answer: It's a Democratic Legislature*, 89 B.U. L. REV. 387, 387-88, 396-97 (2009) (conceding that there is “some truth” to Mann and Ornstein’s claim that “the majority flagrantly manipulates the rules for a partisan advantage,” while arguing that “[a]ctually, the House in the 110th Congress was fairly good about abiding by rules designed to give members some time to examine legislation before they were required to vote, but the rules and abidance by the rules could be even stricter”).

353. Bach, *supra* note 3, at 747; see also Bruhl, *Return of the Line-Item Veto*, *supra* note 127, at 473-74 (arguing that Congress’s record of compliance with statutory procedural rules “presents a distinctly mixed bag”).

routinely ignored, while other rules, such as “fast track” rules, seem to exhibit “a strong record of compliance.”<sup>354</sup>

A review of this scholarship may also suggest that non-constitutional rules are violated much more frequently than constitutional rules. Although “Congress’s disregard of [*INS v. Chadha*’s] teachings has been notorious,”<sup>355</sup> this descriptive scholarship provides very few examples of direct and intentional violations of constitutional procedural rules.<sup>356</sup> That is, if one excludes the hundreds of legislative veto provisions that Congress continued to enact after the Court ruled such provisions unconstitutional in *Chadha*,<sup>357</sup> and unintentional violations such as in the Farm Bill example,<sup>358</sup> examples of flagrant constitutional violations such as in the DRA case seem to be harder to find.

The above may suggest that this Article has slightly underestimated the degree to which the constitutional procedural rules are internalized and canonized in Congress. An alternative explanation, however, is that direct violations of constitutional rules are harder to find both because the Constitution places such sparse lawmaking requirements on Congress and because even these few limitations have been interpreted and implemented by Congress in creative ways that provide much latitude—including, for example, an artificial presumption that the constitutionally required quorum is always present “unless and until the presumption is proven incorrect.”<sup>359</sup> It is possible, therefore, that constitutional violations are

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354. Bruhl, *Return of the Line-Item Veto*, *supra* note 127, at 473-74.

355. Cass & Strauss, *supra* note 81, at 15.

356. Cf. DEAN, *supra* note 89, at 51 (claiming that the behavior of the Republican majority in Congress between 1994 and 2006 was “far worse than merely breaking the rules of the House (or Senate), for they also [had] no hesitation about cavalierly ignoring the Constitution,” but providing few examples to support this claim).

357. See Cass & Strauss, *supra* note 81, at 23 (noting that Congress has included legislative veto provisions in its legislation “numerous times” since *Chadha*); Neal Devins, *Congressional-Executive Information Access Disputes: A Modest Proposal—Do Nothing*, 48 ADMIN. L. REV. 109, 115 (1996) (“In the decade after *Chadha*, 1983-1993, well over 200 legislative vetoes have been enacted into law.”); Louis Fisher, *The Legislative Veto: Invalidated, It Survives*, 56 LAW & CONTEMP. PROBS. 273, 288 (1993) (“Notwithstanding the mandate in *Chadha*, Congress continued to add legislative vetoes to bills and Presidents Reagan and Bush continued to sign them into law. From the date of the Court’s decision in *Chadha* to the end of the 102nd Congress on October 8, 1992, Congress enacted more than two hundred new legislative vetoes.”).

358. See *supra* Part II.B.

359. Bach, *supra* note 3, at 727-30.

less common because the majority party can almost always get its way by violating only nonconstitutional rules.<sup>360</sup>

This explanation seems to find support in the experiences of the states, whose constitutions place much more procedural limits on lawmaking,<sup>361</sup> therefore resulting in many more examples of constitutional violations. Indeed, several scholars have observed that state “legislators often do not follow the legislative procedure requirements of the state constitution, particularly where the legislative proposal is controversial and the courts do not enforce the constitutional restriction.”<sup>362</sup> Some state courts have similarly observed that the state legislature has shown “remarkably poor self-discipline in policing itself,”<sup>363</sup> and that violations of some constitutional lawmaking requirements have “become a procedural regularity.”<sup>364</sup> The Supreme Court of Illinois has perhaps been the most explicit in its conclusion that “the assumption that the General Assembly would police itself and judicial review would not be needed because violations of the constitutionally required procedures would be rare” has been repeatedly refuted in practice.<sup>365</sup> Although the applicability of state experiences to Congress is not clear, these experiences at least suggest that the alternative explanation—that direct violations of constitutional rules are harder to find because the Constitution places few lawmaking requirements on Congress—may be plausible.

In sum, to the extent that the above far-from-scientific observations provide any indication, this Article’s analysis seems to have

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360. Cf. Bach, *Senate’s Compliance*, *supra* note 351, at 88 (suggesting that the reason for the relative paucity of contested questions of order in the Senate is that “Senate procedures have not been a serious obstacle to individualism. Its rules normally are not confining and when they do pinch, it is not for very long.... Rarely do senators contend that existing procedures do not give them enough latitude.”).

361. Robert F. Williams, *State Constitutional Limits on Legislative Procedure: Legislative Compliance and Judicial Enforcement*, 48 U. PITT. L. REV. 797, 798 (1987).

362. *Id.* at 800; *see also* Denning & Smith, *supra* note 15, at 1000 (arguing that “many state legislatures have often seen fit to skirt the edges of their constitutional [lawmaking] requirements, or to ignore them entirely” and that “[i]n the experience of the states,” the presumption that legislatures will comply with procedural constitutional limitations “seems to have been unwarranted”).

363. *Geja’s Cafe v. Metro. Pier & Exposition Auth.*, 606 N.E.2d 1212, 1221 (Ill. 1992).

364. *Id.*; *see also* *Friends of the Parks v. Chi. Park Dist.*, 786 N.E.2d 161, 171 (Ill. 2003); *Cutinello v. Whitley*, 641 N.E.2d 360, 367 (Ill. 1994); *McGinley v. Madigan*, 851 N.E.2d 709, 724 (Ill. App. Ct. 2006).

365. *Geja’s Cafe*, 606 N.E.2d at 1221.

promising explanatory power, at least with regard to nonconstitutional rules. Undeniably, there is a great need for much more vigorous and systematic empirical research about congressional compliance with the rules that govern lawmaking. Hopefully, this Article may contribute to such future research by providing several testable predictions for general empirical studies, as well as for case studies.

### CONCLUSION

Hans Linde was correct in his observation that “[o]ther participants than courts have the opportunity, and the obligation, to insist on legality in lawmaking.”<sup>366</sup> Duty and opportunity, however, are not enough. Congress’s capacity and incentives to enforce the law of congressional lawmaking upon itself are lacking.

This Article’s conclusions refute the widely held assumption that political safeguards can obviate the need for judicial review, at least in the procedural lawmaking rules context. This does not mean that judicial enforcement of these rules is necessarily the proper solution. The impact of judicial review on legislative rule-following behavior, and the other costs and benefits of judicial oversight, remain to be examined. The starting point for any such examination, however, is the recognition that Congress cannot police itself.

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366. Hans A. Linde, *Due Process of Lawmaking*, 55 NEB. L. REV. 197, 243-44 (1976).