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Separating Law-Making from Sausage-Making:
The Case for Judicial Review of the Legislative Process

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ABSTRACT

Separating Law-Making from Sausage-Making:
The Case for Judicial Review of the Legislative Process

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Inspired, perhaps, by the old adage that "people who like sausages and respect the law should never watch either being made," there is significant resistance among judges and scholars alike to the idea that courts should review the lawmaking process. This doctoral dissertation challenges this prevalent position, and establishes the case for judicial review of the legislative process.

The dissertation develops the arguments for the authority of courts to review the legislative process; the legitimacy and theoretical justifications of such judicial review; and the practical and normative importance of such judicial involvement. It also challenges the resistance to judicial review of the legislative process by scrutinizing, and seeking to rebut, the major arguments underlying this resistance, and revealing this position's doctrinal and theoretical incoherence, and its negative consequences.

In an effort to provide a multifaceted exploration of the issue, the dissertation combines multiple approaches of legal scholarship, including a

of unfettered legislative supremacy. Section VI.C argues, therefore, that EBD is incompatible with the U.S. Constitution.

A. Establishing the Link between the Doctrine and Legislative Supremacy

The historical origins of the American EBD are rooted in English common law.[265] Although these origins can perhaps be traced back to the time of Henry VI in fifteenth-century England,[266] the most cited articulation of the English rule was stated in the 1842 decision of *Edinburgh & Dalkeith Railway v. Wauchope*:

> All that a Court of Justice can do is look at the Parliamentary roll [the practical equivalent of the "enrolled bill"]: if from that it should appear that a bill has passed both Houses and received the Royal assent, no Court of Justice can inquire into the mode in which it was introduced into Parliament, nor into what was done previous to its introduction, or what passed in Parliament during its progress in its various stages through both Houses.[267]

This rule is based, to a large extent, on the traditional English view of parliamentary supremacy (or sovereignty).[268] According to the orthodox view

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[265] *See* Lloyd, *supra* note 139, at 20–23; Seth Barrett Tillman, *Defending the (Not So) Indefensible*, 16 CORNELL J.L. & PUB. POL'Y 363, 375–76 (2007).

[266] Lloyd, *supra* note 139 (discussing the English antecedents of the American EBD starting with *Pylkinton* in 1454).

[267] Edinburgh & Dalkeith Ry. v. Wauchope, (1842) 8 Eng. Rep. 279, 285 (H.L.).

[268] On the principle of parliamentary supremacy as the basis for the English EBD, see, for example, R. Elliot, *Rethinking Manner and Form: From Parliamentary Sovereignty to Constitutional Values*, 29 OSGOODE HALL L.J. 215, 220–22 (1991); Jonathan E. Levitsky, *The Europeanization of the British Legal Style*, 42 AM. J. COMP. L. 347, 349 (1994); Lloyd, *supra* note 139, at 21–22; Swinton, *supra* note 248, at 359–62. Admittedly, there are additional (and apparently earlier) historical explanations for this doctrine. *See* Swinton, *supra* note 248, at

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