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Defending the (Not so) Indefensible: A Reply to Professor Aaron-Andrew P. Bruhl

Seth Barrett Tillman, *None*



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Reply

DEFENDING THE (NOT SO) INDEFENSIBLE

Seth Barrett Tillman*

INTRODUCTION

I should like to thank the editors of the *Cornell Journal of Law and Public Policy* for making this colloquy possible. Additionally, I thank Professor Aaron-Andrew P. Bruhl for writing a well-informed, extensive, and thoughtful response.¹ I find myself sympathetic to many of the points Professor Bruhl makes, but not to all. It is difficult to respond as precisely as one might like to Professor Bruhl's piece because his paper presents a moving target. It purports to defend the "conventional assumptions"² with regard to the process of statutory lawmaking. But it does not do so exactly. Indeed, it cannot do so because there are, in fact, two distinct sets of conventional views about the statutory lawmaking process. And these two views do not intellectually cohere. I shall use these remaining pages to explain that conflict and to again defend noncontemporaneous lawmaking as consistent with our constitutional order.

I. THE TWO CONVENTIONAL VIEWS AND PROFESSOR BRUHL'S VIEW.

Article I, Section 7, Clause 2 of the Constitution, also known as the Presentment Clause, sets forth the process by which a bill (an inchoate, yet-to-be-enacted law³) becomes a law. The general outline of the process is known by every well-educated American school child. Clause 2 requires:

* Mr. Tillman—Harvard Law School, JD (2000), University of Chicago, AB (1984), and former law clerk to Judge Jane R. Roth (3d Cir.), Judge William J. Martini (D.N.J.), and Judge Mark E. Fuller (M.D. Al.)—is an associate of Richards, Layton & Finger, P.A., Wilmington, Delaware, and is a member of the Delaware bar. The views expressed do not necessarily represent the views of the firm or its clients.

¹ See Aaron-Andrew P. Bruhl, *Against Mix-and-Match Lawmaking*, 16 CORNELL J.L. & PUB. POL'Y 349 (2007), responding to Seth Barrett Tillman, *Noncontemporaneous Lawmaking: Can the 110th Senate Enact a Bill Passed by the 109th House?*, 16 CORNELL J.L. & PUB. POL'Y 331 (2007).

² Bruhl, *supra* note 1, at 349; see *infra* note 13.

³ 2 JOSEF REDLICH, *THE PROCEDURE OF THE HOUSE OF COMMONS: A STUDY OF ITS HISTORY AND PRESENT FORM* 80 (A. Ernest Steinthal trans., 1908) ("[T]o the outer world an agreement between the two Houses has no legislative effect except when it adheres strictly to the form of a bill, i.e., an inchoate act of parliament.").

Every bill which shall have passed the House of Representatives and the Senate shall, before it becomes a law, be presented to the President of the United States; if he approve, he shall sign it; but if not, he shall return it, with his Objections, to that House in which it shall have originated, who shall enter the Objections at large on their Journal, and proceed to reconsider it. If after such Reconsideration two thirds of that house shall agree to pass the Bill, it shall be sent, together with the objections, to the other house, by which it shall likewise be reconsidered, and if approved by two thirds of that house, it shall become a Law. . . . If any Bill shall not be returned by the President within ten Days (Sundays excepted) after it shall have been presented to him, the Same shall be a Law, in like Manner as if he had signed it, unless the Congress by their Adjournment prevent its Return, in which Case it shall not be a Law.⁴

One view of the Presentment Clause is that all the procedural steps for bill-enactment must take place within the fixed two-year term of a given House. This view, the end-of-the-House's-term-is-the-death-knell-of-a-not-fully-enacted-bill, is repeated *ad nauseam* in legal publications by scholars of considerable reputation.⁵ A few judges in Commonwealth courts, adjudicating constitutional and statutory regimes for lawmaking similar to ours, have embraced this view.⁶ Over the centuries of the American experiment, a few domestic courts have espoused this position, although almost always in dicta or in other non-binding authority.⁷ It was not and it is not the position of any Article III court. The most striking thing about this view is that no one who has taken this position ever seems willing to mount any sort of intellectual defense of it. Its truth and worth are just assumed.

Nevertheless, this position, in its strong form, i.e., that *every* step of bill enactment must be begun and concluded within a given two-year House term, has been expressly rejected by the Supreme Court of the United States in *Edwards v. United States*, which permitted the President to sign a bill (and thereby conclude the enactment process) after the ter-

⁴ U.S. CONST. art. I, § 7, cl. 2.

⁵ See, e.g., Tillman, *supra* note 1, at 334–35 n.9 (quoting Professors Michael Stokes Paulsen, Charles Tiefer, Catherine Fisk, Erwin Chemerinsky, and Bruce Ackerman); Bruhl, *supra* note 1, at 359 (quoting Professor Akhil Reed Amar and describing Amar's view as "initially puzzling").

⁶ See Tillman, *supra* note 1, at 336 n.12 (quoting New Zealand Supreme Court concurrence).

⁷ See *id.* (quoting concurrence in a 1894 Court of Claims decision, and dicta in a 2001 United States Court of Appeals for the Federal Circuit decision).

mination⁸ of a two-year House term.⁹ Furthermore, Presidents have vetoed bills outside the two-year window, and Congresses have presented bills to Presidents outside the two-year window. That is the long-prevailing practice of both of the elected branches of the government.¹⁰ The logic of the *Edwards* position, the logic of the prevailing practice, is not particularly difficult to understand. The Presentment Clause does not state at what time any of the actors must act, except that the President must act within ten days of presentment (Sundays excepted). It is the judicial function, in a proper case or controversy, to impose the strictures written in the Constitution. It is not the judicial function to invent restrictions which are not expressed in the text. The logic of the *Edwards* position leaves open the possibility for the House and the Senate to act noncontemporaneously vis-à-vis one another, just as *Edwards* approved noncontemporaneity between the President and the two legislative houses. If there is a justification for allowing presidential noncontemporaneity, but mandating contemporaneous House-Senate action, it is difficult to draw support for that position from the constitutional text.

In any event, these are the two conventional views: the death-knell view and the *Edwards* view.

But what is Professor Bruhl's view? He does not defend the death-knell view, the view of the academics who refuse to squarely confront *Edwards* and the uniform prevailing practices of the elected branches. Moreover, Professor Bruhl is equivocal with regard to the correctness of *Edwards* and of prevailing practice. He neither accepts it, nor rejects

⁸ My use of the word "termination" refers exclusively to the members' losing their seats at the end of the term for which they were elected. Whether the intermediate legislative actions taken by members during their term, but not finalized as statutes, have continuing legal validity past that time is an entirely different question—it is the question about which Professor Bruhl and I disagree.

⁹ See *Edwards v. United States*, 286 U.S. 482 (1932) (Hughes, C.J.); see also Tillman, *supra* note 1, at 334–35 n.9. The *Edwards* position has been embraced by Commonwealth courts adjudicating controversies within the confines of constitutional and statutory regimes structured similarly to our own. *Id.* (quoting Australian, Indian, and New Zealand high court authority, and persuasive, though now moribund, Canadian scholarly authority).

¹⁰ See Tillman, *supra* note 1, at 340–41 n.21 (noting President Lincoln's signing a bill after termination of the House's two-year term); *id.* (noting President Truman's signing bills after termination of the House); *id.* (noting congressional presentment to President Reagan after termination of the House); *id.* at 341–42 n.22 (noting purported Grant and Truman pocket vetoes of bills after termination of the House). Professor Bruhl notes as counterauthority a House committee report objecting to Lincoln's action. See Bruhl, *supra* note 1, at 354 n.17. I, at least, do not think much of the counterauthority he cites; it offers nothing more than *ipse dixit*.

it.¹¹ Rather, he takes a sort of compromise, “mix-and-match”¹² position. His view is that the two legislative houses must act contemporaneously, within a given two-year House term, whether or not the President is or is not free to act beyond that term. Although he terms this view the “conventional”¹³ view, I do not believe this to be an accurate description. Rather, his argument is a novel attempt to reconcile competing authorities and to concomitantly preserve some form of contemporaneity.

Let’s see how it fares.

II. PROFESSOR BRUHL’S OPENING GAMBIT IN DEFENSE OF CONTEMPORANEOUS BICAMERALISM.

After quoting the Presentment Clause, Professor Bruhl notes:

One finds in [the text of the Presentment Clause] no mention of committees, no discussion of legislative calendars, not even an explicit statement that majority rule is the governing principle. Much of the detail is therefore left to internal rules, to tradition, and occasionally to statutes that regulate proceedings—all sources that are in some cases longstanding and venerable but that are also ultimately subject to the legislature’s will. What matters for present purposes is that the constitutional text is at best coy in telling us the permissible amount of temporal separation between passage in the two houses. Where, if anywhere, is a contemporaneity requirement located?¹⁴

What I find so particularly fascinating about this statement is how closely it resembles the opinion of the Supreme Court of Ireland’s Chief Justice Keane in the recent *Leontjava*¹⁵ judgment. There, like the ordering of Professor Bruhl’s argument, the Chief Justice first recited the relevant constitutional provision controlling legislative processes. Then Chief Justice Keane quoted *M’Culloch v. Maryland*’s imperious dictum, as a flourish, to the effect that:

¹¹ See Bruhl, *supra* note 1, at 354 (“Assuming that this practice is permissible, it does not necessarily mean that noncontemporaneity as to bicameral passage is permissible.”). Professor Bruhl is correct, but evidence of the permissibility of noncontemporaneous presidential action is some evidence against contemporaneity as a general background principle applying to the statutory lawmaking process.

¹² See Bruhl, *supra* note 1.

¹³ Email from Professor Bruhl, to Seth Barrett Tillman (Dec. 9, 2006) (rejecting my analysis of two competing conventional views, and taking the contrary position that “I think it would be more accurate to say there is just one not-totally-thought-out conventional view that is often phrased somewhat unreflectively in death-knell terms, and then there is *Edwards* which nobody thinks about.”).

¹⁴ Bruhl, *supra* note 1, at 359 (footnote omitted).

¹⁵ See *D.P.P. & Anor v. Leontjava*, [2004] IESC 37 (Sup. Ct. Ireland) (Keane, C.J.), available at <http://www.bailii.org/ie/cases/IESC/2004/37.html>.

A constitution, to contain an accurate detail of all the subdivisions of which its great powers will admit, and of all the means by which they may be carried into execution, would partake of the prolixity of a legal code, and could scarcely be embraced by the human mind. It would probably never be understood by the public. Its nature, therefore, requires that only its great outline should be marked, its important objects designated and minor ingredients which compose those objects deduced from the nature of the objects themselves. That this idea was entertained by the framers of the American Constitution is not only to be inferred from the nature of the instrument but from the language In considering this question, then, we must never forget that it is a Constitution we are expounding.¹⁶

And like Professor Bruhl, the Chief Justice notes:

Thus, none of the details of the legislative process in each house—the first and second reading, the committee stage and the report stage—achieve even a mention. The role of political parties . . . the committee system and the distinctions between public and private bills, government bills and bills initiated by [members], are nowhere mentioned. It was *obviously* envisaged by the framers of the Constitution that . . . all these matters could be left to be determined by the [legislature].¹⁷

Although Professor Bruhl and the Chief Justice's analyses are remarkably similar in style, content, and structure, their conclusions are diametrically opposed.

For the Chief Justice, constitutional silence with regard to an aspect of the legislative process indicates that the matter is "obviously" one committed to the discretion of the legislature.¹⁸ For Professor Bruhl, on

¹⁶ *Id.* (quoting *M'Culloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 407 (1819) (Marshall, C.J.) (italics not shown)).

¹⁷ *Leontjava*, *supra* note 15 (emphasis added); *id.* ("Since there is no provision in the Constitution which expressly prohibits [the contested legislative procedure], the onus rested on the respondent to establish clearly that it was invalid having regard to the provisions of the Constitution.").

¹⁸ *Id.* In a bit of irony that perhaps only Professor Bruhl, I, and a few aficionados of constitutional exotica will appreciate, Chief Justice Keane also argued that the Irish Constitution's Rules of Proceedings Clause functions as an independent textual source for the holding. In other words, constitutional silence in regard to a contested legislative process commits discretion to the legislature in that regard. Professor Bruhl has, of course, written widely on Article I Section 5—the U.S. Constitution's Rules of Proceedings Clause. Compare *id.* ("Each House may determine the Rules of its Proceedings, punish its members for disorderly behaviour, and, with the Concurrence of two thirds, expel a Member."), with *Ir. CONST. art. 15.10*

the other hand, the *silence* of the Constitution with regard to an aspect of the legislative process is license to engage in *originalism* of a structural variety because the text of what one would expect to be the operative clause, the Presentment Clause, supplies no concrete answer. It strikes me that a person who makes an argument grounded in constitutional silence bears a high burden of persuasion.¹⁹

Do any of Professor Bruhl's arguments carry that burden?

A. PROFESSOR BRUHL'S TEXTUAL ARGUMENT MANDATING
CONTEMPORANEOUS BICAMERALISM ARISING FROM ELECTORAL
DISCONTINUITY OF THE HOUSE AND THE SENATE.

Professor Bruhl argues:

Sections 2 and 3 provide that all Representatives and one-third of the Senators shall "be chosen every second Year." Congress is in this way temporally segmented; each new two-year term brings a new message from these agents' principals (not to mention some new agents). Every two years there comes a new mandate from the principals, *and one must seek their agents' views anew*. . . . Thus, one could use the electoral cycle clauses to require some form of bicameral contemporaneity.²⁰

Professor Bruhl's position carries some intuitive force. But it is difficult to see why this argument should carry the day.

First, as Professor Bruhl acknowledges, the prevailing view in American legal scholarship is that the Senate, but not the House, is a continuing body.²¹ If that is the case,²² then a final Senate instrument, authenticated by its presiding officer, which internally states that it is

("Each House [of the Oireachtas] shall make its own rules and standing orders, with power to attach penalties for their infringement . . .").

¹⁹ See *supra* notes 17 & 18.

²⁰ Bruhl, *supra* note 1, at 360 (footnotes omitted) (emphasis added).

²¹ See, e.g., Tillman, *supra* note 1, at 337–38 n.15 (discussing *McGrain v. Daugherty*, 273 U.S. 135, 181 (1927) (Van Devanter, J.)). I point out that although *McGrain* held that the Senate was a continuing body, it did not actually hold that the House was not. Cf. *infra* note 22.

²² The standard view is that the Senate is a continuing body, but the House is not. This is not Professor Bruhl's view. He has suggested that both bodies are discontinuous because of the two-year election cycle affecting both houses, albeit affecting them differently. Bruhl, *supra* note 1, 360 n.41. My own view is diametrically opposed to his. I believe the House and the Senate are both continuing bodies. I apologize to Professor Bruhl and others if I failed to make this clear in my prior writings and correspondence. I shall attempt to properly clarify my position in this paper. See, e.g., Email from Harry Evans, Clerk of the Senate, Parliament of Australia, to Seth Barrett Tillman (Nov. 4, 2004) (taking the position that the fact that bills die at the end of a House term is an American convention, but it has no basis in the U.S. Constitution as understood from the point of view of Westminster practice). I agree with Evans.

meant to survive expiration of the House, and emitted from the Senate such that it is beyond the Senate's power to recall, should survive termination of the House's term—even if the House cannot do the same and emit a similar instrument of continuing effect to the Senate. The fact that Professor Bruhl frames his position as applying equally to the House and to the Senate is revelatory of precisely how truly unconventional his view is. Professor Bruhl has to argue, against the prevailing view, that both the House and the Senate are discontinuous bodies. Otherwise, noncontemporaneous lawmaking would be possible when the instrument flows from the Senate to the House, although not when it flows from the House to the Senate.

Again, this does not mean that Professor Bruhl is incorrect—my own view is also unconventional, perhaps considerably more so. But an unconventional intuition is hardly sufficient to meet his high burden. By contrast, my view does not impose on the constitutional text or limit the discretion of the elected branches with regard to the exercise of powers expressly committed to them, i.e., details of the legislative process about which the constitutional text is wholly silent.

Second, if Professor Bruhl is correct, i.e., if termination of the two-year House term kills bills-not-yet-enacted-into-laws and demands action on bills anew by both of the newly seated houses, then the Supreme Court's decision in *Edwards v. United States*²³ was incorrect on precisely the same structural grounds he discusses. For if discontinuity across a House term kills final action of either or both houses, then clearly there is no instrument of continuing validity for the President to sign when he is presented with a bill of a prior Congress. Similarly, a President presented with a bill some six days prior to the termination of the House's two-year term could then only act on the bill for those six days, but not on the four days following termination, notwithstanding the plain words of the Presentment Clause granting him ten days to act. This is illustrative of how Professor Bruhl's view imposes on practice, imposes on precedent, imposes on presidential powers, and most importantly, imposes on the constitutional text.

To put it another way, if Professor Bruhl's argument is that the Senate cannot act on a bill passed by a prior House because that two-year House is gone, then that same position prevents a President from acting on a bill passed by a prior contemporaneous House and Senate, notwithstanding the Supreme Court's *Edwards* holding. Unless I am very much mistaken, these conclusions flow directly from Professor Bruhl's position. But Professor Bruhl leaves these implications and *Edwards* largely

House discontinuity arises by operations of its own rules and conventions; this convention is something the House (or both houses) could opt-out of by rule or by statute.

²³ See *supra* note 9 and accompanying text.

unaddressed.²⁴ I do not suggest that the anti-*Edwards* position is frivolous, but, whatever strengths this position might have, it is most certainly not conventional. Whatever else judgments of the Supreme Court achieve or create, they do define what is or is not conventional.

Third, Professor Bruhl's intuition to the effect that "[e]very two years there is a new mandate from the constituents, and one must seek their agents' views anew"²⁵ is a deeply contentious view of how the principles and policies of agency law should be applied in the public realm. For instance, is it true that in private law today, the prior finalized offers of outgoing agents made to third-parties are rendered null and void upon the selection and installation of new agents? Was that the uniform private law of agency across United States jurisdictions circa 1787? Is that the way our public institutions generally work? Or is this a special "constitutional rule" that applies only to legislative bodies, and if so, why? Further, if a final bona fide offer made by an agent on behalf of a disclosed principal survives the replacement of the agent by the principal, would that be reason to believe that an offer to enact a bill made by the Senate to the House survives the election of some new Senators and an entirely new House?

The law of agency may not be the correct body of law from which to determine the outcome of this issue. Has Professor Bruhl tied his con-

²⁴ Admittedly, not entirely unaddressed. Professor Bruhl writes: "[B]ecause the Constitution does not actually require presidential approval for lawmaking, it is hard to see how the Constitution could require presidential approval *at some particular time* in relation to congressional passage. In other words, the Constitution can leave some wiggle room for unconventional practices surrounding the timing of the President's role . . ." Bruhl, *supra* note 1, at 354 (footnote omitted) (emphasis in the original). Professor Bruhl is grasping at straws here. Although in regard to most bills, express presidential consent is not mandatory to lawmaking, with some bills, i.e., when ten days after presentment Congress is adjourned and thereby precludes a vetoed bill's return, presidential consent is constitutionally required in exactly the same way House and Senate participation is required. In all these cases, under Professor Bruhl's view, House-Senate-Presidential contemporaneity should be demanded. But that is not the practice or the law (as established by the courts). Professor Bruhl also argues that delayed presidential action still comes (in some cases) with indicia of House-Senate-Presidential contemporaneity. *I.e.*, presentment by congressional officers post-House termination indicates continuing congressional consent so when the President signs, all three actors have "consented" contemporaneously even if not formally acting during the same House term. Professor Bruhl's argument may win a battle, but it loses the war. For the President to act on the prior Congress' bill *at all* implies that there is some paper of continuing legal validity for him to sign. And if that continuing legal validity can be established merely by the ministerial action of congressional elected or appointed officers physically delivering a bill, then exactly the same principle would allow for a similar discontinuity between the House and the Senate. Under this view, the House could pass a bill during one term, with its clerk delivering it to the Senate during the next term, leaving the Senate and President free to act on the bill during (at least) that successor term, even absent the express consent of the successor House. Indeed, Professor Bruhl concedes this point later in his paper. See Bruhl, *supra* note 1, at 357 n.32 and accompanying text.

²⁵ See Bruhl, *supra* note 1, at 360.

stitutional horse to the correct doctrinal post?²⁶ Surely there is nothing in the text of Article I, Sections 2 and 3—the provisions mandating the election of members every second year—that explicitly incorporates the law of agency. Does not that settle the matter?

B. PROFESSOR BRUHL'S ARGUMENT MANDATING CONTEMPORANEOUS BICAMERALISM ARISING FROM NONTEXTUAL SOURCES OF LAW.

Professor Bruhl argues:

[P]erhaps the contemporaneity requirement, like some other constitutional rules, resides not so much in an explicit textual command as in pre-constitutional usage, the framers' expectations, and implicit understandings. Certainly there is a strong case to be made that contemporaneity was thought too obvious to require explicit mention. It had been the practice in Britain that bills

²⁶ Cf. EDMUND BURKE, REFLECTIONS ON THE REVOLUTION IN FRANCE 110 (Thomas D. Mahoney ed., 1955) (1790) ("Society is indeed a contract. Subordinate contracts for objects of mere occasional interest may be dissolved at pleasure—but the state ought not to be considered as nothing better than a partnership agreement . . . to be dissolved by the fancy of the parties."). Professor Bruhl, following the scholarly consensus, argues that although state action in regard to ratification of federal constitutional amendments is not or need not be formally contemporaneous, it is implicitly contemporaneous because states may rescind ratification. See Bruhl, *supra* note 1, at 353–54 nn.14-15 and accompanying text. Here too the intuition seems to be based on private law norms, whose relevance is accepted without critique. Rescission as an operative theory of the Article V process is defensible, but it is also thoroughly objectionable on many levels of analysis. First, it is not mentioned in the text of Article V. Second, its supporters point to no discussion of rescission in the debates of the Federal Convention or any state ratifying convention. Third, purported rescission of a state ratification of a proposed amendment was not attempted until the Civil War amendments. And most importantly, rescission was simply not possible in the case of the Twenty-First Amendment, which made use of state ratifying conventions rather than ratification by action of the state legislatures. See U.S. CONST. amend. XXI, § 3. Because these state ratifying conventions go out of existence after debate and final action on a proposed amendment, rescission of a prior ratification is not meaningfully possible, if possible at all. Unless the many sponsors of rescission-as-a-component-of-the-Article-V-process are willing to impose an arbitrary *Dillon*-type time limit on constitutional amendments making use of the state convention ratification procedure, then as a matter of principle, they must concede that in the Article V amendment process there is no *general* background norm of contemporaneity. Cf. *Coleman v. Miller*, 307 U.S. 433, 447 (1939) (Hughes, C.J.) ("The opposing view proceeds on an assumption that if ratification by 'Conventions' were prescribed by the Congress, a convention could not reject and, having adjourned sine die, be reassembled and ratify."). See *generally* *Dillon v. Gloss*, 256 U.S. 368, 375–76 (1921) (Van Devanter, J.) (suggesting in dicta reasonable time limits apply to amendment process). Likewise, if contemporaneity is a background norm of the amendment process how could a long gone Article V national convention proposing an amendment rescind? But cf. Bruhl, *supra* note 1, at 353–54 n.15 (arguing that contemporaneity is sufficiently guaranteed if the states have the power to rescind, even if Congress has no coordinate power to rescind a congressionally proposed constitutional amendment).

died unless all steps—assent by Commons, Lords, and Crown—occurred before the end of a Parliament.²⁷

I address first the proposed “implicit understandings” of the framers. Professor Bruhl quotes *Addington v. Texas*²⁸ for the proposition that “proof beyond reasonable doubt in criminal cases is justified ‘historically and without any explicit constitutional requirement.’”²⁹ To be sure, Professor Bruhl’s restatement of the *Addington* holding is correct, but that holding expressly relied upon the Due Process Clause as the textual hook for this standard of proof in criminal cases.³⁰ Thus the adjudication in *Addington* had to give voice to an open textured clause in the Constitution, one speaking directly to the operation of the courts themselves. By contrast, a principled interpreter of the Presentment Clause—the clause that interests us here—would be reviewing a clause directed to the legislature and its officers, at least in the first instance.³¹ More importantly, the words of the Presentment Clause are not similarly open textured. Indeed, because the words “due process” are neither self-defining nor eighteenth-century legal jargon (at least, according to the standard narrative), the interpreter must look either to coordinate provisions within the constitutional text or to sources of law and authority beyond the text. Such a move, although not obviously correct, is at least highly principled and within the ambit of traditional legal interpretivism. But I submit

²⁷ Bruhl, *supra* note 1, at 360–61 (footnotes omitted) (emphasis added).

²⁸ 441 U.S. 418 (1979) (Burger, C.J.).

²⁹ Bruhl, *supra* note 1, at 360–61 n.45 (quoting *Addington*, 441 U.S. at 423–24).

³⁰ 441 U.S. at 424 (citing *In re Winship*, 397 U.S. 358 (1970) (Brennan, J.)).

³¹ The fact that the courts might or should defer to the elective branches does not mean there is no constitutional or legal question here to answer or for the elective branches to resolve. It only means that the locus of decision shifts from the courts (and the conventions courts use to adjudicate such questions, i.e., judicial orders and opinions supported by fact-finding after adversarial proceedings) to the elective branches (and to the different conventions they use to resolve such questions, i.e., contested votes following debate among members, consultation with experts, and elections). But compare *City of Boerne v. Flores*, 521 U.S. 507, 531–32 (1997) (Kennedy, J.) (“As a general matter, it is for Congress to determine the method by which it will reach a decision.”) (emphasis added), with Seth Barrett Tillman, *A Textualist Defense of Article I, Section 7, Clause 3*, 83 TEX. L. REV. 1265, 1355 (2005) (decrying “judicialization of all American public norms”) (hereinafter *Textualist*). My larger point is that *Addington* required that the Court consider the meaning of the ambiguous Due Process Clause. It was not a free floating judicial dissertation expounding on implicit understandings absent a textual source. See *infra* notes 34–36 and accompanying text.

there is no reason to endeavor to scale through this sort of jurisprudence in view of the Presentment Clause,³² itself a flatland of plain words.³³

Turning to eighteenth-century usage and the framers' expectations, Professor Bruhl cites, by way of example, our sovereign immunity case law, tied by the "mists of metaphor"³⁴ to the Eleventh Amendment, where the Court has frankly admitted that it has stepped away from (or, some might say, over the brink of) the text of the Constitution.³⁵ Professor Bruhl suggests that this sort of legal "reasoning" might support a contemporaneous bicameralism requirement and notes supporting British practice to that effect.

Before turning to Professor Bruhl's substantive point, I think it worth noting, at least in passing, that I do not believe that these indicia of history, even when they can be unimpeachably determined as the universally held views or practices of the founders and of the ratifiers, should serve as sources of authority for determining the legal meaning of express legal texts *if the text is silent in regard to the issue in dispute*.

³² Had the founders placed within the Presentment Clause the word "bicameralism" (or, perhaps even "Congress"), I submit that Professor Bruhl's position would be much stronger, and arguably carry the day. The word "bicameralism" would carry with it the whole history of practice associated with pre-1787 Anglo-American bicameral legislative houses, including the termination of bills-not-yet-fully-enacted by the end of the term of the lower house. But such an open-ended term is not used. Instead, the Presentment Clause uses the terms "House," "Senate," and "President"—terms that are not defined by history, but by the instrument itself. Given that the President is not commanded to act within the House's term, see *Edwards*, I see no principled argument for compelling the House and the Senate to act contemporaneously with one another.

³³ Admittedly, the two-thirds requirement for veto override has caused some genuine confusion. See, e.g., Charles L. Black, Jr., *Some Thoughts on the Veto*, 40 LAW & CONTEMP. PROBS. 87, 101 (1976) (stating that veto "override requires . . . a two-thirds vote of those present, provided there is a quorum") (italics in the original) (citing and misreporting the holding of *Missouri Pacific Ry. Co. v. Kansas*, 248 U.S. 276 (1919) (White, C.J.)). *Missouri Pacific* only required two-thirds of a quorum to support override, *id.* at 284–85, not two-thirds of those present. Indeed, I have argued that the bar for veto override is, in fact, considerably lower than that inartfully expressed by the *Missouri Pacific* Court: it is merely two-thirds of those voting, a quorum being present, not two-thirds of a quorum. See Tillman, *Textualist*, *supra* note 31, at 1290 n.64 (April 2005); see also Adrian Vermeule, *Absolute Voting Rules*, U. CHI. PUB. LAW & LEGAL THEORY WORKING PAPER NO. 103 (Aug. 2005), posted on SSRN. *Contra* Saul Levmore, *Parliamentary Law, Majority Decision Making, and the Voting Paradox*, 75 VA. L. REV. 971, 980 n.26 (1989) ("The 'will of the majority' is easiest to define and discern with only two alternatives. Quorum, tie-vote, and *abstention questions aside*, there will be an absolute majority for one of the proposals. It is when three or more alternatives are pending and none receives an absolute majority that *interesting questions* about the substance of majoritarianism arise. There is simply no collective-choice difficulty in the face of only two alternatives.") (emphasis added).

³⁴ *Berkey v. Third Ave. Ry. Co.*, 244 N.Y. 84, 94 (1926) (Cardozo, J.) (using "mists of metaphor" phrase with reference to veil-piercing doctrine).

³⁵ See Bruhl, *supra* note 1, at 360–61 n.45 (quoting *Alden v. Maine*, 527 U.S. 706, 713 (1999) (Kennedy, J.); *Blatchford v. Native Village of Noatak*, 501 U.S. 775, 779 (1991) (Scalia, J.)). But see *id.* (specifically noting that respondents did not ask the Court to revisit *Hans v. Louisiana*, 134 U.S. 1 (1890) (Bradley, J.)).

Framers' expectations and contemporaneous usage are, at most, free-standing ideas or background assumptions.³⁶

Such assumptions—when not tethered to the text of the instrument of government, when not anchored to its words, when not communicated by some concrete clause—establish nothing. Where the text is silent, the interpreter has no way of telling whether the lawgiver sought to control future legal developments at all, much less to limit future discretion to the (now arduous) Article V amendment process. Where the Constitution is silent, the interpreter has no way of telling whether the lawgiver sought to reify widely held contemporaneous practices and expectations or, instead, sought to depart from or to allow for departure from those practices and views by normal democratic means,³⁷ *e.g.*, rules and statutes.

Where the text is silent, originalist materials are of little use.³⁸

³⁶ My own view is in accord with that expressed in one of the leading supreme court federalism decisions of the last century:

[We reject] an interpretation of the Constitution depending on an implication which is formed on a vague, individual conception of the spirit of the compact, which is not the result of interpreting any specific language to be quoted The established Courts of Justice, when a question arises whether the prescribed limits have been exceeded, must of necessity determine that question; and the only way in which they can properly do so, is by looking to the terms of the instrument by which, affirmatively, the legislative powers were created, and by which, negatively, they are restricted. If what has been done is . . . within the general scope of the affirmative words which give the power, and if it violates no express condition or restriction by which that power is limited[,] it is not for any Court of Justice to inquire further, or to enlarge constructively those conditions and restrictions.

Amalgamated Soc'y of Eng'rs v. Adelaide Steamship Co. Ltd., 1920 WL 17931, 28 C.L.R. 129, 145 & 149 (Aus. 1920) (quoting *R. v. Burah*, 3 App. Cas. 889 (P.C. 1878) (appeal taken from India)). Or, to paraphrase a recent commentator: "It is therefore illegitimate . . . to treat the concept of representative democracy [*Tillman* adding: or bicameralism, or statutory enactment] as a putatively free-standing premise from which additional constitutional implications are then drawn." Nicholas Aroney, *Justice McHugh, Representative Government and the Elimination of Balancing*, 28 SYDNEY L. REV. 505, 514 (2006). Similar views have been expressed by Justice Brennan and others. *See, e.g., id.* at 513 (citing *McGinty v. Western Australia*, 186 C.L.R. 140, 234 (Aus. 1996) (Brennan, J.)).

³⁷ I am indebted to Professor Mark Tushnet for making this point.

³⁸ Although my methodological views founder on the shoals of the Ninth Amendment, there is no cause for exposing my position in this paper to that inhospitable doctrinal environment. *See* U.S. CONST. amend. IX ("The enumeration in the Constitution of certain rights, shall not be construed to deny or disparage others retained by the people."). But the fact that the Constitution expressly mandates unenumerated rights is hardly a reason, in the face of constitutional silence, to imagine a congruent doctrine with regard to (unenumerated) structural claims. There is no Ninth Amendment for structural claims outside the rights context. Likewise, Bruhl's reliance on *Anderson v. Dunn*, 19 U.S. 204 (1821), seems misplaced. The fact that a court may uphold or discover an unenumerated implied power on the theory that it is necessary to enliven enumerated powers is not equivalent to discovering unenumerated restrictions in regard to expressly granted powers.

I know that my methodological views might be of little interest to most. Here, I add that I disagree with the substance of Professor Bruhl's position. In fact, I believe that pre-constitutional usage and the framers' expectations were consistent with noncontemporaneous action. Furthermore, I believe that British (and older English precedents) do not contradict my view, to the extent they apply at all (and I do not believe that they do, as I explain in greater detail below).

Professor Bruhl frames the question in terms of one of expectations with regard to bicameralism or "contemporaneity."³⁹ That is the wrong question if only because there is no reason to believe that the founders and ratifiers ever considered it in those terms. What they had reason to consider was the enrolled bill rule. This rule is older than *Field v. Clark*.⁴⁰ It is older than the United States. It is older than the settlement at Jamestown. It is at least as old as *The Prince's Case*.⁴¹ The substance of the rule was incorporated in the Bill of Rights: "That the . . . proceedings in Parliament ought not be impeached or questioned in any court or place out of Parliament."⁴² It prevents courts and the executive from questioning proceedings in the legislature.⁴³ But it does more than that.

A document on the Parliamentary Roll is conclusive as to its validity as an Act [of Parliament] if it shows on its face that everything has been done which the common law of the United Kingdom has prescribed for the making of an Act of Parliament—that the Queen, the Lords and the Commons have assented to it: *The Prince's Case* (1606). . . . All the court can do is look to the Parliamentary Roll. If it *appears* to have passed both Houses and received the Royal Assent that is the end of the inquiry. . . .⁴⁴

³⁹ Bruhl, *supra* note 1, at 350.

⁴⁰ 143 U.S. 649 (1892) (Harlan, J.).

⁴¹ *The Prince's Case*, 8 Coke Rep. 1a, 505, 77 ER 496 (1606). See also THE REPORTS OF SIR EDWARD COKE, KT., LATE LORD CHIEF-JUSTICE OF ENGLAND AND ONE OF HIS MAJESTIES [sic] COUNCIL OF STATE 667 *et seq.* (London, Lee, Walbanck, Parkman & Bedell 1658).

⁴² Bill of Rights of 1689 art. IX.

⁴³ See Alison L. Young, Case Comment, *Hunting Sovereignty: Jackson v. Her Majesty's Attorney-General*, 2006 PUBLIC LAW 187, 192 (Sum. 2006).

⁴⁴ *Jackson v. Her Majesty's Attorney General*, 2005 WL 2493309, [2005] UKHL 56, at [112] (Hope, L.) (emphasis added). I add that Lord Hope's use of the term "appears" is hardly an invitation to check to see if royal assent and other indicia of authentication took place during a given session or during the life of a given Parliament. But see Bruhl, *supra* note 1, at 358 n.34 (suggesting that a court could, consistent with the enrolled bill rule, inquire as to whether the officers authenticating the bill for each house held office contemporaneously). Professor Bruhl is correct: an American court today could make that inquiry. But if it did so, I do not believe it would be acting consistent with the common law rule as it was understood in 1689 or in 1787. Admittedly, it is difficult to be sure.

This is more than mere constitutional obscurianta. The world view of 1776 and 1787 was shaped by that of 1688 and 1689.⁴⁵ As I explained above, I do not believe that the expectations of the founders should control our interpretation of the Constitution, but for those who do believe that it should, the relevant *specific* intellectual tradition of the founders with regard to how courts and actors outside the legislature should validate a bill was the enrolled bill rule. If the roll indicates that the purported bill passed the House and the Senate and was signed by the President, then the task of validation is at an end. (I leave aside complexities arising from veto override and presidential inaction resulting in a valid statute.)

Professor Bruhl also looked for support for a contemporaneous bicameralism requirement in pre-constitutional usage, as required in Parliament—then and today, and as implied by Blackstone and by Jefferson in his celebrated *Manual*.⁴⁶ My views in this regard are substantially different from his.⁴⁷ And I feel obliged to admit that my views are more of an

⁴⁵ See EDWARD S. CORWIN, *THE TWILIGHT OF THE SUPREME COURT: A HISTORY OF OUR CONSTITUTIONAL THEORY* 102 (1934) (“The ‘founding fathers’ owed their mental sustenance much more largely to seventeenth-century England than to the England with which they were themselves contemporary.”).

⁴⁶ See Bruhl, *supra* note 1, at 361 n.46 and accompanying text. It is noteworthy that Professor Bruhl largely limits his discussion of Blackstone and Jefferson to these early authorities’ views in regard to dissolution, *i.e.*, “all steps . . . occurred before the *end* of a Parliament.” *Id.* (emphasis added). But the very passages Professor Bruhl cites discuss both dissolution and prorogation. Traditionally, when a parliamentary session is prorogued (by the crown), even if it is not the last session of a given Parliament, all unfinished legislative business (of that session) dies. If we took Blackstone and Jefferson seriously, if we believed that these British practices mapped onto our own, then House passage of a bill in the first annual session of a two year Congress followed by final congressional adjournment of that session would, *as a constitutional matter*, preclude the Senate from enacting that bill during the second annual session of the very *same* two year Congress, at least absent repassage by the House. But no one today believes that. And if we are unwilling to buy into the Blackstone-Jefferson position with regard to prorogation or other means by which session business is terminated, why should we buy into their view of dissolution? See *infra* note 56 (arguing that British precedents have little relevance to the temporal or sessional structure of Congress, the House, and the Senate because the American system is founded on separation of powers, not executive prerogative). For an early American constitution that attempted to expressly opt into British parliamentary precedents, notwithstanding strict prototypical American separation of powers, see GA. CONST. art. III (Feb. 5, 1777) (“It shall be an alterable rule that the house of assembly shall expire and be at an end, yearly and every year, on the day preceding the day of election mentioned in the foregoing rule.”).

⁴⁷ For example, Professor Bruhl wrote, “As Tillman recognizes, the rules [of the first House and Senate] assume that both chambers contemporaneously approved of the bill because authentication by the two chambers’ respective presiding officers occurs after both have passed it.” See Bruhl, *supra* note 1, at 361 n.47. I do not believe the early rules *assumed* contemporaneity. I believe the first House and Senate *imposed* contemporaneity by rule—a rule from which contemporary Congresses could choose to depart. As I tried (but evidently failed) to make clear, other aspects of the first Congress’ practices represented a distinct *choice* to clearly depart from then prevailing British practices. See Tillman, *supra* note 1, at 337–38 n.15 (distinguishing the House of Lords where *all* members take the oath at the start of a given

intuition than a reasoned argument supported by high authority. But at the very least my views have textual support in the Constitution.

As Jefferson correctly explained, Parliament is dissolved by two modes: the efflux of the time period for which the members were elected, or by order of the crown.⁴⁸ Congress is dissolved only by the efflux of time. What Jefferson does not explain is that the consequences of dissolution are radically different in the two systems. Indeed, the use of a common term here, “dissolution,” a term not found in the text of the United States Constitution, does not clarify the underlying legal reality, it only makes for confusion.

In the British system,⁴⁹ the executive might issue writs of election after dissolution (by either mode). If that is so, then from the time between dissolution until the time the writs of election call for the first assembling of the new Parliament, there is no Parliament. Likewise, when an election takes place post-dissolution, in the period between the dissolution of one Parliament and the election of new members, there are no members of Parliament or even members-elect. Moreover, when Parliament is dissolved, its members are discharged of their offices.

Not so here in the United States. Here, the moment a two-year House term ends, the constitutional term of the successor House begins.⁵⁰ In our system of separation of powers, where the executive can-

Parliament, notwithstanding that they sat as members in a prior Parliament, from the United States Senate where under 1 Stat. 23 (1789) only newly seated members take the oath). For some (albeit noncontemporaneous) evidence that this was a choice (as opposed to happenstance) on the part of the First Congress see Email from Seth Barrett Tillman, to Harry Evans, Clerk of the Senate, Parliament of Australia (Feb. 24, 2005) (“It seems that your practice . . . assumes that the legal force of the [members’] oaths/affirmations survives prorogation and dissolution of the out-going parliament. Your practice matches the practice of the U.S. Senate. Why have you departed from British practice in this regard?”), *responding with* Harry Evans, Clerk of the Senate, Parliament of Australia, to Seth Barrett Tillman (Feb. 24, 2005) (on file with author):

The reason for the adoption of the standing orders [regarding members’ oaths of office] . . . was that the early [Australian] Senate was dominated by those of the framers of the Constitution who were ‘federalists,’ and who, amongst other things, wanted the Senate to resemble as closely as possible its United States model, and as little as possible the House of Lords. They were very keen on the concept of the Senate as a continuing house, and departed from the concept only where the Constitution clearly forced them to.

⁴⁸ See *supra* note 46.

⁴⁹ I am describing the way Parliament worked in the eighteenth century and prior to that time. In the eighteenth and nineteenth centuries various parliamentary reforms were passed to soften the consequences of some of the defects and difficulties described in the text. See, e.g., Act for the Security of Her Majesty’s Person 1707 c.66, § VI (Gr. Br.) (“[I]n case there is no Parliament in being at the time of such demise [of the crown] that has met and sat, then the last proceeding Parliament shall immediately convene, and sit at Westminster, and be a Parliament to continue . . . as if the same Parliament had never been dissolved . . .”).

⁵⁰ There is counterauthority to my position. President Theodore Roosevelt took the position that in the instant or moment between the termination of one Congress and the seating of

not dissolve Congress, there is always a Congress, House, and Senate in being. In short, a dissolution of Congress cannot take place by operation of law. It is true that Congresses frequently adjourn prior to the end of their two-year term. But when a Congress does so, although its members disperse, they do not resign, they are not discharged of their oaths or offices, and the members remain subject to recall to the capitol, either by the President or by operation of their own rules or by statute. Likewise, when Congress adjourns prior to the end of its constitutional term, the journals of the two houses do not reflect any "dissolution," but rather a mere adjournment *sine die*, i.e., an order instituting a temporary indefinite suspension.⁵¹

It is also true that the successor Congress frequently does not meet at the start of its constitutional term. But, traditionally, the successor

its successor even when the prior Congress met until the last moment of its constitutional term and the successor Congress convened immediately thereafter, (i.e., Congress was never dispersed), that interregnum of one moment was a "recess" permitting the President to make constitutionally valid recess appointments. See Edward A. Hartnett, *Recess Appointments of Article III Judges: Three Constitutional Questions*, 26 CARDOZO L. REV. 377, 416 & nn.173-174, 417-18 & nn.179-180 (2005). The President's power in this regard was not judicially tested. It has been rejected by the clear weight of scholarly authority, and, not surprisingly, in a Senate report. *Id.* at 424; see generally Michael B. Rappaport, 52 UCLA L. REV. 1487, 1538-40 (2005) (objecting to recess appointments that do not arise "during the recess"); William Ty Mayton, *Recess Appointments and an Independent Judiciary*, 20 CONST. COMM. 515, 553 (2004) ("The manifest purpose for the [Recess Appointments] [C]ause is to allow for appointments during the predictably long recess between full sessions, when Senators would have dispersed out of the capital for months or so, beyond the reach of quick recall."); Michael A. Carrier, Note, *When is the Senate in Recess for Purposes of the Recess Appointments Clause?*, 92 MICH. L. REV. 2204, 2228 & nn.121-22, 2247 (1994) (arguing that presidential authority extends to intersession recesses, not to "fictional" or "constructive" recesses between back-to-back meetings of the Senate). Admittedly, I must add that if the Roosevelt-recess-appointment-in-the-instant-between-Congresses view is correct, then the view I have put forth here and in *Noncontemporaneous* is as dead as a doornail. On the other hand, although a rejection of the Roosevelt view does not logically command support for noncontemporaneous lawmaking, a rejection of the Roosevelt view founded in congressional or Senate continuity notwithstanding House termination does lend some not insignificant support to noncontemporaneous lawmaking.

⁵¹ See 1 JOURNAL OF THE HOUSE OF REPRESENTATIVES OF THE UNITED STATES 409 (March 3, 1791) (adjourning "*sine die*" final session of the First House); 1 JOURNAL OF THE SENATE OF THE UNITED STATES 314 (Thursday Evening, March 3, 1791) (adjourning "without day" final session of the First Senate). Compare Memorial Service: Honorable Edward Dumbauld (1905-1997), 5 F. Supp. 2d LI, LXXI (1997) (noting that Judge Dumbauld "once told Judge McCune that his deepest regret in life was that he had majored in Greek rather than Latin at Princeton"), with JOHN MORTIMER, *Rumpole and the Tap End*, in RUMPOLE AND THE AGE OF MIRACLES 130 (Penguin Books Ltd 1988):

'You mean, Lord Chancellor, my retirement is off?' [Mr. Justice] Guthrie [Featherstone] could scarcely believe [his unexpected turn of good fortune].

'Perhaps adjourned. *Sine die*.' [said the Lord Chancellor of England]

'Indefinitely?' [said Guthrie]

'Oh, I'm so glad you keep up with your Latin.' The Chancellor patted Guthrie on the shoulder. It was an order to dismiss. 'So many fellows don't.'

Congress' members were elected during the prior term. So when a Congress' first meeting does not take place at the start of its constitutional term, although there are no qualified members, there are, in fact, extant members-elect.

It might be argued that although it is the tradition for the election of the new Congress to take place during the term of the outgoing Congress, the outgoing Congress has some discretion to delay that election (by statute) to a time after the termination of the outgoing House. And that would mean a "dissolution" took place in the British sense of the term. I suggest that Congress has no such discretion within the ambit of its constitutional authority. Any such delay would wholly destroy the President's express power to convene Congress or either house during the interregnum.⁵² Just as Congress cannot completely strip the jurisdiction of the federal courts, Congress cannot by statute wholly defeat a coordinate power of the President.⁵³ The House, the Senate, the Congress are continuous bodies. Or, to put it another way: congressional power—"love it or loathe it, you can never leave it or lose it."⁵⁴

Congress, the House, and the Senate can never be dissolved, they are continuous bodies, notwithstanding that each and every member of the lower house might turn over.⁵⁵ The fact that, up until now, the bills passed through a single house have expired with the termination of the House, has arisen in consequence of rules chosen by the members. But as the bodies themselves are continuous, the effectiveness of the instruments they create might also continue if they choose to make them do so.⁵⁶

⁵² See U.S. CONST. art. II, § 3.

⁵³ Cf. BURKE, *supra* note 26, at 23 ("The House of Lords, for instance, is not morally competent to *dissolve* the House of Commons, no, nor even to *dissolve* itself, nor to abdicate, if it would, its portion in the legislature of the Kingdom The constituent parts of a state are obliged to hold their public faith with each other") (emphasis added).

⁵⁴ GORE VIDAL, *DULUTH 1* (Random House 1983).

⁵⁵ What if every member of the House were killed by an act of God or war, and the people subsequently elected a full contingent of new House members? Could the new members rely on the decisions taken by their predecessors or would they be obliged to start every bill anew because the "new mandate from constituents [constitutionally compels] seeking their agents' [i.e., members'] views anew[?]" Bruhl, *supra* note 1, 360. If Professor Bruhl would answer this question in the negative, and I expect that he would, then it is not the existence of a "new" House, i.e., a House all of whose members are new, that compels the death-knell approach, but rather only "new" Houses elected every two years, notwithstanding that all the members might be exactly the same in both the prior and the successor House. But that result cannot possibly be correct, can it?

⁵⁶ I submit that any Commonwealth parliamentarian would state categorically that absent express constitutional or statutory authority (where statutory authority would be sufficient), any attempt to engage in noncontemporaneous lawmaking (between meetings of different Parliaments) in their system, the Westminster system, would trespass upon the crown's power to dissolve Parliament and on the concomitant discretionary power to set the timing of elections. But these institutional concerns, tied to executive prerogative, simply play no role in our sys-

tem of government—the American system of separation of powers. Cf. Aaron-Andrew P. Bruhl, *If the Judicial Confirmation Process is Broken, Can a Statute Fix It?*, 85 NEB. L. REV. ____ *passim* (forthcoming 2007) (arguing that cameral autonomy is a constitutional norm), posted on SSRN. (For the same reason, Blackstone and Jefferson’s discussion of Westminster-type prorogation, which had the effect of terminating legislative business of a session within the life of a given Parliament, simply has no relevance to our constitutional system because prorogation was a crown prerogative.) Thus, the consequences of purported “dissolution” (or prorogation) are entirely different here, notwithstanding Jefferson’s use of the same term to describe both phenomena. See *supra* notes 46 & 47 and accompanying text. This is the downside of constitutional comparativism: Jefferson simply went a bridge too far.