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August 26, 2008

Judicial Review of Legislative Procedure: Determining Who Determines the Rules of Proceedings

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I. Introduction

American state legislatures are created as self governing bodies, vested with considerable autonomy under the well-studied principles of separation of powers. Using their power to govern their own procedures, legislatures typically operate pursuant to an extensive collection of procedures based on centuries of practice developed in the British Parliament. Forty-nine state constitutions grant each house of the legislature the power to determine its own rules—such provisions are generally patterned after the Rules of Proceedings Clause of the U.S. Constitution. Legislative rules of procedure not only serve to bring order to the law-making process, but also to protect the interests of members—particularly those in the minority. While some observers may be tempted to dismiss parliamentary procedure as an arcane relic which is mostly invoked

as a dilatory tactic, such criticism hearkens Thomas Jefferson's oft-quoted observation regarding the purpose of parliamentary procedure:

> as it is always in the power of the majority, by their numbers, to stop any improper measures proposed on the part of their opponents, the only weapons by which the minority can defend themselves against similar attempts from those in power are the forms and rules of proceeding which have been adopted as they were found necessary, from time to time . . . by a strict adherence to which the weaker party can only be protected from those irregularities and abuses which these forms were intended to check, and which the wantonness of power is but too often apt to suggest to large and successful majorities.[1]

Due to the separation-of-powers doctrine and legislatures' plenary power under rules-of-proceedings clauses, disputes over procedural matters are generally not subject to judicial review. An important exception to the rule of non-review exists in the case of procedures which are imposed by the constitution itself. Because the judicial branch is the ultimate interpreter of the constitution, it is reasonable to expect courts to enforce constitutionally mandated legislative procedure by invalidating laws which are not passed in compliance with such requirements. Most state constitutions from the eighteenth and early nineteenth century mirrored the U.S. Constitution's lack of detailed procedures imposed on the legislative branch. A mid- to late-nineteenth-century political reform movement was responsible for inserting many procedural mandates in state constitutions. This movement was largely a response to widespread legislative corruption, and the procedural mandates were designed to bring order and transparency to the lawmaking process.

Because the boundaries of legislative power are defined by the constitution, the reform-motivated constitutional procedures should, regardless of their wisdom, be binding on the legislature. In reality, courts have devised numerous justifications for not enforcing constitutionally prescribed procedure. Often, courts will use either the separation-of-powers

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[1] Thomas Jefferson, *Jefferson's Manual of Parliamentary Practice*, *reprinted in Constitution, Jefferson's Manual, and Rules of the House of Representatives*, H.R. Doc. No. 101-256, § I, at 118-119 (William H. Brown, ed., 1991).

doctrine or common-law evidentiary rules to avoid reviewing legislative non-compliance with constitutional procedures. Ultimately, neither concept sufficiently justifies the deference which courts frequently employ.

The separation-of-powers doctrine does largely prevent courts from directly intervening in legislative affairs. However, as shown in the cases reviewed here, when procedural disputes reach the courts, litigants usually do not ask for direct intervention; instead, plaintiffs typically allege that a specific statute has been passed in violation of a certain procedure, and pray for invalidation of the statute. If the procedure in question is mandated by the constitution, separation of powers is not a persuasive justification for holding the case non-justiciable.

Even if a procedural challenge is held justiciable, the court may still avoid requiring meaningful legislative compliance by deferring to the legislature's interpretation of a rule. In these cases, courts will purport to render a decision on the merits, but will heavily rely on the legislature's interpretation of constitutional provisions. Although legislative bodies are entitled to interpret the constitution as they see fit, in cases where legislation is challenged for non-compliance with constitutional requirements, the judiciary should keep in mind that constitutionally prescribed procedure is intended as a check on legislative power. Accordingly, it makes little sense to defer to the legislature's interpretation of a provision meant to prevent legislative over-reaching.

In addition to separation of powers, the other prominent barrier to effective judicial enforcement of constitutionally mandated procedure is the common-law enrolled bill rule. The rule, in its traditional form, holds that an enrolled bill raises a conclusive presumption that it was enacted in compliance with all required procedures. Since bill enrollment is a process under exclusive control of the legislature, the enrolled bill rule effectively prevents meaningful judicial

review of procedural non-compliance. Even the modified version of the rule, which purports to allow some extrinsic evidence to impeach the validity of an enrolled bill, does not provide meaningful relief since admissible extrinsic evidence is usually limited to certain entries in the legislative journals. Most defenders of the enrolled bill rule say that allowing an enacted bill to be impeached by extrinsic evidence would destabilize our system of lawmaking by undercutting the legitimacy of enacted legislation. The experience of states which have adopted an extrinsic evidence rule, however, disproves these concerns.

This paper begins with an overview of the law of legislative procedure. Separation-of-powers concerns are then examined in the context of five specific types of procedures. The final section explores the enrolled bill rule and its common variants. Although the wisdom of constitutionally prescribed legislative procedure is open to debate, the indisputable purpose of such procedures was to prevent legislative corruption. While state constitutions are filled with reform-minded procedural requirements, many courts have demonstrated a clear reluctance to enforce such procedures. As a result, deadlines are ignored, reading requirements are flaunted, and—in extreme cases—bills are passed without a majority vote. With some exceptions (such as the area of bill presentment), procedural checks on legislative power have generally been diluted by judicial hesitancy.

II. Landscape of Legislative Procedure

Legislative proceedings are governed by complex sets of rules covering all aspects of the law-making process. Such rules cover the introduction, consideration, amendment, and passage of measures; decorum in debate; discipline and expulsion of members; and, production of legislative records. At the most fundamental level, these rules fall into either of two categories—

those promulgated by the legislature and those imposed by the constitution. This section discusses the sources of American parliamentary procedure, both constitutional and otherwise. First, the basic principles behind legislatively adopted rules and common-law parliamentary procedure are discussed. Next, relevant case law concerning the federal Rules of Proceedings Clause is reviewed. The section concludes with an overview of common state constitutional restrictions on legislative procedure.

A. Legislative Rulemaking

Forty-nine state constitutions grant each house of the state legislature the power to determine its procedural rules.[2] Each constitution uses language substantially similar to the U.S. Constitution's provision that "[e]ach House may determine the Rules of its Proceedings, punish its Members for disorderly Behaviour, and, with the Concurrence of two thirds, expel a Member."[3] The federal Rules of Proceedings clause was the subject of no recorded debate at the Constitutional Convention of 1787 nor was it discussed in the Federalist Papers. Although the Articles of Confederation had not contained such a clause, several early state constitutions did, and it appears that the Framers considered the inherent power of a legislative body to settle its own rules to be a self-evident point.[4]

Some state constitutions mirror the U.S. Constitution's Rules of Proceedings clause by addressing general procedural rules and discipline of members in the same section. For example, the Washington constitution provides "[e]ach house may determine the rules of its own

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[2] Mason's Manual of Legislative Procedure § 3 (Denver, CO: Natl. Conference of State Legislatures, 2000) (1935). North Carolina is the only state without a rules-of-proceedings clause, an omission which is true not only of the current state constitution, but also the two preceding constitutions of 1776 and 1868, *see* 7 Sources and Documents of United States Constitutions 402-407, 414-430 (William F. Swindler, ed., 1978).

[3] U.S. Const., art I, § 5, cl. 2.

[4] John C. Roberts, *Are Congressional Committees Constitutional?: Radical Textualism, Separation of Powers, and the Enactment Process*, 52 Case W. Res. L. Rev. 489, 528-529 (2001).

proceedings, punish for contempt and disorderly behavior, and, with the concurrence of two-thirds of all the members elected, expel a member, but no member shall be expelled a second time for the same offense."[5] Other states address parliamentary procedure in its own section, such as Utah's model of brevity, "Each house shall determine the rules of its proceedings and choose its own officers and employees."[6] Still others combine many procedural items into one "kitchen sink" clause. Iowa's procedure clause requires keeping of journals; grants each house the power to determine time of adjournment, rules of proceedings, and manner of disciplining members; and, concludes with a general grant of "all other powers necessary for a branch of the general assembly of a free and independent state."[7] Similarly, Oregon's procedure clause grants each house the power to choose officers, judge elections and qualifications of members, determine rules of proceedings and time of adjournment; and, limits length of adjournment or change of venue without concurrence of the other chamber.[8]

In exercising their powers under the rules-of-proceedings clauses, most legislatures have adopted rules based heavily on traditional Anglo-American parliamentary procedure, as modified to accommodate political and social interests unique to each state. Governing bodies in general, and legislatures in particular, operate under generally accepted procedures which grew out of the practice of the English House of Commons.[9] Nineteenth-century political philosopher Francis Lieber described American parliamentary procedure's links to its heritage by remarking

> [p]arliamentary practice . . . such as have been developed by England, independently of the executive, and, like the rest of the common law, been carried over to our soil, form a most essential part of our Anglican constitutional, parliamentary liberty. This practice . . . is not only one of the highest importance for legislatures themselves, but serves as an

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[5] Wash. Const. art. II, § 9.
[6] Utah Const. art. VI, § 12.
[7] Iowa Const. art. III, § 9.
[8] Oregon Const. art. IV, § 11.
[9] Luther S. Cushing, *Rules of Proceeding and Debate in Deliberative Assemblies* (Philadelphia: John C. Winston Co., [1914]) at 7 ("The rules of parliamentary proceedings in this country are derived from, and essentially the same with, those of the British parliament"); *see also*, John Q. Tilson, *Parliamentary Law and Procedure*, at 6-12 (1935).

> element of freedom all over the country . . . . Every other nation of antiquity and modern times has severely suffered from not having a parliamentary practice such as the Anglican race possesses.[10]

Although the specific procedures used in the United States are an outgrowth of the Anglo-American legal tradition, the broader concept of legislative self-governance is grounded in a more universal principle that a legislature possesses inherent power to regulate its own procedure.[11] Many contemporary state constitutions impose procedural requirements on legislatures, including directives concerning voting, bill reading, and session length.[12] When not governed by constitutional requirements, legislative bodies are free to create their own unique standing rules of procedure by utilizing their power under the rules-of-proceedings clause.[13]

Legislatively created rules fall into four categories: adopted rules; custom, usage, and precedents; statutory provisions; and, adopted parliamentary authorities.[14] Of these types of rules, adopted and statutory rules constitute positive law. When procedural issues arise that are not addressed by positive law, the legislature is guided by the general common law of parliamentary procedure as contained in the body's adopted authority or set forth in custom, usage, and precedent.[15] With the possible exception of statutory rules (which are the subject of some confusion[16]), a legislature enjoys plenary control over the development, implementation, enforcement, and modification of the rules it creates. As a result, constitutionally imposed

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[10] Robert Luce, *Legislative Procedure: Parliamentary Practices and the Course of Business in the Framing of Statutes*, at 5 (1922).
[11] Mason's Manual, *supra*, note 2, § 2.
[12] *See infra*, notes 80-116 and accompanying text.
[13] Mason's Manual, *supra* note 2, § 2, ¶ 2 ("A house of a state legislature has complete authority concerning its procedure, so far as it is not limited by constitutional provisions.").
[14] *Id*. § 4, ¶ 2. A common characteristic of these four sources is the direct and sweeping control which the legislature possesses to adopt (or discard) them, see *infra*, text accompanying notes 146-148.
[15] *See e.g., Witherspoon v. State ex rel. West*, 103 So. 134, 137 (Miss. 1925) ("In the absence of special rules of procedure adopted by [a legislative body] . . . its procedure is governed by the general parliamentary law"); *Heimbach v. State*, 89 A.D.2d 138, 147 (N.Y.A.D. 1982) ("When the Legislature has not adopted rules for a particular subject or purpose it '"is governed by the generally accepted rules of parliamentary procedure which flow from general principles of common law."'" (quoting *Matter of Board of Educ. v. City of New York*, 41 N.Y.2d 535, 541, n. 3)).
[16] *See infra*, notes 24-27 and accompanying text.

procedures assume importance as the only opportunity for voters, in their capacity as constitutional sovereigns, to create mandatory and immutable rules for the law-making process.[17]

Adopted rules are usually codified in legislative rulebooks and are enacted by simple resolution (typically readopted at the beginning of each session,[18] except in the case of "continuous bodies" like the U.S. Senate[19]). Adopted rules are usually culled from the common law of parliamentary procedure, but need not conform to every principle found in the common law. In much the same way as statutes relate to common-law principles, an adopted rule supercedes a conflicting common-law parliamentary rule.[20]

Custom, usage, and precedent are extensively documented and studied in the U.S. Congress,[21] but play less of a role in state legislatures. "Usage" is a term of art referring to parliamentary practices adhered to through acclamation. Luther Cushing describes usage as a general body of principles collected from legislative journals, historical practices, published treatises, and personal experience of parliamentarians.[22] Most state legislatures still employ custom and usage in the manner described by Robert Luce, who wrote in 1922, "[u]sages are not officially set forth and are rarely described. They are constantly recognized, are ever changing, and can be learned only by experience."[23] Precedents, while technically a species of usage, are

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[17] The difficulty of effectively imposing constitutionally imposed restrictions on state legislative bodies which are otherwise endowed with plenary powers is hinted at in The Federalist No. 15, at 111 (Alexander Hamilton) (Clinton Rossiter ed., 1961) ("there is in the nature of sovereign power an impatience of control that disposes those who are invested with the exercise of it to look with an evil eye upon all external attempts to restrain or direct its operations.")

[18] *See e.g.,* William H. Brown and Charles W. Johnson, *House Practice: A Guide to the Rules, Precedents, and Procedures of the House*, Ch. 50, § 1 (2003).

[19] Floyd M. Riddick and Alan S. Frumin, *Riddick's Senate Procedure: Precedents and Practices*, S. Doc. No. 101-28, at 1220-1224 (1992).

[20] Mason's Manual, *supra* note 2, § 10.

[21] *See e.g.*, Brown, *supra* note 18, Ch. 50 § 1, at 825-825.

[22] Luther S. Cushing, *Lex Parliamentaria Americana: Elements of the Law and Practice of Legislative Assemblies in the United States of America*, § 778 (1856).

[23] Luce, *supra* note 10, at 14.

more formal insofar as they represent the decisions made by the presiding officer (or, in the case of an appeal of the chair's ruling, the body itself) concerning procedural matters.[24]

The enactment of legislative rules in statute has a long history of use and concomitant confusion.[25] Because rigid adherence to so-called "statutized" rules would inhibit the right of a future legislative body to make its own rules, both houses of Congress generally subscribe to the theory that "the Constitution grants them the prerogative to abrogate by unilateral action any statutory provision that concerns internal affairs within the purview of the rules power."[26] While this principle generally applies to legislative rules codified in state statutes as well,[27] at least one state court has held that legislative rules must yield to duly enacted statutory rules where non-legislative issues are implicated.[28]

To fill the gaps not addressed by adopted rules, customs, or statutory rules, most legislative bodies adopt a parliamentary authority which compiles rules from various legislative bodies.[29] Although an adopted authority governs all situations not addressed by a body's own rules, it may be suspended or waived in the same manner as the standing rules.[30]

Given the numerous sources of legislative procedure, bodies must also agree on the order of precedence in which the rules apply. *Mason's Manual*, the most commonly used

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[24] Mason's Manual, *supra* note 2, § 39, ¶ 3.
[25] *See* 24 Cong. Rec. S228 (1892), the U.S. Senate, unsure of whether Congress may "enact[] by law provisions for the direction of either House as to the time or mode of its proceeding without the special assent of that particular House in the particular Congress," took the "safer way" of enacting procedures for counting of electoral college vote in statute *and* rule.
[26] Aaron-Andrew P. Bruhl, *Using Statutes to Set Legislative Rules: Entrenchment, Separation of Powers, and the Rules of Proceedings Clause*, 19 J. of L. & Politics 345, 369 (Fall 2003).
[27] *See Schweizer v. Territory*, 47 P. 1094 (Okla. 1897) (statutory three-readings rule "receives its entire force from legislative sanction, and it exists only at legislative pleasure."); *Coggin v. Davey*, 211 S.E.2d 708, 710-711 (Ga. 1975) ("We do not believe that it can reasonably be argued that the House or Senate cannot pass an internal operating rule for its own procedures that is in conflict with a statute formerly enacted.").
[28] *Zemprelli v. Scranton*, 519 A.2d 518, 520 (Pa. Commw. Ct. 1986) (Sunset Act requiring legislative action in the face of agency sunsetting held judicially enforceable because the court "is not invading the province of a separate co-equal branch of government but is interpreting and reviewing, with great caution, a unique statutory framework controlling the continued existence of administrative agencies.").
[29] Mason's Manual, *supra* note 2, §§ 30-31.
[30] *Id.* at § 32.

parliamentary authority in American state legislatures,[31] uses the following ranking of authority (in descending order): constitutional provisions and judicial decisions thereon; adopted rules; custom, usage, and precedents; statutory provisions; adopted authority; and common law of parliamentary procedure.[32] Notably, *Mason's Manual* recognizes that judicial interpretations of constitutional provisions should be given the same weight as the constitution itself. This was not always the case—the original 1979 edition of the manual ranked constitutional rules as the highest of eight authorities, but judicial decisions as the lowest.[33] During the 2000 revision of the manual, the revision committee reordered the rankings and combined constitutional rules with related judicial decisions.[34] As discussed later, many judicial opinions cite respect for legislative sovereignty as support for deference to legislative interpretation of constitutional rules. The fact that legislative scholars recognized the legitimacy of judicial interpretation during the 2000 revisions undercuts this argument and suggests other motives, such as institutional autonomy and fear of legislative reprisal, may be the true motivating factors behind judicial deference.[35]

B. Point of Comparison: The Federal Rules of Proceedings Clause

Although each state's courts are free to interpret the procedural components of their own constitution as they see fit, judges will frequently refer to federal practice and case law in their opinions. Sometimes these references are used to support the court's interpretation of its

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[31] Natl. Conference of State Legislatures, Using *Mason's Manual of Legislative Procedure*: The Advantages to Legislative Bodies, http://www.ncsl.org/programs/legismgt/about/masons.htm (last visited Nov. 3, 2007) (seventy of the ninety-nine state legislative chambers use Mason's Manual).
[32] Mason's Manual, *supra* note 2, § 4, ¶ 2.
[33] Brenda Erickson and Hogan Brown, *Sources of Parliamentary Procedure: A New Precedence for Legislatures*, 7 J. of Am. Society of Legislative Clerks & Secretaries 3, 3 (2001).
[34] *Id.* at 4.
[35] *See generally,* Laura Langer, *Judicial Review in State Supreme Courts*, 19-32 (2002) (theories concerning checks on state court judicial review of legislative acts).

constitution's provisions. In *State ex rel. Robinson v. Fluent*, the Washington Supreme Court was asked to rule on the constitutionality of a legislative interim committee.[36] The challenge to the interim committee was based solely on five sections of the state constitution.[37] The court examined numerous cases from other jurisdictions, including the U.S. Supreme Court case *McGrain v. Daughterty*.[38] When determining the legislature's structural power (such as the power to establish an interim committee), cases interpreting similar provisions from other states' constitutions can be useful as an interpretive aid. But reference to federal case law seems out of place given the fundamental difference between state constitutions (which limit the otherwise plenary power of the legislative branch) and the U.S. Constitution (which is a grant of specific enumerated powers to Congress).[39]

State judicial consideration of national law is not limited to case law. When ruling on senate confirmation of executive appointments, the Mississippi Supreme Court looked to Congressional rules of procedure, noting that the state confirmation process was governed by the Mississippi rules of proceedings clause, which "was taken verbatim" from the U.S. Constitution.[40] After citing U.S. Senate rules in support of its interpretation of the Mississippi constitution, the court cautioned, "[w]hile the interpretation put upon [the rules of proceedings clauses] of the two Constitutions by both the national and state Senates is not binding on the courts, it is, to say the least, very persuasive as to its correctness, and should not be departed from, unless manifestly wrong."[41] Illustrating a contrary approach, the New Jersey Supreme Court in 1894 decided that despite virtually identical constitutional wording, it would not

[36] 191 P.2d 241 (Wash. 1948).
[37] *Id*. at 244-245.
[38] 273 U.S. 135 (1927).
[39] *See*, Michael E. Libonati, *The Legislative Branch*, *in* 3 State Constitutions for the Twenty-first Century 37, 37 (G. Alan Tarr and Robert F. Williams, eds., 2006).
[40] *Witherspoon v. State ex rel. West*, 103 So. 134, 138 (Miss. 1925).
[41] *Id.* at 138-139.

presume that the state Senate was a continuous body in the same manner as its federal counterpart.[42]

Because legislative procedure has been much more thoroughly studied and developed in the federal system than in the states, state courts will often consult (and sometimes rely on) federal law when adjudicating procedural controversies.[43] As a result, it is helpful to review the basic rules laid down by the U.S. Supreme Court in interpreting the federal Rules of Proceedings Clause. The watershed Supreme Court case in this area is *U.S. v. Ballin*.[44] This case shaped the Supreme Court's approach to judicial review of legislative procedure by establishing a general presumption that questions of Congressional compliance with procedural rules are non-justiciable, subject to three narrow exceptions—violation of a "constitutional restraint," violation of a fundamental right, or Congressional action which does not bear "reasonable relationship" to "the result which is sought to be attained."[45] *Ballin* presented the question of whether a constitutional quorum of Representatives was present upon passage of a certain statute.[46] Writing for the court, Justice Brewer noted that the Constitution defines a quorum[47] and while the Rules of Proceedings Clause gave each house the power to craft its rules, that power is not without limit. Specifically, the court held that rules enacted under the Rules of Proceedings Clause could not "ignore constitutional restraints or violate fundamental rights, and there should be a reasonable relation between the mode or method of proceeding established by the rule and

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[42] *Attorney General ex rel. Werts v. Rogers*, 28 A. 726, 760 (N.J. 1894) ("We must construe our own constitution exclusively by its own lights.").
[43] *See also, State ex rel. City Loan & Savings Co. v. Moore*, 177 N.E. 910, 911 (Ohio 1931), *State ex rel. Coleman v. Lewis*, 186 S.E. 625, 630 (S.C. 1936), *Crawford v. Gilchrist*, 59 So. 963, 968 (Fla. 1912) (all citing *U.S. v. Ballin*, 144 U.S. 1 (1892) with approval).
[44] 144 U.S. 1 (1892).
[45] Michael B. Miller, *The Justiciability of Legislative Rules and the "Political" Political Question Doctrine*, 78 Cal. L. Rev. 1341, 1350 (1990).
[46] *Ballin*, 144 U.S. at 2-3 (the court stated the facts as follows: although 212 members (more than the minimum quorum requirement) were present at the time of the vote, 74 refused to vote, thus making the total votes cast less than the required quorum).
[47] U.S. Const. art. I, § 5, cl. 1 ("a Majority of each [house] shall constitute a Quorum to do Business").

the result which is sought to be attained."[48] After a brief textual analysis of the quorum clause, the court acknowledged that while a majority of members constituted a quorum, the constitution was silent on how the presence of a majority should be determined. Because the constitution "has prescribed no method for making this determination," Brewer wrote, "it is therefore within the competency of the house to prescribe any method which shall be reasonably certain to ascertain the fact."[49] As previously mentioned, *Ballin* establishes three situations in which Congressional procedure could present a justiciable question; however, since none of these situations applied to the quorum calculation at issue, the Court concluded that the statute at issue was "beyond challenge."[50]

Ballin also serves as an example of the common way in which procedural controversies arrive in court. The dispute that lead to the *Ballin* case was a hotly debated issue in the House of Representatives during the Fifty-first Congress. At that time, the minority party in the House could thwart action by refusing to respond to a roll call (thus preventing a quorum). When the House convened after the 1889 elections, the Republican party held a four-seat majority. Given the Republican's small margin, the Democratic minority planned on using their quorum-blocking ability to defeat controversial legislation.[51] In January 1890, when the Democrats used this tactic to block action on a contested election, newly elected Republican Speaker Thomas Reed directed the clerk to add to the roll call those members who were present but refusing to answer. This action contradicted decades of House precedent—which had been supported by both parties—and lead to several days of chaotic fighting.[52] Reed's change in the quorum procedure (which was part of a package of "Reed rules" designed to end Democratic obstruction), was first

[48] *Ballin*, 144 U.S. at 5.
[49] *Id.* at 6.
[50] *Id.* at 9.
[51] L. White Busbey, *Uncle Joe Cannon*, 171-174 (1927).
[52] *Id.* at 176-182.

implemented as a ruling from the chair and later adopted as an amendment to the House rules.[53] Although the rule change spurred heated debate (coming perilously close to physical altercation on several occasions), aggrieved Democrats did not go directly to court. The issue only arrived before the Supreme Court when the import firm Ballin, Joseph & Co. challenged the validity of a new duty on worsted cloth which was passed by the House in June 1890, under the Reed quorum procedure.[54] Similarly, controversies over state legislative procedure usually arrive in court when non-legislators challenge the validity of a particular enacted bill. But whereas *Ballin* involved a procedural question upon which the Constitution was silent, many state controversies entail procedures which are expressly provided for in state constitutions. As a result, citation to *Ballin* in state court opinions is misplaced to the extent that the state court is dealing with an express constitutional provision.[55]

Forty years after *Ballin*, the Supreme Court issued its second opinion concerning Congressional rules of procedure, *U.S. v. Smith*.[56] While a strict reading of *Ballin* would have arguably precluded judicial review in *Smith*, the court distinguished the two factual situations. *Smith* involved the presidential appointment of George Smith to the Federal Power Commission. When a dispute arose over whether the Senate could, pursuant to its rules, recall the resolution

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[53] Gregory J. Wawro & Eric Schickler, *Filibuster: Obstruction and Lawmaking in the U.S. Senate*, 63 (2006). Ironically, when the Republicans lost control of Congress in the next election cycle, the newly empowered Democratic leadership promptly repealed the Reed rules. When the Democratic majority was reduced two years later, the leadership reinstated the rules rather than face obstruction at the hands of the Republicans. Busbey, *supra* note 51, at 183-184. The entire controversy surrounding the Reed rules has been identified as a major turning point in the evolution of American legislative politics. *See* Ronald Brownstein, *The Second Civil War: How Extreme Partisanship Has Paralyzed Washington and Polarized America*, 36-37 (2007).
[54] Respondents' Motion to Advance at 1-2, *U.S. v. Ballin*, 144 U.S. 1 (1891).
[55] *Ballin* is historically noteworthy simply for the fact that a dispute over Congressional procedure ended up in court. Previous disagreements over Congressional procedure, even extremely heated ones, had been resolved within the legislative branch with no anticipation of judicial review. *See* Robert C. Byrd, 1 *The Senate, 1789-1989: Addresses on the History of the United States Senate*, Sen. Doc. 100-20, at 134-139 (Wendy Wolff, ed., 1991) (contentious debate in 1837 on expunging the 1834 Senate censure of President Andrew Jackson involved discussion of the procedural validity of altering the Senate journal. Despite high passions, the dispute was resolved entirely within the Senate).
[56] 286 U.S. 6 (1932).

confirming the appointment, the court held the issue was justiciable because the interpretation of Senate rules affected a non-member of the Senate (i.e., Smith) and thus "the question presented is of necessity a judicial one."[57] At the outset of its analysis the court acknowledged that it "must give great weight to the Senate's present construction of its own rules; but so far, at least, as that construction was arrived at subsequent to the events in controversy, we are not concluded by it."[58] The deference implied by this statement (and in *Ballin*) notwithstanding, the *Smith* court used standard legal rules of interpretation to determine that the Senate had interpreted its rules incorrectly.

While the *Smith* court appeared to depart from the *Ballin* presumption of non-justiciability out of concern for the rights of a non-member, it did not invoke *Ballin*'s "fundamental rights" language. The question of fundamental rights arose in the court's next legislative procedure case, *Christoffel v. U.S.*[59] Harold Christoffel was convicted of criminal perjury based on statements he made, under oath, to a House committee in 1947.[60] The perjury law of the District of Columbia required that a perjurious statement be made contrary to "an oath or affirmation before a competent tribunal."[61] As part of his defense, Christoffel argued that when he made the allegedly perjurious statements, a quorum of the committee's members was not present and thus the committee did not constitute a competent tribunal.[62] Although the court's opinion does discuss House rules and practice concerning committee quorum in some detail, it ends the discussion by remarking "the considerations which may lead Congress as a matter of legislative practice to treat as valid the conduct of its committees do not control the

[57] *Id*. at 33.
[58] *Id.*
[59] 338 U.S. 84 (1949).
[60] *Id.* at 85 (Specifically, Christoffel, in response to questions from the committee, "unequivocally denied that he was a Communist or that he endorsed, supported or participated in Communist programs." On the basis of these statements, he was convicted for violating the perjury laws of the District of Columbia).
[61] *Id.* at 85, n. 2.
[62] *Id.* at 85-86.

issue before us."[63] Although the opinion references the Rules of Proceedings Clause, the court's reasoning indicates that the case is not about legislative procedure so much as criminal procedure: "The heart of this case is that by the charge that was given it the jury was allowed to assume that the conditions of competency were satisfied even though the basis in fact was not established and in face of a possible finding that the facts contradicted the assumption."[64] The government argued that a quorum had been present at the beginning of the hearing, and should thus be presumed to have continued until otherwise noted in the record. Although the majority criticized this argument from the standpoint of parliamentary procedure, they ultimately based their holding on the violation of Christoffel's fundamental rights, noting that the jury should not have been instructed to presume the presence of a lawful quorum.[65]

The Supreme Court next addressed Congressional rules against the backdrop of field hearings by the House Committee on Un-American Activities (HUAC). In *Yellin v. U.S.*, the defendant appealed his criminal conviction for contempt of Congress, after he refused to answer committee questions in a public hearing.[66] Yellin's defense was that the committee refused to follow its own rule. The rule in question required (under Yellin's interpretation) the committee to consider holding a closed-door session if "interrogation of a witness in a public hearing might . . . unjustly injure his reputation."[67] Whereas *Ballin* had expressed a default rule of non-justiciability absent specific enumerated exceptions, Chief Justice Warren, writing for the *Yellin* majority, departed from the *Ballin* sentiment, writing, "[i]t has long been settled, of course, that rules of Congress and its committees are judicially cognizable."[68] Although Yellin's conviction

[63] *Id.* at 88.
[64] *Id.* at 88-89.
[65] *Id.* at 90.
[66] 374 U.S. 109 (1963).
[67] *Id.* at 114-115.
[68] *Id.* at 114.

could have plausibly been reversed on the grounds of fundamental rights, or a *Smith*-style concern for the rights of non-members, the majority instead proceeded to advance its own interpretation of the committee rule, finding that the committee was required by rule to consider Yellin's request for a closed session.[69] The court went so far as to concede that under its own interpretation of the rule "Yellin might not prevail, even if the Committee takes note of . . . his request for an executive session. But he is at least entitled to have the Committee follow its rules and give him consideration according to the standards it has adopted."[70] The four dissenting justices argued for a return to the deference espoused in *Ballin*, writing "[w]hile the testimony is reasonably clear as to the Committee's construction and application of its own rule, if there were any doubt about the matter it is not our place to resolve every doubt against the committee."[71] The *Yellin* opinion is a startling departure from prior holdings insofar as the court decided a purely internal matter by choosing its interpretation of a Congressional rule over Congress's own interpretation. Ultimately, *Yellin* may be anomalous to the Court's other Rules of Proceedings Clause cases. The most plausible explanation for this departure is the political context of the HUAC hearings and the resultant movement to rethink the extent of Congress's investigatory powers.[72]

Given the relative lack of procedural requirements imposed on Congress by the Constitution, it is not surprising that the Supreme Court has infrequently addressed the justiciability of legislative rules.[73] State courts, on the other hand, are faced with the many

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[69] *Id.* at 118-120.
[70] *Id.* at 121.
[71] *Id.* at 146 (White, J., dissenting).
[72] *See* J. Richard Broughton, *Paying Ambition's Debt: Can the Separation of Powers Tame the Impetuous Vortex of Congressional Investigations?*, 21 Whittier L. Rev. 797, 807-810 (2000).
[73] For examples of lower federal court cases on legislative procedure, *see, e.g., Vander Jagt v. O'Neill*, 699 P.2d 1166 (D.C. Cir. 1982) (Republican Representatives' suit alleging that the minority party was underrepresented on House committees was justiciable, but Court of Appeals declined to adjudicate the controversy due to separation of powers concerns) and *Gregg v. Barrett*, 771 F.2d 539 (D.C. Cir. 1985) (suit against publishers of the *Congressional*

detailed procedural requirements contained in state constitutions. In order to fully understand the judicial approach to these procedural mandates, it is first necessary to examine the constitutions themselves.

C. State Constitutional Provisions Governing Legislative Procedure

Unlike the barebones legislative procedures contained in Article I of the U.S. Constitution, state constitutions typically contain numerous procedural restraints. Such detailed constitutional procedures did not appear in early state constitutions, but instead were inserted as amendments or provisions in new constitutions adopted in the nineteenth century.[74] Such procedural provisions grew out of a period of populist political reform spurred by public dissatisfaction with legislative corruption. When reformers enacted these mandatory legislative procedures (usually during constitutional conventions), they had the effect of impliedly limiting the legislatures' otherwise plenary power derived from rules-of-proceedings clauses.

Before considering the specific procedural provisions found in state constitutions, it is helpful to briefly outline the provisions found in the federal Constitution. Unlike the detailed list of enumerated powers found in Article I, Section 8, the Constitution contains only the sparsest procedural directives. Specifically, Article I contains five grants of procedural power and six procedural limitations.[75] The grants of power concern selection of officers,[76] judging elections

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Record dismissed; plaintiffs who were members of Congress dismissed under doctrine of remedial discretion, non-Congressional plaintiffs dismissed upon holding that First Amendment does not provide a right to receive a verbatim transcript of Congressional debate).

[74] Robert F. Williams, *State Constitutional Limits on Legislative Procedure: Legislative Compliance and Judicial Enforcement*, 48 U. Pitt. L. Rev. 797, 798 (1987).

[75] Arguably this list is incomplete since it does not include the impeachment provisions of Article I, §§ 2 and 3. Impeachment is not considered here because it more closely resembles a judicial proceeding and is largely governed by separate procedural rules and objectives. *See* Robert C. Byrd, 2 *The Senate, supra* note 55, at 60-61 (U.S. impeachment procedure based on English criminal procedure); *Senate Manual*, Sen. Doc. 107-1, at 175-183 (Andrea LaRue, ed. 2002) (Senate rules of procedure for impeachment trials).

[76] U.S. Const. art I, §2, cl. 5 (House) and § 3, cl. 5 (Senate).

and qualifications of members, compelling the attendance of members, determining the rules of proceedings, and punishing or expelling members.[77] Of the procedural limitations, four are found in Article I, Section 5: the quorum requirement, the mandatory keeping of journals, the recorded vote requirement, and the requirement that changes in venue or adjournments of more than three days be consented to by the other body.[78] Two more limitations appear in Article I, Section 7: the requirement that revenue-raising bills originate in the House, and the presentment and veto-override procedures applicable to bills and concurrent resolutions.[79]

In stark contrast, state constitutions typically contain more detailed controls. Due to combinations of local political concerns, historical developments, and the era during which any given constitution was drafted, each constitution contains a unique array of legislative procedures. Despite the myriad differences among constitutions, some trends are noticeable. Many constitutions impose temporal restrictions on law-making. Several have constitutional timelines governing the introduction of bills. Some prohibit legislation at the end of a session, in order to prevent a flurry of eleventh hour lawmaking.[80] Others require a specified number of days between a bill's introduction and action on the bill, presumably to give legislators the opportunity to examine the proposed law.[81] Still other states use the constitution to establish systems of pre-session bill filing.[82]

[77] U.S. Const. art. I, § 5, cl. 1-2; the power to expel a member contains its own limitation, requiring a two-thirds vote of the chamber from which the member is expelled.
[78] U.S. Const. art. I, § 5, cl. 1, 3-4.
[79] U.S. Const. art. I, § 7, cl. 1-3.
[80] *See e.g.,* Miss. Const. art. IV, § 67 (no new bills allowed during last three days of session).
[81] *See e.g.*, Calif. Const. art. IV, § 8(a) (no floor or committee action allowed until thirty-one days after a bill's introduction).
[82] *See e.g.,* La. Const. art. III, § 2(A)(2) (bills to be introduced at regular session must be pre-filed by tenth day before convening; thereafter legislators are limited to five bills each, except as provided for by joint rule to the contrary).

Another common feature is a requirement that bills be read a certain number of times before passage.[83] Almost all states require bills to be read three times in each house, most requiring certain readings to be performed on different days.[84] Such provisions are typically designed to "prevent surprise and foster public notice."[85] Reading requirements may specify that bills be read by title or at length, although mandatory at-length reading clauses often include a mechanism to dispense with the requirement.[86] Other variations designed to promote transparency and accountability in the consideration of legislation include mandatory printing of bills prior to passage,[87] and even constitutional procedures concerning hand-written alterations to legislation.[88]

Constitutions also commonly contain provisions aimed at informing citizens of the actions taken by their elected representatives. Chief among these types of accountability mechanisms are requirements for recorded votes. In comparison to the U.S. Constitution's recorded-vote requirement, which applies only when affirmatively requested by one-fifth of the members present,[89] many state constitutions require a recorded vote on final passage of all

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[83] The custom of reading bills three times is rooted in historical practice originating before the invention of the printing press. Because members could not have their own copies of proposals, "it was directed that every bill should be read three times in the house. At the present day, these three readings are purely nominal; the clerk confines himself to a reading of the title and the first words. But a most important effect has resulted from this antique regulation. The three readings have served to mark three distinct degrees—three epochs—in the passing of a bill, at each of which the debate upon it may be recommenced at pleasure." Cushing, *supra* note 22, § 2125 n. 1 at 830-831 (quoting Jeremy Bentham, *Political Tactics*, *in* 2 Works 301, 353 (1843)).
[84] Tommy Neal, *Lawmaking and the Legislative Process*, Tables 5.2 and 5.3, at 48-49 (1996).
[85] Libonati, *supra* note 39, at 56.
[86] *See, e.g.*, Colo. Const. art. V, § 22 ("Every bill shall be read by title when introduced, and at length on two different days in each house; provided, however, any reading at length may be dispensed with upon unanimous consent of the members present."); Okla. Const. art. V, § 35 (reading at length may be dispensed with upon two-thirds vote, but such a vote must be taken by yeas and nays and recorded in the journal).
[87] *See e.g.*, Md. Const. art. III, § 27(a) (in addition to reading requirement, which may be suspended on two-thirds vote, "no bill shall be read a third time until it shall have been actually engrossed or printed for a third reading," n.b., printing requirement is not subject to suspension); N.Y. Const. art. III, § 14 (each bill must be "printed and upon the desks of members, in its final form" at least three days prior to passage, unless the governor declares an emergency).
[88] N.M. Const. art. IV, § 20 ("No interlineation or erasure in a signed bill, shall be effective, unless certified thereon in express terms by the presiding officer of each house quoting the words interlined or erased, nor unless the fact of the making of such interlineation or erasure be publicly announced in each house and entered on the journal.").
[89] U.S. Const. art. I, § 5, cl. 3.

legislation.[90] Typically a state constitution's recorded-vote requirement will also address issues such as what number of votes is required for passage (e.g., a majority of members elected versus a majority of members present[91]), the manner of voting,[92] or when the vote on final passage must be held.[93]

A procedure commonly codified in state constitutions, yet only implied in the U.S. Constitution, is the enrollment process. Enrollment serves to authenticate the passage of the bill by both legislative chambers.[94] The enrolled bill is a copy of the identical language passed by both chambers, and is signed by each chamber's presiding officer.[95] The enrollment process is often delegated to staff (except for the final signatures) and is usually a prerequisite for presentation of an act to the governor for her approval or veto. Originally, state constitutional enrollment provisions were intended to promote accountability by requiring a formal certification that a bill was passed in compliance with procedural mandates.[96] Although the enrollment process is well-established in Congressional practice[97] the rules governing the procedure are entirely a creation of Congress. State enrollment procedures, on the other hand, are frequently set forth in the constitution. Enrollment provisions often specify who must sign the enrolled bill (almost always the presiding officers of each chamber).[98] Some constitutions

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[90] Legislative Drafting Research Fund, Columbia Univ., *Index Digest of State Constitutions* 844-845 (1915).
[91] *Compare* Wyo. Const. art. III, § 25 ("No bill shall become a law except by a vote of a majority of all the members elected to each house"), *with* Idaho Const. art. III, § 15 ("no bill shall become a law without the concurrence of a majority of the members present").
[92] *See e.g.*, Ill. Const. art. IV, § 8(c) ("A record vote is a vote by yeas and nays entered on the journal.").
[93] *See e.g.*, Okla. Const. art. V, § 34 (vote on final passage must be taken upon bill's third reading).
[94] Norman J. Singer, 1 *Sutherland's Statutes and Statutory Construction* § 14:8, at 799-804 (2002).
[95] Mason's Manual, *supra* note 2, § 738.
[96] Libonati, *supra* note 39, at 56-57.
[97] Senate Rule 14.5; Riddick, *supra* note 19, at 823-831; Jefferson, *supra* note 1 § XLVIII, at 284-286; Lewis Deschler, 7 *Precedents of the U.S. House of Representatives*, H.R. Doc. No. 94-661, Ch. 24, §§ 14-15.
[98] *But see* Nev. Const. art. IV, § 18 (requiring signatures of presiding officer of each chamber *and* the Secretary of the Senate and Clerk of the House).

also specify that the presiding officer must sign enrolled bills in the presence of the house.[99] A few constitutions require the bill's title to be publicly read upon the presiding officer's signing.[100]

The aforementioned constitutionally prescribed procedures are just a sampling of the most common rules found in state constitutions. Other procedures appear in multiple constitutions (likely due to the tendency of constitutional conventions to borrow from other jurisdictions) and yet other states have experimented with inserting novel procedural mandates in their constitutions, sometimes through citizen initiative measures.[101]

Early state constitutions, which did not contain detailed procedural controls, were not without their critics. Prior to the drafting of the U.S. Constitution, Pennsylvania activists campaigned for a radical reformation in framing the state's first constitution, calling for emphatic departure from the systems of Anglo-Saxon government which had been transported to the colonies.[102] Among the more farfetched ideas advanced by the radicals was a requirement that all laws passed by the legislature be published for consideration by the people before they could become effective.[103] The radicals implored their fellow citizens of the newly independent nation not to follow in the improvident footsteps of their Saxon predecessors who

> had delegated all power through election, legislative as well as executive, for it was all power that was dangerous, "whether it be lodged in the hands of one man, one hundred or one thousand"—including even the power lodged in the representatives of the people. "No country can be called *free* which is governed by an absolute power; and it matters not whether it be an absolute royal power or an absolute legislative power, as the

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[99] *See e.g.*, S.D. Const. art. III, § 19. Perhaps the most detailed enrollment process is contained in Mo. Const. art. III, § 29: "No bill shall become a law until it is signed by the presiding officer of each house in open session, who first shall suspend all other business, declare that the bill shall now be read and that if no objection be made he will sign the same. If in either house any member shall object in writing to the signing of a bill, the objection shall be noted in the journal and annexed to the bill to be considered by the governor in connection therewith." A similar provision, without the objection procedure, is contained in Ky. Const. § 56.

[100] *See e.g.*, Wyo. Const. art. III, § 28.

[101] *See e.g.*, Colo. Const. art. V, § 22a (prohibiting legislators from making binding commitments in party caucuses).

[102] Gordon S. Wood, *The Creation of the American Republic* 226-237 (1969).

[103] *Id.* at 232.

> consequences will be the same to the people." "In most states," the radicals warned in essays and pamphlets . . . "men have been too careless in the delegation of their governmental power; and not only disposed of it in an improper manner, but suffered it to continue so long in the same hands, that the *deputies* have, like the King and Lords of Great Britain, at length become *possessors in their own right*; and instead of *public servants*, are in fact the *makers* of the public."[104]

Nonetheless, the constitution promoted by the Pennsylvania radicals was a failure[105] and populist restrictions on legislative power did not gain sustained strength until the nineteenth century.

The true momentum behind constitutionally mandated legislative procedure occurred during the mid- to late-nineteenth century. Robert Luce describes the growth of constitutional restrictions as a reaction to the industrial revolution, noting that "with the mushroom growth of corporations after the invention of the steam locomotive . . . legislative rules began to seem too weak."[106] Likewise, Michael Libonati describes the phenomenon as a move by Jacksonian democrats to counter the increasing ability of special interests to procure special privileges from the legislature.[107] The reform movement was motivated by extensive examples of legislative abuses, including "[l]ast minute consideration of important measures, logrolling, mixing substantive provisions in omnibus bills, low visibility and hasty enactment of important, and sometimes corrupt, legislation, and the attachment of unrelated provisions to bills in the amendment process."[108]

Several nineteenth-century commentators acknowledged the trend of public distrust of legislatures and the concomitant urge to address legislative abuses via populist constitutional restrictions (from 1864 through 1879, thirty-seven states wrote and ratified new constitutions[109]).

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[104] *Id.* at 228-229 (quoting Demophilus [pseud.], *Genuine Principles*, Pennsylvania Packet, Apr. 29, May 20, and Nov. 19, 1776) (emphasis in original).
[105] *Id.* at 233-237.
[106] Luce, *supra* note 10, at 11.
[107] Libonati, *supra* note 39, at 55.
[108] Williams, *supra* note 74, at 798.
[109] Libonati, *supra* note 39, at 55.

One late nineteenth century commentator wrote about the corruption of state legislatures by employing an analogy to the judiciary:

> We are so accustomed to the dishonesty of Legislatures that we do not think much about it, but we can get a glimpse of how it ought to look to us by reflecting on the tremendous change that would have to come over a country before constitutional checks like these could be imposed on the judiciary. Imagine a judiciary article, for instance, providing that no judgment or decree should be valid unless the judge should append to it a statement under oath that during the argument he had been continually present, that his attention had not wandered, that he had remained awake throughout all the discussions which had taken place, that citations of authorities contained in the decision were all genuine, and that it contained no perversion of law or fact.[110]

Another writer summarized several new 1890s constitutions by concluding "[o]ne of the most marked features of all recent State constitutions is the distrust shown of the Legislature."[111]

While the cause of constitutionally prescribed legislative procedure is clear, the wisdom of such an approach is hotly debated. Luce described the increase of procedural provisions as "odium" which, while once justified in some states, was no longer necessary in any state as of 1922.[112] In the late twentieth century, Oregon judge Hans Linde wrote that reformation of American lawmaking procedures in general (including legislative procedure) is an ongoing process which "has never come to an end."[113] Acknowledging that some of the nineteenth-century legislative procedure reforms are now considered "inappropriate," Linde commended the ongoing American "impulse to secure responsible government" through the "conscious and deliberate legitimization of the lawmaking process."[114]

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[110] Luce, *supra* note 10, at 11 (quoting "A New Kind of Veto," *The Nation*, July 15, 1875).
[111] Amasa M. Eaton, *Recent State Constitutions*, 6 Harvard L. Rev. 109, 109 (1892). As examples of constitutionally codified legislative procedure, Eaton cites recorded-vote requirements, reading requirements, detailed enrollment procedures, requirements that concurrence with amendments from the other chamber and adoption of conference committee reports be accomplished through recorded vote, and restrictions against introduction of bills or passage of appropriations bills at the end of a session. *Id.* at 112-113.
[112] Luce, *supra* note 10, at 11-12.
[113] Hans A. Linde, *Due Process of Lawmaking*, 55 Neb. L. Rev. 197, 241 (1976).
[114] *Id.*

In summarizing the landscape of procedural reform, Libonati notes that the proliferation of constitutionally prescribed procedures has had the effect of impliedly modifying rules-of-proceedings clauses and the concept of state legislatures as repositories of plenary power. The arguments against such constitutional provisions criticize the constraints as "seem[ing] to embody a historical and retrospective approach to state constitution making by entrenching the results of yesteryear's controversies."[115] Proponents of such provisions characterize the restrictions as "a collective effort . . . to entrench principles of notice, deliberation, and accountability into the legislative process by stipulating rules of due process for legislative bodies."[116]

Regardless of the wisdom of constitutional constraints on legislative procedure (or their success from a public policy perspective), state courts should be expected to enforce them as they would any other constitutional provision.[117] Reality, however, has seen the promulgation of overly deferential, often inconsistent, judicial doctrines. At the heart of judicial deference in this context is the belief that the legislature is the best judge of its compliance. The idea that constitutional provisions enacted to curb legislative abuse should be enforced solely by the legislature is fundamentally flawed. The doctrines most frequently used to justify judicial deference are considered in the next two sections.

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[115] Libonati, *supra* note 39, at 57.
[116] *Id.*
[117] The importance of state court enforcement is underscored by the fact that federal courts will not review state legislation for compliance with procedural mandates of a state constitution, *see In re Duncan*, 139 U.S. 449, 462 (1890) ("Whether certain statutes have or have not binding force, it is for the State to determine, and that determination in itself involves no infraction of the Constitution of the United States, and raises no Federal question giving the courts of the United States jurisdiction.").

III. Separation of Powers Doctrine

Having explored the content and origin of constitutionally prescribed legislative procedure, this section looks at how courts have addressed controversies over the implementation of such procedures. The cases discussed here show the widely varying judicial responses to procedural disputes. Quite often, despite a procedure's constitutional status, courts will hesitate to review a legislature's actions—instead deferring to legislative judgment or holding a controversy non-justiciable. Sometimes this is due to sincere jurisprudential theory, other times it results from confused misapplication of rules concerning non-constitutional procedures, and in some instances courts are no doubt influenced by political factors (although this is rarely reflected in the text of the opinion).

Regardless of the motivation, most opinions rely heavily on the doctrine of separation of powers to support judicial deference (a few cases cite the political-question doctrine, a subset of separation of powers, but this is generally not discussed here[118]). One common result is that procedural disputes are held non-justiciable, under the theory that courts cannot invade the inner workings of the legislature. The other common result is that a court will hold the controversy justiciable, but defer to the legislature's interpretation of the constitutional provision at issue. In the end, the deferential approach often has the same effect as holding the case non-justiciable, since legislatures have frequently advanced highly questionable interpretations which have nonetheless been accorded significant deference. The third and final outcome (which is less common, although not unheard of) is the rendering of a decision on the merits, unimpeded by substantial deference to legislative arguments.

Deference and non-justiciability can only be fully understood after first considering the treatment of non-constitutional legislative procedures (i.e., those rules promulgated under a

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[118] *See infra*, note 133 and accompanying text.

body's rules-of-proceedings clause powers). Such non-constitutional rules are generally not reviewable by courts, due to the broad grant of power contained in rules-of-proceedings clauses. But every rule has its exceptions, and non-constitutional rules do occasionally lead to justiciable controversies, as when a duly-enacted rule conflicts with a constitutional provision. While non-review is an appropriate default rule when non-constitutional procedures are at issue, courts too often blur the distinction between constitutional and non-constitutional rules and refuse to review *any* questions of legislative procedure.

This section begins with a brief explanation of the non-justiciability of non-constitutional rules, as well as some exceptions to the default rule. Next, state court review (or lack thereof) of constitutionally mandated rules is considered in the context of five common types of procedures: deadlines and limits on session length, reading requirements, voting, investigations and contempt proceedings, and bill presentment.

A. Non-Constitutional Rules

In the context of constitutionally prescribed procedures, judicial deference to legislative rule-making power is sometimes based on a misapplication of well-established theories concerning *non*-constitutional rules of procedure. To fully understand this judicial confusion, it is necessary to briefly discuss the rationale concerning non-review of non-constitutional rules. Legislative procedure not controlled by constitutional provisions is generally exempt from judicial review. While courts are not always consistent in their rationale for this rule, the majority of jurisdictions rely on the separation-of-powers doctrine—because legislative power is vested in the legislature, it is generally inappropriate for the judiciary to interfere with the internal workings of a co-equal branch. Logically, the default rule of non-justiciability is subject

to an exception allowing judicial review of legislative action that violates the constitution. The non-justiciable nature of legislative rules encompasses two related but different situations: review of rules themselves and questions of legislative compliance with their own rules.

When asked to directly review the legality of legislative rules, state courts generally decline, citing separation of powers concerns. The opinions in such cases often enunciate doctrines comparable to the U.S. Supreme Court's holding in *Ballin*, even though *Ballin* itself did not involve a direct challenge.[119] For example, the North Dakota Supreme Court was asked in *State ex rel. Spaeth v. Meiers* to rule on the Senate President pro tem's refusal to accept a bill passed by the House of Representatives.[120] Because the controversy involved the "interpretation and application of the legislature's procedural rules," the court relied on North Daokota's separation-of-powers jurisprudence, cautioning that "the judiciary exercises great restraint when requested to intervene in matters entrusted to the other branches of government."[121] Without discounting the seriousness of the controversy before it, the court held that the proper forum for resolving the dispute was the legislature.[122] In a separate concurrence, Chief Justice Ralph Erickstad hinted at the ultimate futility of judicial review, noting that when the Senate upheld the chair's interpretation of the rules it had "in effect, killed the bill . . . and it is as dead as though it had been considered on its merits."[123] The court did not, however, adopt a posture of absolute deference, acknowledging that ten years earlier the same court had reviewed a set of newly

[119] *See supra* text accompanying notes 46-54. The challenging party in *Ballin* did not directly challenge the rule, but rather argued that a statute was void because it was enacted via an allegedly unconstitutional procedure. Perhaps not appreciating this distinction, state courts are quick to cite *Ballin* in all manner of legislative procedure cases, probably because it is one of a small number of U.S. Supreme Court cases on the subject.
[120] 403 N.W.2d 392 (N.D. 1987). A member of the senate moved to appeal the decision of the presiding officer, but the motion was tabled on a vote of the senate, thus making the president pro tem's action tantamount to a procedural rule. *Id.* at 393-394.
[121] *Id.* at 394.
[122] *Id.* ("[The president pro tem]'s interpretation of the Senate's procedural rules and the subsequent refusal of the Senate members to overrule his determination are internal matters capable of resolution by the legislative branch, which has various nonjudicial remedies available to it within the political forum.").
[123] *Id.* at 395 (Erickstad, C.J., concurring).

enacted rules which allegedly violated certain constitutional provisions.[124] In this prior case, *State ex rel. Sanstead v. Freed*, the lieutenant governor (who, under the constitution, serves as the senate's presiding officer) asked the supreme court to invalidate new rules which limited his ability to cast tie-breaking votes.[125] Although voting procedures are usually the exclusive purview of the legislature, the challenged rules ultimately turned on a conflict between two sections of the constitution: Section 77 (allowing the lieutenant governor to vote when the senate "be equally divided") and Section 65 (requiring all laws to be passed "by a majority of all the *members*-elect in each house [of the legislature]" (emphasis added)).[126] Asserting its "responsibility . . . to act as the ultimate interpreter of the Constitution of the State of North Dakota," the court concluded that the rule was judicially reviewable, quoting from the U.S. Supreme Court's opinion in *Killbourn v. Thompson*,[127] "it is the province and duty of the judicial department to determine in cases regularly brought before them, whether the powers of any branch of the government, and even those of the legislature in the enactment of laws, have been exercised in conformity to the Constitution."[128] The *Spaeth* majority distinguished the case from *Sanstead* by saying there was no allegation in *Spaeth* of an unconstitutional rule.[129]

Other courts have enunciated the same rule the U.S. Supreme Court articulated in *Ballin*, but arrived at different results. The Pennsylvania Supreme Court in *Zemprelli v. Daniels* faced a factual situation somewhat similar to the *Ballin* facts—legislative action (in this case, senate confirmation of executive nominees) was challenged based on an argument that the senate's

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[124] *Id.* at 393 (distinguishing the facts from *State ex rel. Sanstead v. Freed*).
[125] 251 N.W.2d 898, 900-901 (N.D. 1977).
[126] *Id.* at 904.
[127] 103 U.S. 168, 199 (1881).
[128] *Sanstead*, 251 N.W.2d at 903-904 (quoting *Killbourn*, 103 U.S. at 199).
[129] *Spaeth*, 403 N.W.2d at 394, *but see* dissenting opinion, at 396-396.

rules misinterpreted the meaning of a "majority" vote.[130] The *Zemprelli* court analyzed the issue quite similarly to the U.S. Supreme Court's approach in *Ballin*, declaring "[i]nsofar as [the senate rule] embodies the Senate's interpretation of . . . the Constitution it must be accorded a certain amount of weight. If it is at variance with the meaning and intent of the provisions it purports to construe, however, it is void."[131] But where the *Ballin* court held that a challenge to the House's definition of a majority was non-justiciable, the *Zemprelli* court decided the challenge on its merits. Although the court ultimately adopted the legislature's reading of the constitutional definition of a majority, it rejected the contention that the case presented a non-justiciable political question under the *Baker v. Carr* test.[132]

Although the political-question doctrine is closely tied to separation of powers, state courts often cite the latter theory, while rarely invoking the former.[133] This does not, however, prevent parties from raising the political-question doctrine in their arguments. In *Dye v. State ex rel. Hale*, members of the Mississippi Senate brought suit challenging certain rules that granted power to the lieutenant governor (who served as the senate's presiding officer).[134] The lieutenant governor argued that the suit should be dismissed under the political-question doctrine.[135] While ultimately upholding the constitutionality of the rules, the court did find it constituted a

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[130] 436 A.2d 1165, 1166 (Pa. 1981) (plaintiff/challenger argued that a majority required a majority of all senators elected to office, with no adjustment for subsequent deaths, resignations, or other vacancies).
[131] *Id.* at 1170 (citations omitted).
[132] *See Baker v. Carr*, 369 U.S. 186 (1962). Although the court carefully considers *Baker* (albeit ultimately rejecting its applicability to present controversy), it does not mention *Ballin* at all, despite similar themes and fact patterns.
[133] *See* Hans A. Linde, *E Pluribus—Constitutional Theory and State Courts*, 18 Ga. L. Rev. 165, 189-190 (1984) ("If a 'political question doctrine' exists in state court, I have not heard of it. What law students learn in the opening chapter of the typical casebook is not general constitutional law but federal jurisdiction."). For an illustration of the different responses to political questions in state and federal courts, *compare Attorney General ex rel. Werts v. Rogers*, 28 A. 726 (N.J. 1894) *and In re Gunn*, 32 P. 470 (Kan. 1893) (state courts asserting jurisdiction to settle disputes between rival bodies both claiming to be the legitimate legislature) *with Luther v. Borden*, 48 U.S. (7 How.) 1 (1849) (dispute over validity of two rival state governments in Rhode Island held non-justiciable political question).
[134] 507 So.2d 332 (Miss. 1987)
[135] *Id.* at 338.

justiciable controversy. Addressing the political question argument, the majority declined to adopt an absolutist stance, holding:

> Without doubt we will as a general rule decline adjudication of controversies arising within the Legislative Department of government where those controversies relate solely to the internal affairs of that department. On the other hand, legislators nor the bodies in which they serve are above the law, and in those rare instances where a claim is presented that the actions of a legislative body contravene rights secured by the constitutions of the United States or of this state, it is the responsibility of the judiciary to act, notwithstanding that political considerations may motivate the assertion of the claims nor that our final judgment may have practical political consequences.[136]

This disposition of the political-question issue did not end the case. The rules being challenged granted the lieutenant governor various powers including overseeing staff, assigning members to committees, and referring bills. Finding that these were all internal procedural matters, the court declared the challenged rules were squarely within the senate's power under the rules-of-proceedings clause.[137] While the rules themselves were not reviewable *per se*, the court did cite the constitution's separation-of-powers provision as justification for judicial determination of whether the lieutenant governor was an "eligible receiver" of the powers granted by the rules. The majority held the lieutenant governor to be "enough of a member of the Senate" to be vested with procedural powers, thus allowing the rules to continue in force.[138]

Cases such as *Sanstead*, *Zemprelli*, and *Dye* show that notwithstanding a legislature's power under the rules-of-proceedings clause, non-constitutional rules that conflict with a constitutional provision are subject to judicial review. In comparison, cases concerning a legislature's *compliance* with non-constitutional rules are usually summarily dispensed with, given the well-settled rule that "[v]iolation of rules of procedure adopted by a house of the legislature for its own convenience and not required by the constitution will not impair the

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[136] *Id.* (citations omitted).
[137] *Id.* at 345-346.
[138] *Id.* at 347.

validity of a statute."[139] For example, in *State ex rel. City Loan & Savings v. Moore*, a plaintiff challenged the validity of a particular bill alleging that it was a *de facto* motion to reconsider a previously-enacted bill, and as such was made too late, in violation of the legislature's rules.[140] The supreme court of Ohio agreed that the bill constituted a motion to reconsider but even so, such a violation was not reviewable, since "[t]he provision for reconsideration is no part of the Constitution and is therefore entirely within the control of the General Assembly. Having made the rule, it should be regarded, but a failure to regard it is not the subject-matter of judicial inquiry."[141] The same approach has been applied to violations of joint rules, as in *St. Louis & San Francisco Railway v. Gill*, where the supreme court of Arkansas held "[t]he joint rules of the general assembly were creatures of its own, to be maintained and enforced, rescinded, suspended, or amended, as it might deem proper. Their observance was a matter entirely subject to legislative control and discretion, not subject to be reviewed by the courts."[142]

Although such holdings are so terse that constitutional theories of justiciability are not always discussed, rules-of-proceedings clauses are the foundation for judicial non-review. In *State ex rel. Grendell v. Davidson*,[143] plaintiffs challenged the validity of a statute based on an alleged violation of legislative rules concerning conference committee amendments and requested a writ of mandamus requiring the legislature to reconsider the bill in compliance with the pertinent rule.[144] The court held the claim non-justiciable because the Ohio rules-of-proceedings clause

[139] Mason's Manual, *supra* note 2, § 15, ¶ 1.
[140] 177 N.E. 910 (Oh. 1931).
[141] *Id.* at 911; *see also, State v. Sav. Bank of New London*, 64 A. 5, 9 (Conn. 1906) ("Rules of proceedings are the servants of the House and subject to its authority.").
[142] 15 S.W. 18, 19 (Ark. 1891).
[143] 716 N.E.2d 704, 709 (Ohio 1999).
[144] Specifically, the bill passed after both houses adopted conference committee amendments which did not "relate exclusively to the original matters of difference between the two houses," as required under the rules. *Id.* at 706.

> commits the issuance and observance of procedural rules to the General Assembly. A writ of mandamus will not issue to a legislative body . . . to require the performance of duties that are purely legislative in character and over which such legislative bodies have exclusive control. The constitutional principle of separation of powers protects the General Assembly from such infringement.[145]

In addition to granting legislatures the power to make rules, the rules-of-proceedings clauses also convey authority to a body to suspend its own rules. Thus, without reaching constitutional issues, courts may reject challenges to statutes based on legislative violation of internal rules by citing the legislature's right to suspend. For example, in *State v. Brown*, the South Carolina Supreme Court dismissed a claim that a bill was read on the last day of the session (in violation of standing rules) by concluding "these rules are under the control of the respective houses for which they are prescribed, and may be, and as a matter of fact have been, suspended whenever, in the judgment of the body to which they apply, the public welfare requires."[146] Even without explicit evidence of a formal motion to suspend, courts may employ a presumption of suspension,[147] or hold that any action in violation of internal rules constitutes a deemed suspension.[148]

B. Constitutional Rules

As explained in the previous section, legislative action concerning non-constitutional rules is generally not subject to judicial review. Nonetheless, as illustrated by the *Sanstead*,

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[145] *Id.* at 709 (citations omitted).
[146] 11 S.E. 641, 643 (S.C. 1890).
[147] *See e.g., In re Ross*, 94 A. 304, 306 (N.J. 1914) ("the House had power to suspend its own rule, and there is nothing in the proofs before us to suggest that this course was not taken by it. The presumption is in favor of orderly procedure by that body.").
[148] *See e.g.,* Mason's Manual, *supra* note 2, § 284 (action taken by legislative body in violation of adopted rules or general parliamentary law "may be regarded as implied suspension and the action taken in violation of the rules is valid as long as the body had the authority to suspend the rules violated. This does not apply to mandatory constitutional provisions.").

Zemprelli, and *Dye* cases,[149] an exception to the rule of non-justiciability allows for review when constitutional provisions are implicated. If this is true in the context of reviewing the constitutionality of a internal rule, one might also assume the same reasoning would apply to review of legislative compliance with constitutionally mandated procedures. Surprisingly, this is not always the case. Legislatures in many states are subject to reform-minded constitutional procedures, yet are able to disregard the procedures due to judicial reluctance to review legislative non-compliance. This section examines case law in the context of various procedural requirements.

The judicial branch's power as ultimate interpreter of the constitution is most famously contained in *Marbury v. Madison*'s declaration that "[i]t is emphatically the province and duty of the judicial department to say what the law is."[150] Some state courts have invoked the reasoning of *Marbury* when asked to review legislative compliance with constitutionally prescribed procedures. In *Wells v. Riviere*, the Arkansas Supreme Court was faced with a challenge to the validity of measures passed when the legislature had creatively sought to evade the constitutional limit on session length.[151] In response to arguments that the legislature was the proper judge of whether its extended session was lawful, the court cited *Marbury* in holding, "[w]e do not imply that we have the authority to dictate to the General Assembly . . . how it proceeds about its business. It can convene as it pleases. However, whether its acts are lawful is a matter for this court."[152] Similarly, in *Alexander v. State ex rel. Allain*, the Mississippi Supreme Court used similar language (also invoking *Marbury*) when holding

[149] *See supra*, text accompanying notes 125-128, 130-132, and 134-138
[150] 5 U.S. (1 Cranch) 137, 177 (1803).
[151] 599 S.W.2d 375 (Ark. 1980).
[152] *Id.* at 381; *see also, Dillon v. King*, 529 P.2d 745, 751 (N.M. 1974) ("We disclaim any intention of even suggesting to the Legislature how it should conduct its affairs. It is nevertheless our function and duty to say what the law is and what the Constitution means.").

> [t]he executive, legislative and judicial departments of the state all serve the same constituency and are, of course, subject to and bound by the terms of the same state constitution. The interpretation of the constitution becomes the duty of the judicial department when the meaning of that supreme document is put in issue.[153]

While the justification for judicial interpretation of the constitution is settled in every state as an abstract proposition, many courts have downplayed their traditional role as constitutional interpreters when confronted with disputes over constitutionally mandated legislative procedure.[154] By employing either the doctrine of non-justiciability (i.e., a judicial agenda setting or "gatekeeping" mechanism) or rendering a decision on the merits which defers to legislative preferences, state courts may chose between two paths to the same destination: affirming legislative behavior which circumvents the spirit (and often the letter) of constitutionally prescribed procedures.[155]

To confuse matters further, courts sometimes rely on rules-of-proceedings clauses to support holdings of non-justiciability or justify deference to legislative interpretations. Such readings misunderstand both the role of the judiciary and the true meaning of the clauses. Rules-of-proceedings clauses serve as textual affirmations of generally accepted separation-of-powers principles (arguably, the clauses themselves are superfluous[156]). Separation of powers demands that the judicial branch not interfere with the internal operations of the legislature absent extraordinary circumstances. However, the cases considered in the following sections show that

[153] 441 So.2d 1329, 1332 (Miss. 1983).
[154] *See infra*, text accompanying notes 189-199, 206-212.
[155] *See* Langer, *supra* note 35, at 19-20 (describing two-stage judicial decision making model).
[156] The lack of debate concerning the federal Rules of Proceedings clause supports the inference that such inherent legislative power is self-evident. The Articles of Confederation contained no comparable clause, but the legislative body created a system of procedural rules nonetheless. Roberts, *supra* note 4, at 528. Moreover, North Carolina's constitution contains no rules-of-proceedings clause, but the legislature has continued to determines its rules, presumably under its inherent legislative power. *See* S. Res. 1, Sess. 2007 (N.C. 2007); H. Res. 423, Sess. 2007 (N.C. 2007) (rules enactment resolutions). Cushing lists the ability to establish rules of procedure as one of the "collective or aggregate privileges of a legislative assembly," which are meant "to enable the assembly to perform the functions with which it is invested, in a free, intelligent, and impartial manner." Cushing, *supra* note 22, §§ 608, 610. Given the inherent right of legislatures to determine their own rules, it can be argued that rules-of-proceedings clauses are merely a formal recognition of that right and should not be used as a foundation to vest legislative bodies with powers of constitutional interpretation.

courts are most often asked to judge legislative procedure in the context of reviewing a specific piece of legislation,[157] and this implicates the well-traveled causeway of judicial review. While the legitimacy of judicial review was unsettled at the time of the federal constitutional convention, by the time the nineteenth-century reform movement successfully enacted procedural reforms in state constitutions, legal scholars had largely accepted the ability of state courts to review legislative acts for constitutionality.[158] Thus, it is likely that the reform-motivated procedures were propounded with the intent that judicial review of enacted legislation would serve as an enforcement mechanism. Separation of powers in the context of Anglo-American legislative independence is heavily focused on promoting the sovereignty of the legislature and countering a lengthy history of monarchical encroachment.[159] As Cushing describes legislative sovereignty, "the legislative department…[is] by its very nature, the depositary of *so much of the supreme and absolute power as the people see fit to embody* in their form of government."[160] Cushing's qualification of the legislature's power is an important limitation to note, given the American rejection of the British theory of legislative sovereignty.[161] To the extent that a state's voters have seen fit to limit the powers of the legislature through constitutionally prescribed procedure, challenges to legislative non-compliance with such procedures are justiciable and should be decided without heightened deference to the legislature.

[157] *But see infra*, text accompanying notes 216-246, discussing cases concerning legislative investigations and contempt proceedings.
[158] William E. Nelson, *Changing Conceptions of Judicial Review: The Evolution of Constitutional Theory in the States, 1790-1860*, 120 U. Pa. L. Rev. 1166, 1170 (1972).
[159] For historical context, *see* Thomas Pitt Taswell-Langmead, *English Constitutional History: From the Teutonic Conquest to the Present Time* (Phillip A. Ashworth, ed., 1905), 234, 244-245, 291, 376, 399-400, 420, 476-477, 500 (various examples of monarchical usurpation of parliamentary power in British history).
[160] Cushing, *supra* note 22, § 8, at 3-4 (emphasis added).
[161] Nelson, *supra*, note 158, at 1170-1171 ("Americans rejected the traditional British view that the legislature possessed complete sovereignty and argued instead that sovereignty lay with the people, who by a constitution delegated limited power to the legislature. Legislators were mere 'servants of the people,' and a constitution, 'the commission from whence [they] … derive[d] their power.'") (citations omitted, alterations in original); *see also* Appellee's Reply Brief at 1-2, *U.S. v. Ballin*, 144 U.S. 1 (1891) ("There was nothing from which our forefathers more decidedly determined to depart than from the English scheme of enacting laws.").

1. Deadlines and Limits on Session Length

Constitutional deadlines for consideration of bills and limits on the length of sessions were generally enacted to curtail the passage of eleventh-hour laws and endless legislative sessions.[162] Enforcement of such provisions, however, has been uneven. In *Capito v. Topping*, the West Virginia Supreme Court confronted the common practice of the legislature "stopping the clock."[163] The case involved gubernatorial vetoes of several bills passed at the end of the senate's 1909 session. The West Virginia constitution required vetoes to be delivered within five days of adjournment. The senate journal said the body had adjourned on February 26, in compliance with the constitution's 45-day limit on session length. Extrinsic evidence was introduced to show the senate had actually stayed in session until February 27. Although the February 27 meeting was a violation of the limit on session length, the direct question in *Capito* was which day should be considered the date of adjournment for purposes of calculating the five-day veto timeline.[164] Although the court's refusal to consider evidence of adjournment after the deadline was based largely on the enrolled bill rule[165] it also suggested in dicta that a violation of the limit on session length did not constitute cognizable harm:

> The common practice of staying the hands of the clock to enable the Legislature to effect an adjournment apparently within the time fixed by the Constitution for the expiration of the term is dwelt upon in the argument as a serious trespass upon the rights of the executive in respect to the time allowed him for examination of, and action upon, bills undisposed of by him at the time of adjournment; it being pointed out that he might thus be deprived of the entire period of five days. In point of fact no serious curtailment of this period has ever occurred in the history of the state, and the assumption that it will ever occur would be a violent and highly improbable one. If it should, the resultant evil might be slight as compared with that of altering the probative force and character of legislative records, and making the proof of legislative action depend upon uncertain oral evidence.[166]

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[162] *See supra*, text accompanying notes 80-82.
[163] 64 S.E. 845 (W.Va. 1909).
[164] *Id.* at 846.
[165] *See infra*, text accompanying notes 278-305.
[166] *Id.* at 847-848.

Capito is an excellent example of how a court can use collateral issues (in this case, evidentiary rulings) to purportedly render a decision on the merits which in fact vitiates the ability of citizens (or the governor) to enforce constitutionally mandated procedures. Nor is the result in *Capito* unusual. The Oklahoma Supreme Court was faced with a similar situation in *Davis v. Thompson*, where the plaintiff challenged the legality of legislation which had been passed after midnight on the ninetieth day of the legislative session.[167] The Oklahoma constitution at the time limited sessions to "ninety legislative days."[168] The 90-day deadline arrived at midnight June 12 and the challenged legislation was undisputedly passed at 10:27 a.m. on June 13.[169] The legislature, however, argued that it could define a "legislative day" differently from a calendar day and that June 13 was merely an extension of the June 12 legislative day. The court held the controversy to be justiciable, but ultimately adopted the legislature's argument, writing "we believe the Legislature, unless prohibited by the Constitution, has the power and right to determine for itself when the moment of time has arrived for adjournment, subject to the rule of reason."[170] The majority held that the "rule of reason" would be violated in cases of "gross and flagrant violation of the constitutional intent as to the length of a legislative day" but declined to provide any further guidance, declaring "the unit or length of time of a legislative day cannot be set by this court."[171] One dissenting opinion argued that the session limit had been enacted by voters in 1966 and replaced a previous provision which did not limit session length. Advancing an alternative contextual analysis, the dissent reasoned that the court should strictly construe the limit and define a legislative day as "that

[167] 721 P.2d 789 (Okla. 1986),
[168] Okla. Const. art. V, § 26 (1966).
[169] *Davis*, 721 P.2d at 791.
[170] *Id.* at 792-793.
[171] *Id.* at 793.

period in which legislative acts transpire on a specified date."[172] The *Davis* holding that a legislative day is not synonymous with a calendar day is plausible; nonetheless, the majority's refusal to clearly articulate a rule, instead ceding interpretive power to the legislature, clearly undercuts the intent of the voters who imposed a limit on session length.

Some courts have been more assertive when interpreting timeline provisions. The Arkansas Supreme Court considered a particularly aggressive legislative attempt to evade a limit on session length in *Wells v. Riviere*.[173] The constitution limited regular legislative sessions to sixty days "unless [waived] by a vote of two-thirds of the members elected to each house."[174] The Seventy-second General Assembly, before reaching the sixty-day mark, adjourned after passing a concurrent resolution extending the session through the opening day of the Seventy-third General Assembly. Under the terms of the resolution, the legislature would be in recess subject to a call of the Speaker of the House and President pro tem of the Senate.[175] A split court found the extension was valid in regards to one proposed constitutional amendment that was awaiting action at the time of the original adjournment; but, to the extent the legislature sought to retain the right to call itself back into session for other purposes, the extension was invalid and legislation passed during the sessions convened under the extension was void. The plurality opinion acknowledged that the two-thirds wavier provision in the constitution afforded some flexibility to the legislature in extending the adjournment deadline and that the legislature, not

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[172] *Id.* at 794 (Wilson, J., dissenting) (Wilson's alternative contextual analysis argued that "the mandate of § 26 establishes that the adjective term, 'legislative', modifies 'days' and not visa-versa. The specification of '*days*' does *not* denote an *infinite period*, but rather has an identifiable beginning and end. . . . [A] 'legislative day' may constitutionally encompass from seconds, to minutes, to twenty-four hours, *within a calendar date* certain, to the extent that legislative actions transpire thereon." (emphasis in original)).
[173] 599 S.W.2d 375 (Ark. 1980).
[174] Ark. Const. art. V, § 17.
[175] *Wells*, 599 S.W.2d at 377-378.

the courts, had the power to decide whether to invoke the waiver provision.[176] "But," the court reasoned,

> even a conceded power can be exercised in an unconstitutional manner. While a legislative declaration creates a strong presumption of legality, that presumption can be rebutted by objective facts that are inconsistent with such a declaration. Are there sufficient facts to find that the General Assembly had a purpose in recessing for 20 months? We do not find evidence to support such a purpose.[177]

In a separate opinion, Justice John Purtle addressed potential separation-of-powers issues, defending the court's review of the concurrent resolution, noting that the court was "simply interpreting part of that language in the Constitution which creates the framework of state government."[178] Purtle agreed that the waiver provision allowed for reasonable extensions of a session, but concluded "[t]here is not the slightest hint that the people intended an 'on again' / 'off again' session extending over the entire biennium."[179] Despite the legislature's transparent attempt to completely evade the constitutional limit on session length, three justices argued in dissent that the court should not have reviewed the measures passed during the extended session, because "[t]he legislature is responsible to the people alone, not to the courts, for its disregard of, or failure to perform, a duty clearly enjoined upon it by the constitution, and the remedy is with the people, by electing other servants, and not through the courts."[180]

Judicial hesitancy to enforce deadlines and session limits is no doubt influenced by the realities of legislative work, which often takes place under hectic and time-pressured circumstances. Nonetheless, constitutional limitations on legislative action exist for a reason and should be enforced. As *Capito* and *Davis* illustrate, mere justiciability is not enough to ensure meaningful enforcement, since courts may use evidentiary rules or judicial deference to avoid

[176] *Id.* at 380.
[177] *Id.*
[178] *Id.* at 382 (Purtle, J., concurring in part and dissenting in part).
[179] *Id.* at 383.
[180] *Id.* at 387 (Stroud, J., dissenting) (quoting *Wells v. Purcell*, 592 S.W.2d 100, 104 (Ark. 1979)).

issuing a direct ruling on the merits of the complaint. Although judicial deference to legislative decisions is justified in many situations, it is counter-intuitive to defer to a body's interpretation of provisions which were designed to limit its own power, particularly when (as in *Capito* and *Davis*) evidence suggests deliberate intent to evade the limitation at issue. Moreover, every constitution provides for special sessions in some form,[181] thus providing a safety valve if work cannot be accomplished during the constitutionally delimited period.

2. Reading Requirements

Bill reading provisions (almost always requiring three separate readings in each house) were another nineteenth-century method of preventing surprise legislation.[182] Parties dissatisfied with legislation have frequently brought legal challenges alleging that constitutional reading requirements were not complied with during the bill's passage. In response, many courts have developed mechanisms to avoid invalidating laws passed in violation of reading clauses.

South Carolina's "preeminent" legislative procedure case, *State ex rel. Coleman v. Lewis*, concerned a readings clause dispute.[183] The plaintiffs in *Coleman* challenged a 1936 law under a variety of theories, including legislative violation of the constitution's requirement that each act be read three times in each house.[184] Ultimately, the supreme court rejected the challenge based on application of the modified enrolled bill rule,[185] however it took pains to specify that the issue was justiciable and the enrolled bill rule did not prevent the court, on a theoretical level, from enforcing compliance with the reading requirement: "It will be observed that [the modified

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[181] *See* Council of State Governments, *Book of the States*, Table 3.2, at 76-78 (39th ed., 2007).
[182] *See supra*, text accompanying notes 83-86.
[183] 186 S.E. 625 (S.C. 1936); *see* Charles F. Reid, *The South Carolina Legislature's Power over Itself: Legislative Rules v. Statutory Laws*, J. of the Am. Society of Legislative Clerks & Secretaries, Spring 2007, at 2, 3 (*Coleman* is "South Carolina's preeminent case concerning the legislature's authority to establish rules of procedure.").
[184] S.C. Const. art III, § 18.
[185] *See infra*, text accompanying notes 306-308.

enrolled bill rule] by no means negatives the power of the court to inquire into those prerequisites fixed by the constitution, and of which prerequisites the journals of the two houses are required to furnish the evidence."[186] Having established its theoretical ability to enforce the constitution's reading clause, the court then noted that "[t]he Constitution does not specifically require that the journals shall show . . . the number of times and days that [a bill] has been read in either or both houses."[187] Because the readings clause did not require compliance to be reflected in the journals, the court would not even consider journal evidence, instead saying that the "enrolled bill appears entirely regular upon its face" and thus rejecting the readings clause challenge.[188]

A more categorical refusal to enforce a constitutional readings clause came in the Mississippi case of *Tuck v. Blackmon*.[189] In *Tuck*, several legislators had requested a reading at length of a pending conference committee report, pursuant to the constitution's dictate that "every bill shall be read in full immediately before the vote on its final passage upon the demand of any member."[190] The lieutenant governor, in her capacity as president of the senate, rejected the senators' request, whereupon the aggrieved legislators brought suit seeking injunctive relief to require a reading pursuant to the constitution's readings clause.[191] Although the court's opinion claims to preserve the rule from *Dye v. State ex rel. Hale* (allowing judicial review of legislative rules when constitutional issues are at issue[192]) the *Tuck* court struck a decidedly

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[186] *Coleman*, 186 S.E. at 629 (quoting *State ex rel. Hoover v. Town Council of Chester*, 17 S.E. 752, 755 (S.C. 1893)).
[187] *Id.* at 629-630 (quoting *Wingfield v. South Carolina Tax Comm'n*, 144 S.E. 846, 850 (S.C. 1928)).
[188] *Id.* at 629.
[189] 798 So.2d 402 (Miss. 2001). For an explanation of the political circumstances surrounding the *Tuck* case, *see* Leslie Southwick, *Separation of Powers at the State Level: Interpretations and Challenges in Mississippi*, 72 Miss. L.J. 927, 1008-1010 (2003).
[190] Miss. Const., art. IV, § 59.
[191] *Tuck*, 798 So.2d at 404.
[192] *See, supra* text accompanying notes 134-138.

deferential tone. Acknowledging that constitutionally prescribed procedures are mandatory, the court cited a variety of pre-*Dye* holdings, including the principle that

> [t]he sound view . . . is to regard all of the provisions of the constitution as mandatory, and those regulating the legislative department as addressed to and mandatory to that body, and with which the courts have nothing to do in the way of revision of how the legislature has performed its duty in the matters confided exclusively to it by the constitution.[193]

Relying on precedent interpreting the Mississippi rules-of-proceedings clause, the *Tuck* court declared "procedural provisions for the operation of the Legislature—*whether created by the constitution, statute or rule adopted by the houses*—should be left to the Legislature to apply and interpret, without judicial review."[194] Without elaboration (or reference to precedent), the court cited the political-question doctrine as justification for deference to the legislature when interpreting constitutional rules. In a seeming contradiction, just one paragraph after categorically refusing to review legislative rules, the court carves out an exception by saying "[o]nly where that body (or in this case, the President of the Senate who is, by its rules, vested with authority to make rulings on points or order) exercises the responsibility in a manifestly wrong manner which does critical harm to the legislative process is judicial intervention justified."[195]

Despite the extensive verbiage that the *Tuck* opinion devotes to defending non-review of legislative procedure, the court appears to nominally review the ruling at issue, stating "our question is whether the ruling of the Lieutenant Governor was a grossly unreasonable interpretation of Section 59, and, if so, whether the legislative process suffered substantial harm from that ruling."[196] After a textual analysis of the readings clause and a review of the case's

[193] *Id.* at 407 (quoting *Ex parte Wren*, 63 Miss. 512, 534 (1886)).
[194] *Id.* at 407 (emphasis added).
[195] *Id.*
[196] *Id.* at 408.

facts, the court held, "[i]t is impossible for us to say that [the Lieutenant Governor's] ruling was arbitrary or manifestly wrong."[197] Writing separately, Justice Oliver Diaz concurred with the conclusion that the Lieutenant Governor's ruling was correct, but disagreed strongly with the "sweeping language . . . in the majority's opinion abrogating this Court's authority to interpret rules of legislative procedure that infringe upon fundamental constitutional rights."[198] Predicting potential problems which could result, Justice Diaz criticized the majority opinion, saying it

> seems to recognize no principled difference in the Legislature's ability to determine rules of procedure and its authority to enforce them when challenged on constitutional grounds. I believe a repudiation of this distinction under the guise of judicial restraint would compel us to cast a blind eye toward alleged violations of fundamental constitutional rights simply because they are framed as internal "procedural matters."[199]

The result in *Tuck* could be justified on some theories, most notably on the grounds of remedial discretion, since the plaintiffs pursued judicial relief instead of exhausting appeals within the legislature. The majority, however, does not choose a narrow rationale, instead laying down a sweeping rule of non-review. Moreover, the opinion misinterprets the legislature's rules-of-proceedings clause powers, fails to distinguish between deference and non-justiciability, and ultimately establishes a confusing and internally contradictory rule concerning judicial review of procedural disputes.

While reading requirements are a historical vestige of a time when legislators could not all have their own copy of pending legislation, such provisions still have relevancy in modern times. Legislators who oppose quick-moving proposals often request reading at length in order to buy time to conduct negotiations or simply call attention to their grievances.[200] Giving each

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[197] *Id.* at 409.
[198] *Id.* at 410 (Diaz, J., specially concurring).
[199] *Id.* at 411.
[200] *See* Southwick, *supra* note 189, at 1008 (criticizing the reading request in *Tuck* as a tactic to "achieve a goal unrelated to the procedure itself"); Ryan Morgan, *Redistricting Thickens Tensions: Civility Fades as Dems Dig in*, Denver Post, May 7, 2003, at B3 (although not mentioned in the article, part of the dispute centered around the

bill three readings provides notice to legislators and interested parties of a measure's progress—a crucial component of enhancing transparency and accountability in the lawmaking process. Courts would do well to support these objectives by enforcing constitutional reading provisions.

3. Voting Procedures

Legislative voting procedure (which covers the manner of voting, determining the outcome, processes for changing votes, and rules for disqualifying a member for conflict of interest) is central to the efficacy of the legislative process. Because voting procedure is developed with an eye toward administrative concerns and privileges of members, it is a classic example of the legislature exercising its internal rule-making power under the rules-of-proceedings clause. As such, courts are rarely asked to adjudicate these issues, except when (as discussed in this section) a particular piece of legislation is challenged for not having received the required number of votes.

New York's confused jurisprudence concerning legislative voting requirements spans two different constitutions. In 1853 the state's high court decided *People ex rel. Scott v. Supervisors of Chenango*, a suit alleging several procedural deficiencies in the passage of an 1851 statute.[201] The court was asked to interpret the recorded-vote provision of the 1846 constitution, which stated: "No bill shall be passed unless by the assent of a majority of all the members elected to each branch of the legislature, and the question upon the final passage shall be taken immediately upon its last reading, and the yeas and nays entered on the journal."[202] The bill in question had received recorded votes in both chambers but was then subjected to a

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minority party's request that the 28-page bill be read at length; in response, the Senate President ordered several staff members to simultaneously read portions of the bill in order to reduce the delay caused by the reading).

[201] 8 N.Y. 317 (1853).

[202] N.Y. Const. of 1846, art. III, § 15.

protracted conference committee process wherein both chambers held several more votes on amendments. The final senate vote on the bill (in which the senate receded from two conference committee amendments) was not recorded in the journal.[203] The court declined to rule on the merits, citing a defect in the pleadings. While the senate's failure to record the vote could possibly be excused by distinguishing between a vote on third reading and a vote on receding from amendments,[204] the court went one step further in hollowing out the recorded-vote requirement. Despite the clear wording of the constitution, the court remarked in dictum that:

> the provision of the constitution requiring the question upon the final passage of a bill to be taken immediately upon its last reading, and the yeas and nays to be entered on the journal is only directory to the legislature. There is no clause declaring the act to be void if this direction be not followed.[205]

Over 125 years later, under a new constitution, the New York Appellate Division decided *Heimbach v. State*,[206] which involved interpretation of the similarly worded recorded-vote requirement in the current constitution.[207] The vote at issue in *Heimbach* (on passage of Senate Bill 1905) was recorded in the Senate journal, which showed the bill passed with 31 "aye" votes, the minimum required for passage in the 60-member senate. The dispute arose because one of the 31 votes in favor was attributed to Senator Howard Nolan who, all sides agreed, was in a hospital at the time of the vote.[208] Senate Bill 1905 was passed under the New York Senate's "fast roll call" procedure wherein the clerk conducts a "roll call" vote by calling the names of five senators. The remaining 55 members may vote "no" by raising their hands, but otherwise

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[203] *Scott*, 8 N.Y. at 327-328.
[204] *But see People ex rel. City of Springfield v. Edmands*, 96 N.E. 914, 916 (Ill. 1911) (on similar facts, court reached contrary conclusion "that any action evidencing the intention to enact a bill into a law, where the vote is taken by yeas and nays and entered on the journal, is a final passage of the bill").
[205] *Scott*, 8 N.Y. at 328.
[206] 454 N.Y.S.2d 993 (N.Y. App. Div. 1982) (per curiam), *aff'd*, 452 N.E.2d 1264 (N.Y. 1983).
[207] N.Y. Const. art. III, § 14 (notably, and perhaps in response to *Scott*, the current recorded vote requirement specifies that "upon the last reading of a bill, no amendment thereof shall be allowed," apparently foreclosing another scenario as the one at issue in *Scott*).
[208] *Heimbach*, 454 N.Y.S.2d at 994.

any senator who was present at the morning roll call will be recorded as an "aye" vote.[209] On the day in question, Senator Nolan had been present during morning roll call but left prior to the vote on S.B. 1905 in order to check into the hospital for upcoming surgery. In an affidavit, Senator Nolan said he had made arrangements to report his mid-day departure, but this was never communicated to the clerk. Because the constitution requires bills to be approved by a majority of members of each chamber, and Sen. Nolan's erroneously recorded vote was necessary for S.B. 1905 to receive a majority, it would seem that the court was faced with a straightforward case, subject to some potential evidentiary problems. Instead of emphasizing the constitution's majority vote requirement, the court declared that the rules-of-proceedings clause was the operative constitutional provision in the case. Reasoning that since Senator Nolan's vote was recorded pursuant to the "fast roll call" procedure (which was established by a validly adopted rule), the court concluded the outcome was constitutionally permissible.[210] As the court correctly points out, its ability to rule on the constitutionality of the fast roll call procedure is probably foreclosed by the rules-of-proceedings clause; however, the power of the judiciary to review S.B. 1905 for compliance with the constitution's minimum-vote requirement is a different matter. The trial court had declared S.B. 1905 void. The appellate court reversed, holding the voting issue non-justiciable. The appellate court's holding relies on two erroneous conclusions. First, the court confuses common-law parliamentary procedure concerning legislators presence for purposes of a *quorum* with the rules of *voting*.[211] Second, the court's reliance on the rules-of-proceedings clause mistakenly confers the legislature's rule-making powers onto matters of compliance with constitutionally mandated procedures. Although the opinion does mention the evidence presented at trial, the court ultimately relies on separation-of-powers doctrine in

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[209] *Id.* at 995-996.
[210] *Id.* at 999.
[211] *Id.* at 998-999.

reversing, declaring "[j]udicial review of every internal dispute between the members of the Legislature would frustrate the legislative process and violate the constitutional principle of separation of powers."[212]

Illustrating a robust approach to judicial review of voting procedures is *State ex rel. McKinley v. Martin*, which concerned a challenge to a 1907 law for non-compliance with the constitution's recorded vote provision.[213] The Alabama constitution requires "the names of the members voting for and against [a bill on final passage] be entered upon the journals, and a majority of each house be recorded thereon as voting in its favor."[214] In a brief opinion, the court explained that the senate journal for the vote in question failed to list the "no" votes and the votes in favor failed to constitute a quorum. Rejecting an affidavit from the Secretary of the Senate saying that the journal was incorrect and that all constitutional provisions had, in fact, been complied with, the court declared that the only competent journal was the copy deposited with the Secretary of State, and since it did not contain the information required by the recorded vote provision, the bill in question was not validly enacted.[215]

Judicial adjudication of voting disputes is comparatively unusual, since such controversies are typically resolved in the legislature, due to the paramount importance of reliable voting procedures. Exceptions to this general trend include enforcement of recorded vote provisions (such as *McKinley*) and construing constitutional definitions of quorums or majorities.[216] Although the mechanics of voting is most often a matter for unfettered legislative discretion, ensuring that legislation passes pursuant to constitutionally required quorums and majorities is a subject appropriately within the judicial scope of power. Thus it is disturbing to

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[212] *Id.* at 999 (internal quotation marks omitted).
[213] 48 So. 846 (Ala. 1909).
[214] Ala. Const. art. IV, § 63.
[215] *McKinley*, 48 So. at 847.
[216] *See* Mason's Manual, *supra* note 2, §§ 500-517.

see the *Heimbach* court's reliance on the rules-of-proceedings clause as the basis for non-review of an improperly enacted statute.

4. Investigations and Contempt Proceedings

A legislature's ability to investigate and punish is rooted in an extensive body of Anglo-Saxon law concerning the privileges of Parliament collectively, and its members individually. In a broad sense, legislative privilege is premised on the need for members to meet and deliberate without interference—as Cushing writes, legislators "should be excused from obeying any other call, not so immediately necessary for the great services of the nation."[217] Although Cushing acknowledges the "numerous controversies" and changing legal rules that characterized the British law of parliamentary privilege,[218] the ability of a legislature to enforce its own privileges is ultimately premised on the settled belief that

> [t]he privileges of a legislative assembly would be entirely ineffectual to enable it to discharge its functions, if it had no power to punish offenders, to impose disciplinary regulations upon its members, or to enforce obedience to its commands. These powers are so essential to the authority of a legislative assembly, that it cannot well exist without them; and they are consequently entitled to be regarded as belonging to every such assembly as a necessary incident. The privileges and the powers of a legislative assembly are therefore so far connected together that the latter are the necessary complement of the former.[219]

Because litigation concerning investigations and contempt citations is a more direct challenge to legislative power than typical cases involving the validity of legislation, it is not surprising that courts are more deferential in this area. Although a substantial amount of deference is justified, judicial restraint can go too far. Case law concerning investigations and contempt proceedings

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[217] Cushing, *supra* note 22, § 529 at 216.
[218] *Id.* §§ 534-537, at 217-220.
[219] *Id.* § 533, at 217.

can generally be grouped into two categories—the ability of the legislature to conduct investigations and the rights of non-members in such investigations.

Occasional challenges to legislatures' ability to conduct investigations or disciplinary proceedings have been largely unsuccessful due to the extensive legal history concerning legislative privileges. Legislative investigatory power is based on a body's "incidental inquisitory power." Such power is broad in scope, encompassing "all grievances of the citizen, which are remediable by legislative enactment, and . . . all abuses of power by persons in office."[220] A legislature also has inherent power, often reinforced by explicit constitutional text, to discipline its own members; however, disciplinary power also extends to non-members guilty of contempt.[221] The judicial power of American legislatures is substantially less than the power historically enjoyed by the British Parliament, which at its high-water mark encompassed many civil and criminal matters.[222] As a result, American legislatures generally operate under restrictions such that their judicial powers are limited to discipline of members, contempt proceedings, and impeachment.[223]

The Washington case of *State ex rel. Robinson v. Fluent* concerned a challenge to the legality of an interim investigative committee on "un-American activities."[224] The plaintiff pointed to the constitutional provision limiting legislative sessions to sixty days.[225] Although the legislature had adjourned by the sixty-day deadline, the plaintiff argued it could not vest an

[220] Cushing, *supra* note 22, § 641, at 255.
[221] *Id.*, § 655, at 259.
[222] *Id.*, §§ 645-654, at 257-259.
[223] The most notable restriction on legislative exercise of judicial power is the prohibition on bills of attainder, *see* U.S. const. art I, § 9, cl. 3; Legislative Drafting Research Fund, *supra* note 90, at 44 (similar provisions in state constitutions).
[224] 191 P.2d 241 (Wash. 1948).
[225] Wash. Const. art. II, § 12 (amended 1979).

interim committee with legislative powers after adjournment *sine die*.[226] The court held that the sixty-day limit applied to enacting laws, but did not limit the other powers of the legislature.[227] Because there was no constitutional restriction on the legislature's investigative power, the court upheld the legality of the interim committee, noting "except where the Constitution has imposed limits upon the legislative power, it must be considered as practically absolute . . . . The protection against unwise or oppressive legislation, within constitutional bounds, is by an appeal to the justice and patriotism of the representatives of the people."[228] Notably, the *Robinson* court's extensive review of American case law on interim committees did include a minority of jurisdictions which required interim committees to be created by bill instead of resolution.[229] The distinction is important, since bills are subject to the presentment and veto process, thus impairing the sovereign power of the legislature to act without interference from the executive. At least one of the three minority-rule cases cited in *Robinson* is of questionable modern authority,[230] and the other two cases are from jurisdictions (California and Illinois) that do not currently have constitutional limits on session length, perhaps making restrictions on interim committees moot.[231] Because the investigative powers of legislatures are so firmly established, judicial non-review is generally appropriate.

As discussed previously, two of the U.S. Supreme Court's five cases concerning Congressional procedure have concerned the rights of non-members in investigatory

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[226] *Robinson*, 191 P.2d at 245 (characterizing plaintiff's argument: "when a legislature adjourns sine die, that legislature ceases to exist and, as there are no legislative powers attached to the term of the legislators as such . . . such legislature cannot legislate subsequent to its adjournment sine die.").
[227] *Id.* at 246.
[228] *Id.* at 258 (quoting 1 Cooley's Constitutional Limitations 345 (8th ed., Carrington, ed.)).
[229] *Id.* at 256-258 (citing *Swing v. Riley*, 90 P.2d 313 (Cal. 1939), *Dickinson v. Johnson*, 176 S.W. 116 (Ark. 1915), and *Fergus v. Russel*, 110 N.E. 130 (Ill. 1915) (all requiring interim committees to be created by statute instead of resolution)).
[230] *See Berry v. Gordon*, 376 S.W.2d 279, 286 (Ark. 1964) (questioning validity of *Dickinson* due to constitutional amendment).
[231] *See* Council of State Governments, *supra* note 181, Table 3.2 at 76-77.

proceedings.[232] While the Supreme Court has taken an aggressive stance in protecting the rights of non-members, state courts have been decidedly more restrained. The Texas Supreme Court confronted the issue in *Canfield v. Gresham*, a case involving allegations of "public odium, infamy, ridicule," as well as "falsehood, indecency, and reportorial mendacity."[233] Newspaper reporter H.S. Canfield had published several "sensational, false, defamatory, and slanderous" articles concerning the Texas House of Representatives. In reaction to the articles, the house passed a resolution finding that Canfield had breached the privileges of the house, and rescinding his permission to sit at the reporter's table on the floor. When Canfield subsequently attempted to enter the chamber, he was removed by the sergeant at arms. After this incident Canfield sued the sergeant at arms and the speaker of the house for assault. Although the case was dismissed, the speaker was required to appear in court to answer the complaint, causing him to leave the session, whereupon "a general dissatisfaction and disturbed state of mind ensued, unfitting the representatives for calm and deliberate legislation."[234] In response to the lawsuit, the house passed a second resolution accusing Canfield of contempt and requiring him to appear before the house for a hearing. Canfield appeared as required but because he "declined to express any regret for any part of his conduct," the house passed a third resolution imposing a 48-hour prison sentence for contempt.[235] Without any discussion of the legality of using a contempt proceeding to retaliate against a non-member's use of civil process, the court upheld the sentence, relying on the Texas constitution's punishment clause, which allowed the legislature to punish "any person not a member . . . for obstructing any of its proceedings."[236]

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[232] *See supra*, text accompanying notes 59-71.
[233] 17 S.W. 390, 390, 392 (Tex. 1891).
[234] *Id.* at 391.
[235] *Id.*
[236] *Id.* at 393; Tex. Const. art III, § 15. The legal issues in *Canfield* were almost certainly subsumed by the dynamics of nineteenth century Texas politics.

Whereas the *Canfield* court resolved the issue by simply relying on the constitution's broad grant of power, the California Supreme Court conducted a more thorough review of a non-member's procedural rights in *Ex parte McCarthy*,[237] although the ultimate result is similar. D.O. McCarthy, the publisher of a San Francisco newspaper, was summoned to appear before a committee investigating an article he had published accusing seven state senators of bribery. After admitting to publishing the article, McCarthy refused to answer any additional questions and was subsequently found guilty of contempt and sentenced to jail "until he shall have purged himself of his contempt by answering the questions which had been propounded to him."[238] McCarthy challenged his imprisonment, but the court declined to intervene,[239] based on the theory that McCarthy was not the subject of the investigation, but rather a witness in the senate's investigation of its own members, who had been accused of bribery.[240] In its discussion of investigatory power, the court stressed the legislature's freedom in conducting investigations, emphasizing that "[t]hese powers [of investigation] are derived not from the Constitution; on the contrary, they arise from the very creation of a legislative body, and are founded upon the principle of self preservation."[241] Not only did the court uphold the ability of the senate to punish McCarthy for contempt, it also found that McCarthy was not entitled to assistance of council during the investigation, and even if he did possess a theoretical right to council, the court could not enforce it, since it was "a matter resting solely in the discretion" of the legislature.[242]

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[237] 29 Cal. 395 (1866).
[238] *Id.* at 397-398.
[239] Because McCarthy came before the court on a habeas corpus petition, the opinion does not directly discuss whether the legislative action was reviewable by the court since McCarthy sought a release from custody, not an invalidation of the contempt resolution. Based on the court's treatment of McCarthy's right to counsel, see *infra*, text accompanying note 242, it is likely that it would have held the contempt citation non-justiciable.
[240] *Id.* at 405-406.
[241] *Id.* at 403.
[242] *Id.* at 399-400 (quoting *In re Favley*, 7 Wis. 630 (1858)).

Although the right of legislative bodies to cite non-members for contempt is well-settled law, the level of deference shown in *Canfield* and *McCarthy* seems to resemble the ulteriorly disfavored British practices that Cushing describes:

> It was anciently attempted by the house of commons, not only to arrogate to themselves the exclusive jurisdiction of all cases in which they pretended that their privileges were concerned, even incidentally; but, also, and as a necessary consequence, to deny all other tribunals all knowledge of what those privileges were; but both these pretensions have for a long time been abandoned . . . at the present day, whenever a question of privilege arises or is made in any court, either directly or indirectly, in the exercise of its ordinary jurisdiction, such court is bound to take notice of and decide upon, the privilege in question.[243]

Because of the "cumbersome and troublesome" process needed to enforce contempt proceedings under its inherent power,[244] Congress has implemented a statutory system providing for contempt proceedings through the judicial branch.[245] While state legislatures are under no obligation to create similar structures (and given the comparative rarity of investigations in state bodies, detailed contempt statutes may be unnecessary), in the absence of a statutory system providing for review by non-legislative tribunals, state courts should not advance an entirely deferential view as shown in *Canfield* and *McCarthy*.[246] Although history shows that legislative privileges are well-established, it also warns of undesirable results which can grow from unchecked legislative protection of its privileges.[247]

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[243] Cushing, *supra* note 22, § 537 at 219.
[244] *Fields v. U.S.*, 164 F.2d 97, 99-100 (D.C. Cir. 1947) (giving history of Congressional contempt enforcement proceedings).
[245] 2 U.S.C. §§ 192, 194.
[246] *Cf. Barenblatt v. U.S.*, 360 U.S. 109, 111 (1959) ("Broad as it is, the [Congress's investigatory] power is not, however, without limitations.").
[247] *See e.g.,* Cushing, *supra* note 22, § 535 at 217 ("During the reigns of George I. and II. . . it appears to have been the established principle, that any illegal or wrongfully injurious act, which subjected a member [of Parliament] to any inconvenience, or had a tendency to divert his mind or his attention from his parliamentary duties, was a breach of privilege and punishable as such."). It is not surprising that *Canfield* and *McCarthy* both involve legislative punishment of journalists. Legislative-press relations have long been the subject of political controversy. *See* Byrd, *supra* note 55, at 100-101 (physical altercations in the U.S. Capitol involving reporters), and 158-159 (describing 1838 rule excluding out-of-town reporters from Senate chamber). For a modern example of a legislative-press dispute, which did not end in litigation, *see* Jennifer Brown, "Bruce alone in the House" *Denver Post*, Jan. 20, 2008,

5. Presentment Procedures

One area in which courts have not displayed the deference seen in many legislative-procedure cases is bill presentment.[248] Although there are several reasons for this departure from the larger trend of judicial deference, two theories appear most frequently. First, presentment is the actual process by which legislation is enacted and courts tend to be more comfortable deciding if a law was validly enacted. In contrast, disputes over pre-presentation procedure typically concern a bill's *consideration* as opposed to the final enactment. Second, presentment controversies often entail disagreements between the legislative and executive branches, which the courts usually feel qualified to resolve.

Charleston National Bank v. Fox involved a challenge to the validity of a West Virginia tax statute which was purported to have become law, pursuant to the Constitution, when the governor did not sign or veto it upon presentment.[249] The plaintiffs introduced evidence showing that the bill presented to the governor and the bill filed with the secretary of state as having become law without the governor's signature, were different versions of the same bill. After recounting the constitution's requirement that every bill passed by the legislature must be presented to the governor before it can become law, the court also acknowledged the deference it

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at C1 (lawmaker who kicked photographer on the floor of the house was investigated by committee and censured by the full body); 66th Colo. Gen. Assembly, H. Res. 08-1005 (resolution of censure).

[248] The same non-deferential approach is true of the U.S. Supreme Court, which relied on the presentment clauses of the U.S. Constitution when invalidating the legislative veto. *I.N.S. v. Chadha*, 462 U.S. 919, 946-948 (1982). It is important to note, however, that the federal presentment clauses are quite different from most state presentment provisions. Typically, state constitutions outline detailed steps in which a bill must be certified by legislative officers from both chambers and presented to the governor. The U.S. Constitution does not provide such detail. *See* Roberts, *supra* note 4, at 526 ("the [federal] constitutional notion of 'presentment' does not necessarily mean what it seems to mean. It certainly does not require a physical presentation to the actual president by the actual presiding officer of the originating chamber.").

[249] 194 S.E. 4 (W. Va. 1937).

usually accorded legislative records and the general presumption in favor of a duly certified enrolled bill.[250] Having laid this groundwork, the court framed the issue before it as whether

> the question of presentment . . . [is] to be left to the attestation of the clerk of the House as evidenced by the printed acts, or do the courts, when called upon to enforce a purported statute, have a right and duty, *ex mero motu*, to determine the existence of this fact?[251]

In a rare departure from West Virginia's tradition of judicial deference,[252] the court decided to look beyond the enrolled bill and the clerk's certification, saying the court was "entitled to look to the requirements of the Joint Rules of the Legislature as to the handling of bills when they are presented to the Governor in determining what bills have been presented to him."[253] Finding the bill passed by both houses of the legislature was not the same bill presented to the governor, the court invalidated the statute due to non-compliance with the constitutional presentment requirement.[254]

In a similar case of administrative disorganization, the Connecticut Supreme Court was confronted with a challenge to a tax statute in *State v. Savings Bank of New London*.[255] The bill at issue had been passed by both chambers. The house (the second chamber to consider the bill) passed it on third reading in the morning, but that afternoon a motion was made to reconsider the previous vote. The motion was then tabled, effectively killing the bill. Through a clerical error, the enrolled bill was transmitted to the governor, who signed it before the mistake was discovered.[256] The bank, arguing that the bill was valid, claimed that the actual presentment of the bill was dispositive, even if it was in error, and the governor's signature on the bill was final. The court disagreed, holding that "no bill can be 'presented' to the Governor unless it has

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[250] *Id.* at 6-8.
[251] *Id.* at 8.
[252] *See supra*, text accompanying notes 163-166.
[253] *Id.* at 9.
[254] *Id.*
[255] 64 A. 5 (Conn. 1906).
[256] *Id.* at 6-7.

'passed' both houses of the General Assembly."[257] Because final action on the bill had been suspended through the tabling of the motion to reconsider, the bill had not been passed in the constitutional sense required by the presentment clause, and the physical presentment was immaterial.[258]

Whereas *Savings Bank* involved presentment by accident, the case of *Maloney v. Rhodes* involved a deliberate legislative attempt to expedite presentment by evading the certification process required by the Ohio constitution.[259] Due to elaborate political machinations, the Ohio Senate wished to present six bills to the governor, but refused to deliver the bills to the lieutenant governor (who was required to sign the enrolled bills as the senate's presiding officer) for fear that he would keep the bills until the session had expired.[260] The Ohio constitution's presentment provisions required all bills to be signed by each chamber's presiding officer "to certify that the procedural requirements for passage have been met."[261] The senate had presented the lieutenant governor with evidence showing that all procedural requirements had been complied with and urged him to immediately sign the certification attesting to this fact—but he refused. The senate leadership then bypassed the lieutenant governor, presenting the bills directly to the governor. In court, the senators who had made the decision to bypass the certification procedure presented evidence of the lieutenant governor's intention to hold the bills and argued that the senate had "the right and duty, under [the Ohio Constitution], and under rules of parliamentary procedure, to protect the integrity of its processes from the nonfeasance of its presiding officers."[262] The court disagreed, noting that the certification requirement was

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[257] *Id.* at 9.
[258] *Id.*
[259] 345 N.E.2d 407 (Ohio 1976).
[260] For a full explanation of the case's political backstory, *see Id.* at 416-417 (Corrigan, J., concurring in part).
[261] Ohio Const. art. II, § 15(E).
[262] *Maloney*, 345 N.E.2d at 414.

mandatory. Because the lieutenant governor's role in the enrollment and presentment process was ministerial, the court explained that he should have signed the bills within a reasonable time. If he refused to do so, the senate's recourse would be to seek a writ of mandamus to compel certification—it was not empowered to skip the enrollment procedures altogether.[263]

A more recent presentment case arose in *King v. Cuomo*.[264] While many presentment cases arise out of disputes between the legislative and executive branches, *King* involved a constitutional question upon which the legislature and governor *agreed*, but the New York Court of Appeals struck down the procedure nonetheless. A municipal government sought a declaratory judgment that a bill had become law without the governor's signature because he had not signed it within ten days of presentment.[265] The governor and legislature argued that after it had passed the bill in question, the legislature had recalled it via a "recall resolution." Although the recall process was not mentioned in the constitution, it was a long-standing custom of parliamentary procedure in New York and governors had traditionally respected the legislature's ability to recall bills which had not yet been approved or vetoed. Because of the New York courts' history of holding legislative procedure issues non-justiciable, the governor and legislature argued the recall process was not subject to judicial review. The court acknowledged that legislative rules

> are entitled to respect. However those rules cannot immunize or withdraw the subsisting question of constitutional law-making power from judicial review. . . . [T]he discrete rules of the two houses do not constitute organic law and may not substitute for or

[263] *Id.* at 414-415. Notably, the majority's opinion does not discuss justiciability. Although there is no clear reason for this omission, it is presumably due to the pressing need for an authoritative resolution of the complex inter-branch dispute. The outgoing governor signed the six bills at issue (without the signature of the lieutenant governor) and sent them to the secretary of state, who refused to file them and returned them to the new governor. The complaint in the case was filed by a taxpayer, seeking declaratory judgment and injunctive relief. *Id* at 409.
[264] 613 N.E.2d 950 (N.Y. 1993).
[265] *See* N.Y. Const. art. IV, § 7 ("If any bill shall not be returned by the governor within ten days (Sundays excepted) after it shall have been presented to him or her, the same shall be a law in like manner as if he or she had signed it").

> substantially alter the plain and precise terms of the primary source of governing authority.[266]

Although the court seemed to imply that any constitutionally prescribed procedure would be subject to review, it heavily emphasized the presentment process's unique inter-branch nature. The court noted that past cases holding procedural disputes non-justiciable had relied on the rules-of-proceedings clause. The text of that clause, however, covers each house's "own proceedings," and thus the rules-of-proceedings clause "cannot justify rules which extend beyond the Legislature's 'own proceedings' and are inextricably intertwined with proceedings pending entirely before the Executive."[267] Reviewing the constitution's three routes for enacted legislation (approval, veto, or approval by gubernatorial inaction), the court concluded that the constitution did not anticipate the recall process and "the Legislature, even with the Executive's acquiescence, cannot place itself outside the express mandate of the Constitution."[268] The court's holding in *King* is a dramatic departure from the deferential approach taken in *Heimbach*,[269] an inconsistency not lost on the dissenters, who argued for a deferential reliance on the rules-of-proceedings clause, writing, "[t]he fact that no prohibition on the Legislature's practice of recalling bills has been added [to the constitution] suggests that the practice was intended to be permitted."[270] The majority attempted to distinguish *Heimbach* on its facts, noting that voting procedure is a wholly internal legislative process, whereas presentment implicates two branches of government. This approach fails to take into account the similarities between the two cases—both involved statutes whose validity depended on interpretation of arguably ambiguous constitutional text. Why the *Heimbach* court accepted a questionable constitutional

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[266] *King*, 613 N.E.2d at 952.
[267] *Id.* (emphasis omitted).
[268] *Id.* at 953.
[269] *See supra*, text accompanying notes 206-212.
[270] *Id.* at 957 (Smith, J., dissenting in part).

interpretation advanced by the legislature while the *King* court rejected an equally (if not more) plausible argument supported by *two* branches of government is unclear.

The judiciary's comparatively assertive role in resolving presentment controversies is premised on the inter-branch nature of the presentment process. While courts are right to arbitrate constitutional disputes between the branches, it does not follow that the judicial branch must categorically defer to the legislature in all other matters of legislative procedure.[271] When courts defer to legislatures on issues of constitutionally prescribed procedure they usually do so out of "respect" for the legislative branch. This approach loses sight of the fact that the legislature, while vested with plenary lawmaking powers, is nonetheless subordinate to the constitution.[272] As illustrated above, when courts defer to legislatures they do so via two avenues: non-justiciability or deference to legislative interpretations of the constitution. Non-justiciability is appropriate in most cases concerning non-constitutional procedure but is often misapplied to disputes over constitutionally mandated procedures, possibly due to extra-legal factors such as political power and judicial fear of reprisal.[273] Judicial deference to legislative interpretation is not improper per se, but has lead to unfortunate results in may cases. On some occasions, legislatures have certainly advanced plausible interpretations of ambiguous procedural mandates, however, as the cases in this section show, such interpretations are frequently designed to vitiate the controls which were intended by their framers to check legislative power.

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[271] *See* Eugene V. Rostow, "The Democratic Character of Judicial Review" 66 Harvard L. Rev. 193, 194 (1952) ("It is a grave oversimplification to contend that no society can be democratic unless its legislature has sovereign powers.").

[272] *See* Cushing, *supra* note 22, § 6, at 3 (characterizing difference between British Parliament and American legislatures by writing "the existence and powers of [Parliament] rest only upon custom and tradition, aided by occasional statute provisions; whereas [American legislatures] are founded in, and for a great part *regulated, limited, and controlled by*, written fundamental laws or constitutions." (emphasis added)).

[273] *See* Langer, *supra* note 35, at 33-46 (discussing legislative-judicial relations).

Issues of justiciability and deference notwithstanding, even when courts agree to hear a procedural dispute on its merits, meaningful review is often thwarted by evidentiary law—specifically the enrolled bill rule, which is the topic of the next section.

III. The Enrolled Bill Rule

The previous section examined the spectrum of judicial deference in the context of specific procedural requirements. The enrolled bill rule, which is perhaps the most prominent barrier to judicial review of legislative procedure, cuts across all types of procedures. In its strictest form, the rule treats an enrolled bill[274] as conclusive evidence of proper enactment, "with no other evidence . . . admissible to establish that the bill was not lawfully enacted."[275] The enrolled bill rule is a common-law doctrine which has historical origins in the Anglo-Saxon rule prohibiting impeachment of documents representing the king's word. American courts have substituted legislative deference for regnal deference, often citing the separation-of-powers doctrine as support for continued adherence to the rule.[276] Due to the numerous variations which U.S. courts have made to the traditional "conclusive presumption" iteration of the enrolled bill rule, most modern authorities characterize state court rules in this arena as falling along a spectrum.[277] For simplicity's sake, discussion here will divide the spectrum into three categories: the strict enrolled bill rule, the modified enrolled bill rule, and the extrinsic evidence rule.

[274] An enrolled bill is defined as "a copy of the bill in the form it has passed both houses, which has been proofread and corrected . . . and printed with blanks for the certification of passage and accuracy and signature by the governor. This bill is certified by the presiding officers and chief legislative officers of both houses as being correct and as having duly passed both houses." Mason's Manual, *supra* note 2, § 702 ¶ 1. Enrollment (which is a bicameral process) should be distinguished from engrossment, the authentication of approved legislation in the house of origin. *See* Singer, *supra* note 94, § 15:1 at 814; Cushing, *supra* note 22, §§ 2127-2128 at 831.
[275] Singer, *supra* note 94, § 15:3 at 819.
[276] *Id.* at 819-820.
[277] *See* Mason's Manual, *supra* note 2, § 697 (three categories); Williams, *supra* note 74, at 816-823 (five categories); Singer, *supra* note 94, §§ 15:3-15:6 at 819-830 (four categories).

A. Strict Enrolled Bill Rule

As noted above, the enrolled bill rule has roots in English common law. This historical pedigree appeared to influence the California Supreme Court when it adopted the enrolled bill rule in *Sherman v. Story*.[278] *Sherman* concerned a dispute over Senate Bill 56 (of the 1866 session), which repealed a military poll tax. Senate Bill 56 originated in the senate and passed the assembly with amendments. Sherman, the tax collector for the city and county of San Francisco, argued that the enrolled bill (which was signed by the governor) included the assembly amendments, even though the senate had never approved them. After discussing the historical practice in the British parliament and courts, the *Sherman* court held that upon being properly enrolled and deposited with the secretary of state, California bills "must be regarded as the record, and as 'a monument of' as 'high a nature' and solemn character as an Act of Parliament enrolled in chancery . . . unless there is something in our Constitution or laws detracting from its dignity, or authorizing its impeachment."[279] The court spent considerable time discussing the English doctrine which prohibited the pleading of *nul tiel record*[280] in the face of a properly enrolled bill. Using this doctrine as justification for American adoption of the enrolled bill rule, the court then considered cases from several U.S. jurisdictions, most of which strictly applied the rule. After its review of U.S. case law, the court declared that "the solemn record of the Act, as it is enrolled and authenticated on file in the office of the Secretary of State, cannot be impeached by showing defects and irregularities in the proceedings while pending before the Legislature."[281] While writing favorably of the enrolled bill rule, the *Sherman* court did acknowledge that constitutional or statutory provisions could abrogate the traditional

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[278] 30 Cal. 253 (1866).
[279] *Id.* at 258.
[280] "A plea denying the existence of the record on which the plaintiff bases a claim." Black's Law Dictionary at 1099.
[281] *Sherman*, 30 Cal. at 269.

common-law rule. It noted that some states' constitutions required specific information to be recorded in legislative journals, and failure to record such data could impeach an enrolled bill.[282] When considering whether any such provision was applicable in California, the court discussed two constitutionally prescribed legislative procedures which expressly required documentation of compliance in the legislative journals.[283] Even in these situations, the court declined to authorize journal evidence to impeach an enrolled bill, noting "there is no provision in law declaring how the Journals shall be authenticated, or what shall be their effect."[284] Although the court acknowledged the right of the legislature to statutorily overturn the enrolled bill rule, the opinion also editorialized, in dictum, about the wisdom of doing so, rhetorically asking:

> When we once depart from principle—from a sound rule of law—where shall we stop? Do not the circumstances of this case open to our vision a vista of absurdities into which we shall stumble if we attempt to explore forbidden fields for evidence of a vague, shadowy and unsatisfactory character upon which to overthrow the enrolled statutes of the land?[285]

The legislature took no steps to abrogate the enrolled bill rule and *Sherman* remains good law today. Notably, like most cases applying the enrolled bill rule, *Sherman* says nothing concerning justiciability. A party is theoretically free to challenge a law based on procedural irregularities, but since introduction of the enrolled bill into evidence raises a conclusive presumption as to its procedural validity, such challenges are doomed to fail.[286]

Mississippi's adoption of the enrolled bill rule came in the case *Ex parte Wren*, which also included a review of cases from other jurisdictions, noting "the great diversity of opinion"

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[282] *Id.* at 270-271 (discussing *Spangler v. Jacoby*, 14 Ill. 298 (1853)).
[283] *Id.* at 276 (citing Cal. Const. of 1849, art. IV, §§ 11 and 17 (requiring recorded vote on the request of any three legislators and journal entries concerning gubernatorial vetoes, respectively).
[284] *Id.*
[285] *Id.* at 279.
[286] Although many courts consider the enrolled bill rule an evidentiary rule, in reality it functions much like the parol evidence rule, which has been characterized as "not a rule of evidence but a rule of substantive law." Restatement (Second) of Contracts § 213 cmt. a (1979).

regarding the ability of courts to look beyond the enrolled bill.[287] The court discussed two alternatives to the strict enrolled bill rule: the journal rule (requiring journal entries showing compliance with constitutional procedures) and the modified enrolled bill rule (see discussion in next section). In dismissing the journal rule, the court declared "[i]ts absurdity is so manifest as to have found few advocates."[288] Although it found "considerable support" for the modified enrolled bill rule, the *Wren* court declined to adopt it, citing separation-of-powers concerns as justification for a strict application of the rule.[289] In drawing the separation-of-powers boundary, the court acknowledged its role in enforcing the constitution, but did not see any need to abandon the enrolled bill rule, declaring

> It is the admitted province of the courts to judge and declare if an act of the legislature violates the constitution, but this duty of the courts begins with the completed act of the legislature. It does not antedate it. The legislature is one of the three co-ordinate and co-equal departments into which powers of government are divided . . . . From necessity the judicial department must judge of the conformity of legislative acts to the constitution, but what are legislative acts must be determined by what are authenticated as such according to the constitution.[290]

The court also rationalized its adherence to the enrolled bill rule by emphasizing the need for stability and predictability in the law, writing "[i]f the validity of every act published as law is to be tested by examining its history . . . there will be an amount of litigation, difficulty, and painful uncertainty appalling in its contemplation and multiplying a hundred fold the alleged uncertainty of the law."[291] Conceding that the enrolled bill rule precludes judicial remedy for legislative violation of constitutionally prescribed procedure, the court dismissed the idea of allowing

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[287] 63 Miss. 512, 528 (1886).
[288] *Id.* at 529.
[289] *Id.* at 532 (every alternative to the enrolled bill rule "subordinates the legislature and disregards that coequal position in our system of the three departments of government.").
[290] *Id.* at 533-534.
[291] *Id.* at 532.

extrinsic evidence to impeach a certified act, saying "[t]he proposition is monstrous, and the recognition of such a doctrine is full of mischief without any compensating advantage."[292]

One important limitation on the enrolled bill rule is illustrated in the Illinois case of *Benjamin v. Devon Bank*.[293] Plaintiffs in *Benjamin* challenged the siting of a government office, relying on a provision in a recent appropriations bill which prohibited certain facilities from being located within 500 feet of a school. The defendants challenged the validity of the provision, pointing to the constitutional prohibition on including general legislation in an appropriations bill.[294] Legislative leadership and staff argued as amicii, that under the enrolled bill rule, the signatures on the enrolled bill certified that the act complied with all constitutional provisions and thus established a conclusive presumption which the court could not question. The court rejected this argument, reiterating the fact that the enrolled bill rule creates a conclusive presumption regarding procedural compliance, not substantive compliance. Since the appropriations bill limitation was substantive, it was subject to judicial review.[295]

Because the plaintiffs in *Benjamin* did not allege procedural defects in the bill's passage, the court did not directly address the enrolled bill rule, but the opinion did note extensive evidence from the state's 1969-70 constitutional convention indicating that the framers intended to adopt the enrolled bill rule, thus overturning Illinois's prior use of the journal rule.[296] With this evidence in the record, the Illinois supreme court applied the enrolled bill rule in future

[292] *Id.* at 535. Despite its solid enthusiasm for the enrolled bill rule, the *Wren* court did establish two narrow exceptions, one for veto overrides (which can be authenticated only by the constitutionally-mandated record vote) and proposed constitutional amendments, which the court reasoned were not "bills" within the meaning of the enrolled bill rule.

[293] 368 N.E.2d 878 (Ill. 1977).

[294] Ill. Const. art. IV, § 8 ("Appropriation bills shall be limited to the subject of appropriations.").

[295] *Benjamin*, 368 N.E.2d at 880-881. The rule adopted in *Benjamin* is similar to other cases which have held that alleged violations of the common "single subject" rule are not foreclosed by the enrolled bill rule, since the violation can be determined by an analysis of the text itself. *See* Millard H. Ruud, "No Law Shall Embrace More than One Subject," 42 Minn. L. Rev. 389, 393 (1958) (enrolled bill rule cannot "insulate an act from the attack that it violates the one-subject rule because the fact of violation can be determined from the act itself without resort to extrinsic evidence.").

[296] *Benjamin*, 368 N.E.2d at 879-880.

cases, including in the 1992 case *Geja's Cafe v. Metropolitan Pier and Exposition Authority*.[297] The opinion in *Geja's Cafe* is, however, clearly reluctant. The case involved a challenge to a bill which all parties acknowledged was passed in violation of the constitution's readings clause. While the court relied on *Benjamin* to determine that the enrolled bill rule was anticipated by the constitution's framers, it also criticized the legislature for "remarkably poor self-discipline in policing itself."[298] In upholding the enrolled bill rule, the court was quite frank, reasoning:

> We do so because, for today at least, we feel that the doctrine of separation of powers is more compelling [than the plaintiff's argument]. However, we defer to the legislature hesitantly, because we do not wish to understate the importance of complying with the Constitution when passing bills. If the General Assembly continues its poor record of policing itself, we reserve the right to revisit this issue on another day to decide the continued propriety of ignoring this constitutional violation.[299]

While the Illinois Supreme Court criticized the enrolled bill rule based on a track record of legislative non-compliance, others have objected to the rule based on the inherent conflict between constitutionally prescribed procedures and the rule's effect of precluding judicial enforcement. When the Utah Supreme Court adopted the enrolled bill rule in *Ritchie v. Richards*,[300] two justices wrote separately in order to raise quite articulate criticisms of the rule. The *Ritchie* court was confronted with the question of whether legislative journals could be used to impeach an enrolled bill for failure to comply with constitutionally mandated procedures. While the majority, citing the enrolled bill rule, declined to consider the journals, Justice George Bartch dissented, saying that the new state's adoption of the old common-law rule

> would place the legislature, in the mode of the enactment of laws, beyond the control of the sovereignty itself, and the limitations contained in the constitution respecting the manner of enacting laws would be mere useless verbiage. With all due respect to that co-

[297] 606 N.E.2d 1212 (Ill. 1992).
[298] *Id.* at 1221.
[299] *Id.*
[300] 47 P. 670 (Utah 1896).

> ordinate branch of the government, I cannot consent to a proposition that would invest it with a power so arbitrary.[301]

Justice Bartch was particularly critical of the majority's use the separation-of-powers doctrine. Bartch noted that the rule's historical pedigree was incompatible with the democratic principle that the people, not a monarch, are sovereign. Because the people, in their sovereign capacity, had adopted the constitutional provisions concerning legislative procedure, Justice Bartch felt that the procedures, reflecting the people's "supreme will," were mandatory and must be enforced.[302] Noting that the judicial branch was vested with the power to declare what the law is, Bartch noted, "[t]his right or power necessarily includes the power to declare what enactments of the legislature are, and what are not, laws; and in exercising this function the courts do not trench upon the domain of the legislative department, although they pass judgment upon its official acts."[303]

Despite its continued popularity in some state courts (and the U.S. Supreme Court[304]), the strict enrolled bill rule is a legal fiction based on principles that are no longer applicable in the American system of government.[305] Unfortunately, as shown in the next section, the most common variant of the rule (the modified enrolled bill rule) does not go far enough to ameliorate the rule's obstruction of meaningful review of procedural compliance in the legislative branch.

B. Modified Enrolled Bill Rule

The modified enrolled bill rule is not so much a rule as a conglomeration of judicial holdings which have departed, to some extent, from the strict enrolled bill rule by allowing

[301] *Id.* at 675 (Bartch, J., concurring in part and dissenting in part).
[302] *Id.*
[303] *Id.* at 676.
[304] *See Marshall Field & Co v. Clark*, 143 U.S. 649 (1892) (adopting strict enrolled bill rule).
[305] *See supra*, text accompanying note 276.

evidence from legislative journals to prove that an enrolled bill was passed in violation of required procedures. Like its strict counterpart, the modified rule does not effect justiciability per se, but determines whether a party challenging a statute will be able to present evidence to rebut the presumption of procedural validity created by the enrolled bill.

The modified rule often limits admissible evidence to journal entries concerning procedures that are constitutionally required to be documented in the journals (mandatory journal entries). *State ex rel. Coleman v. Lewis* illustrates this limitation as articulated by the South Carolina Supreme Court.[306] The legislation at issue in *Coleman* was challenged based on an alleged violation of the readings clause. While the court clearly reserved the right to examine journal evidence "to inquire into those prerequisites fixed by the constitution,"[307] it held that since the constitution's readings clause did not require compliance to be recorded in the journals, a readings-clause challenge was conclusively defeated upon introduction of the enrolled bill. In support of the modified approach, the court extolled the virtues of restricting judicial review, namely "[p]ublic policy, certainty as to what the law is, convenience, and that respect due by the courts to the wisdom and integrity of the Legislature, a co-ordinate branch of the government."[308]

The Arkansas case *Bradley Lumber Co. v. Cheney* also illustrates a typical approach to "permissive" journal entries (i.e., any journal entry not required by the constitution).[309] Bradley Lumber challenged a statute which created a severance tax on rough lumber. It introduced journal evidence showing that the bill had passed out of the house of origin with a certain amendment, but the version signed by the governor did not include the amendment. Arguing that the governor had signed a different bill than the legislature had passed, Bradley sought to

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[306] 186 S.E. 625 (S.C. 1936).
[307] *See supra*, text accompanying notes 183-188.
[308] *Id.* at 629 (quoting 26 Am. & Eng. Ency. of Law 557).
[309] 295 S.W.2d 765 (Ark. 1956).

invalidate the statute. The court employed the common presumption that the enrolled bill establishes that "every requirement for [a bill's] passage was complied with."[310] In the face of the presumption, the silence of journals cannot impeach the procedural validity of legislation "unless the constitution requires the journals affirmatively to show the action taken."[311] The court noted that the Arkansas constitution only required a journal record of the final vote, not action on amendments. It accordingly held that under the presumption it would assume the house had receded from its amendment sometime before the bill was presented to the governor.[312]

The Missouri Supreme Court, in *State ex rel. Attorney General v. Mead*, abandoned the strict enrolled bill rule in order to allow for the admission of some journal evidence, but did not pass up the opportunity to comment on the nineteenth-century popularity of constitutionally mandated legislative procedure.[313] Noting that the state had followed the strict rule under its prior constitution, the court acknowledged the need to reevaluate the common-law rule in light of the new 1865 constitution's recorded-vote requirement, a provision adopted "as if with the advance toward a 'higher civilization' greater precautions were requisite in legislative matters than in the early days of our State's history."[314] In rejecting the plaintiff's challenge (which relied on the absence of permissive journal entries), the court preemptively responded to criticism of the limited review afforded by the modified enrolled bill rule, writing

> If it be said that this construction leaves it optional with the Legislature whether they shall comply with the explicit commands of [the enrollment clause] . . . One obvious reply is, that confidence must be reposed somewhere; that the very nature of republican government demands and presupposes it; that if the trust thus reposed is not well founded; that if integrity is not to be found among the legislative representatives of the

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[310] *Id.* at 766.
[311] *Id.*
[312] *Id.*
[313] 71 Mo. 266 (1879).
[314] *Id.* at 270.

> people, it would be but an easy matter by a simulated observance of constitutional forms in the registry of falsehoods upon the journals, to evade and defeat the most rigid provisions of the organic law that the wit of man is capable to devise.[315]

The portions of *Mead* that establish the parameters of Missouri's modified rule remain good law.[316]

The practical limitations on admitting journal evidence to challenge an enrolled bill are illustrated by a pair of Colorado cases—one adopting, and one applying, the modified enrolled bill rule. In the first case, *In re Roberts*, a criminal defendant filed a habeas corpus petition, alleging that the statute under which he was charged had been enacted in violation of Colorado's recorded-vote provision.[317] The constitution required a journal entry showing the names of legislators voting, but Roberts argued that the "journal records are so defective that they fail to disclose the fact with required certainty."[318] The Colorado Supreme Court reviewed the case law of various states, referring to the strict enrolled bill rule as the "English rule" and the modified version as the "American rule." It quickly settled on the American rule but noted that a journal's "value as evidence . . . is a question for the courts, and will be affected by the internal evidence which such records furnish as to the system and completeness, or carelessness and slovenliness with which they have been kept."[319] Since the recorded-vote provision required a mandatory journal entry, the court found it was appropriate to examine the journals. In doing so, however, it harshly criticized the reliability of the journals, saying "these so-called journals are not strictly journals, but memoranda for journals" and declaring "it is earnestly to be hoped that more careful attention will be given in future legislative proceedings."[320] Based on its review of the

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[315] *Id.* at 271-272 (emphasis omitted).
[316] *See e.g., Hatfield v. Meers*, 402 S.W.2d 35, 43 (Mo. App. 1966) (citing and applying *Mead*).
[317] 5 Colo. 525 (1881).
[318] *Id.* at 526.
[319] *Id.* at 530.
[320] *Id.* at 530-531.

disorganized records of the legislature, the court concluded it was inferable that the bill was adopted in accordance with the recorded-vote requirement.[321] As a tie-breaker, the court also established a presumption in favor of a bill's validity when the journals were ambiguous, incomplete, or incomprehensible.[322]

The Colorado Supreme Court revisited the issue in *People ex rel. Manville v. Leddy*,[323] in which it recounted the sorry state of affairs it had encountered when examining the journals in *Roberts*. *Leddy* also involved a challenge to legislation based on an alleged violation of the recorded-vote rule, but this time the court wrote of the improved state of record-keeping, saying that in response to *Roberts*, the General Assembly had implemented effective rules governing the journal preparation. The plaintiff in *Manville* introduced the senate journal into evidence, pointing out that it lacked a list of the senators voting on final passage of the bill.[324] The state auditor, defending the challenged legislation, introduced work papers of the senate clerk's office, showing a purported roll-call tally sheet for the bill's final passage. Finding that such evidence was unreliable, the court declined to consider it.[325] The court said it could not overlook the lack of a recorded vote upon the senate journal, declaring

> This court cannot make such an entry for the Senate. To do so would be legislation, and such power is reserved in the people or vested in the General Assembly alone. . . . The sovereign people, in whom is vested all governmental power, have spoken in their organic law, and their mandate, so expressed, must be enforced by the courts, even though wise and beneficent attempted legislation is thereby defeated.[326]

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[321] *Id.* at 532-533 (specifically at issue was whether the House had properly concurred with Senate amendments and whether the final conference committee report had been properly adopted; the "journals" contained many loose vote tally sheets, which appeared (but could not be proven) to correspond to certain votes which were required to be recorded).
[322] *Id.* at 534.
[323] 123 P. 824 (Colo. 1912).
[324] *Id.* at 826.
[325] *Id.* at 827-828.
[326] *Id.* at 830.

In 1978, the Colorado Supreme Court confronted another technological evolution—tape recordings of legislative sessions. Finding that the legislative recordings were not authorized or required by the constitution, the court held that they could not be used to impeach the journals.[327]

The Colorado cases illustrate the most common variation of the modified rule—allowing journal evidence to impeach an enrolled bill only in the case of mandatory journal entries. This iteration is often referred to as the "journal rule,"[328] although that term is used by others to describe different concepts.[329] A minority variant of the modified rule allows courts to consider any type of journal evidence. The Wyoming Supreme Court explained its adoption of this variant in *Arbuckle v. Pflaeging* by declaring "we are not limited by the recital of a single journal entry if upon construing all the entries together it is manifest that such single entry is erroneous or incomplete, and, notwithstanding that fact, upon all the entries, the provision of the Constitution has been complied with."[330] One of the allegations in *Arbuckle* was that the legislature violated the constitutional requirement that bill titles be read immediately preceding the bill's enrollment.[331] Although the provision does not mandate a journal entry, the court nonetheless examined the journal evidence to determine whether the reading requirement had been complied with. Ultimately, the court found the journals to be ambiguous and employed a presumption in

[327] *In re Interrogatories of the Governor Regarding Certain Bills of Fifty-first General Assembly*, 578 P.2d 200, 207 (Colo. 1978).
[328] *See* Singer, *supra* note 94, § 15:5 at 827 ("if constitutional compliance with mandatory provisions is not set forth in the journal there is a conclusive presumption that the proper proceedings were not followed and the presumption is against the validity of the act")
[329] *See* Williams, *supra* note 74, at 821 (describing journal entry rule as "allow[ing] a court to consider any evidence appearing in the legislative journals to help determine the validity of a statute . . . with the enrolled bill being considered only prima facie valid."); Mason's Manual, *supra* note 2, § 697, ¶ 4 ("The journal alone or the journals and other records are required to show all necessary steps in the passage of bills. Unless questioned, the enrolled bill will stand, but no further presumptions favor its passage or regularity.").
[330] 123 P. 918, 923 (Wyo. 1912).
[331] Wyo Const. art III, § 28.

favor of upholding enacted legislation,[332] but adherence to the standard iteration of the modified rule would have prevented even this modest level of review.

An even more unusual, and much maligned, version of the modified rule is referred to by Singer as the "affirmative contradiction rule," and presumes the enrolled bill is valid unless the journals affirmatively show a constitutional violation.[333] The Kansas Supreme Court spoke approvingly of the affirmative contradiction rule in *State ex rel. Godard v. Andrews*, holding that the enrolled bill was conclusive evidence of procedural compliance "unless the journals of the legislature show clearly, conclusively, and beyond all doubt, that the act was not passed regularly and legally."[334] Singer criticizes this variation, noting that

> [i]t is illusory to suppose that a bill may be rendered invalid by an affirmative entry of noncompliance. . . . As a practical matter it would be remarkable for the journal to recite affirmatively that the bill was not read or a vote was not taken or that any required procedural step was not carried out.[335]

As further illustration of the corrosive effects that can result from "adjustments" to the modified enrolled bill rule, the Tennessee Supreme Court has used a combination of the affirmative contradiction rule and questionable constitutional interpretation to vitiate the judiciary's ability to enforce mandatory procedures. In *Home Telegraph Co. v. City Council of Nashville* the court was asked to invalidate legislation which had not been enrolled in open session, as required by the constitution.[336] The city, seeking to invalidate a statute concerning public utilities, pointed out that the law's enrollment was never documented in the house journal. Even though the constitution explicitly required the enrollment to be recorded in the journal, the court construed the provision to be directory and held that the journal's silence could not impeach the enrolled

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[332] *Arbuckle*, 123 P. at 924.
[333] Singer, *supra* note 94, § 15:4 at 825-827.
[334] 67 P. 870, 872 (Kan. 1902).
[335] Singer, *supra* note 94, § 15:5, at 826.
[336] 101 S.W. 770 (Tenn. 1907).

bill. In defending this conclusion, the court decried the potential effects of a contrary rule, saying it "would lead to confusion and disastrous results" and allow "the journal clerk of either house, by design or negligence, to nullify any legislation, no matter how important, by simply omitting the necessary entry upon the journal."[337]

The modified enrolled bill rule is a step in the right direction but is overly cautious in its preference for journal evidence. Not only does the distinction between mandatory and permissive journal entries prevent courts from fully evaluating relevant evidence, but the reliance on journals is an anachronism. *In re Roberts* shows the historical justification for judicial skepticism of any extrinsic evidence. But the disorganized legislative records of the nineteenth century have been replaced by increasingly sophisticated technology which provides evidence of the type that courts are well accustomed to evaluating in the context of litigation.[338] As the next section shows, carefully planned use of extrinsic evidence can allow for meaningful review of procedural compliance without leading to the pitfalls that defenders of the enrolled bill rule frequently predict.

C. Extrinsic Evidence Rule

Although the modified enrolled bill rule does allow some modicum of judicial review for procedural compliance, its efficacy is limited by the fact that only journal evidence can be used to impeach an enrolled bill. Since the legislature is in control of its own journal, a majority of members can effectively avoid constitutionally prescribed procedures by falsifying the journal. Defenders of the strict and modified enrolled bill rules have decried the use of extrinsic evidence on the grounds of separation of powers, judicial administration, and the need for stability in

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[337] *Id.* at 773.
[338] *See e.g.,* Jeff Finch, *Planning for Chamber Automation*, 3 J. of Am. Society of Legislative Clerks & Secretaries 7 (1997).

lawmaking. The experience of jurisdictions which have allowed extrinsic evidence has indicated that these fears are not well founded.

As with the modified enrolled bill rule, the extrinsic evidence rule exists along a spectrum. Some jurisdictions have allowed extrinsic evidence to impeach an enrolled bill only in narrowly defined circumstances. For example, the Florida Supreme Court adopted the modified enrolled bill rule in *State v. Kaufman*, but established three situations in which extrinsic evidence could be used to contradict the enrolled bill and the journals.[339] The *Kaufman* court reversed a trial judge's ruling that admitted tape recordings of a legislative session to prove that lawmakers violated the state's readings clause when passing a criminal statute. The court stressed that "journals are the only evidence superior in dignity to recorded acts" but did acknowledge "a few, very specific instances where using parol evidence to impeach a journal might be allowed."[340] Specifically, the court wrote that journals could be impeached by "public records of superior or equal dignity," or in cases of fraud, or to prove that legislation was passed by the legislature after a constitutionally imposed deadline for adjournment *sine die*.[341]

The New Mexico Supreme Court, in dicta, suggested it would allow extrinsic evidence for the narrow purpose of showing that the legislature had stayed in session past the deadline for adjournment.[342] While upholding the state's use of the strict enrolled bill rule in all other situations, the court lamented the legislature's increasing refusal to adjourn by the constitutionally imposed deadline. "Their frequent failure to do so," the court wrote, "breeds disrespect for our law and our institutions. Ignoring this constitutional mandate reflects no credit upon the legislative branch of government for having indulged in such a course, or upon the

[339] 430 So.2d 904 (Fla. 1983).
[340] *Id.* at 905-906.
[341] *Id.* at 906.
[342] *Dillon v. King*, 529 P.2d 745, 750-752 (N.M. 1974).

judicial branch for having condoned it."[343] Oddly, the court justified this stance by saying of the constitutional limit on session length, "the voice of the people speaks clearly in directing the Legislature to complete its business and then to go hence from the legislative halls."[344] The same clarity could certainly be said to apply to New Mexico's recorded-vote and enrollment procedures, both of which require mandatory journal entries[345] and both of which are rendered judicially unenforceable by the enrolled bill rule. Another example of narrow use of extrinsic evidence is found in West Virginia, which generally follows the modified enrolled bill rule, but will allow extrinsic evidence when journals are silent, ambiguous, or conflicting.[346]

Other jurisdictions have adopted a broader version of the extrinsic evidence rule. The Kentucky Supreme Court, in *D&W Auto Supply v. Department of Revenue*, abandoned its previous adherence to the enrolled bill rule in favor of allowing extrinsic evidence.[347] The plaintiffs in *D&W Auto* challenged a new tax levy on the grounds that it had not passed the house by a majority vote of all members elected to the body, as required by the constitution.[348] In overruling Kentucky's use of the enrolled bill rule, the court noted that prior cases had given three reasons in support of the strict rule: separation of powers, convenience, and the unreliability of legislative records. Remarking that "when a theory supporting a rule of law is not grounded in facts, or upon sound logic, or is unjust, or has been discredited by actual experience, it should be discarded," the court proceeded to rebut the three rationales previously

[343] *Id.* at 751.
[344] *Id.*
[345] New Mexico Const. art. IV, §§ 17, 20.
[346] *State ex rel. Heck's Discount Ctrs. v. Winters*, 132 S.E.2d 374, 379-380 (W.Va. 1963).
[347] 602 S.W.2d 420 (Ky. 1980).
[348] Ky. Const. § 46 requires revenue bills to "receive the votes of a majority of all the members elected to each house." The bill challenged in *D&W Auto* had passed the house with a majority of members *present*, but failed to reach the constitutionally mandated majority of all members *elected.*

used to support the enrolled bill rule.[349] In rejecting the separation-of-powers argument, the court declared:

> The proper exercise of judicial authority requires us to recognize any law which is unconstitutional and to declare it void. . . . We are sworn to see that violations of the constitution by any person, corporation, state agency or branch of government are brought to light and corrected. To countenance an artificial rule of law that silences our voices when confronted with violations of our constitution is not acceptable to this court.[350]

Similarly, the court was not persuaded by earlier arguments of convenience, writing "the fact that the number and complexity of lawsuits may increase is not persuasive if one is mindful that the overriding purpose of our judicial system is to discover the truth and see that justice is done."[351] Finally, the court found that poor record-keeping on the part of the legislature had ceased to be an insurmountable problem with advances in technology such as recording devices and modern office equipment. Although the violation at issue in *D&W Auto* could conceivably have been proven by examination of the journals, the court expressly adopted the extrinsic evidence rule, holding that the enrolled bill creates a prima facie presumption of validity, "but such presumption may be overcome by clear, satisfactory and convincing evidence establishing that constitutional requirements have not been met."[352]

The most definitive adoption of the extrinsic evidence rule is found in New Jersey. That state had previously abided by the enrolled bill rule,[353] but statutorily abrogated the rule in 1873. The statute, still in force, allows the governor (through the attorney general) or any two New Jersey citizens to challenge a bill or joint resolution based on procedural violations.[354] The

[349] *D&W Auto*, 602 S.W.2d at 424.
[350] *Id.*
[351] *Id.*
[352] *Id.* at 425.
[353] *See State ex rel. Pangborn v. Young*, 32 N.J.L. 29 (N.J. 1866).
[354] N.J. Rev. Stat. §§ 1:7-1, 1:7-4 (2007); *see also In re McCabe*, 409 A.2d 1158, 1161 (N.J. 1980) ("the subject matter of the inquiry [authorized by N.J. Rev. Stat. § 1:7-1] involves only the mechanics of the enactment of the law and not the unconstitutional validity of the law itself.").

statute requires any such action to be brought in the court of appeals within one year of the law's enactment.[355] Although many of the cases decided under New Jersey's statutory framework have concerned internal legislative procedures, the system also affords an orderly method for courts to consider other challenges which would be justiciable even under the enrolled bill rule.[356]

Characterized by one commentator as an *in rem* action against a bill,[357] the cause of action authorized by the New Jersey statute has not resulted in the types of calamities that proponents of the enrolled bill rule have predicted would result from allowing extrinsic evidence. The New Jersey Supreme Court upheld the constitutionality of the statute in 1912 in response to a lawsuit claiming that the legislature could not authorize challenges outside the context of adversarial litigation. The court upheld the law, writing

> we see no reason for concluding that it is beyond the power of the Legislature to create a method of judicial procedure in which the sole and only question to be presented for decision is whether or not a given statute was enacted in conformity to constitutional requirements . . . . In no other way can the people of the state be informed whether a given law which appears upon the statute book is one which they are obliged to obey.[358]

In the same year, 1912, the court invalidated a law which was signed by the governor in a different form than it passed the legislature.[359] Upon examination of the legislative records (including a comparison of the enrolled bill to introduced version of the bill) and testimony by the house clerk, the court concluded that the governor had signed the introduced bill whereas the

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[355] N.J. Rev. Stat. § 1:7-1.

[356] *See e.g., In re An Act Concerning Alcoholic Beverages*, 31 A.2d 837 (N.J. 1943) (holding that Senate president, in his capacity as acting governor while governor was out of state, was authorized to sign legislation after governor had returned but failed to notify staff that he was in the state).

[357] J.A.C. Grant, *New Jersey's "Popular Action" in Rem to Control Legislative Procedure*, 4 Rutgers L. Rev. 391, 399 (1950).

[358] *In re An Act to Amend an Act Entitled "An Act Concerning Public Utilities,"* 84 A. 706 (N.J. 1912).

[359] *In re Jaegle*, 85 A. 214 (N.J. 1912).

legislature had approved the amended bill, and thus "neither the one nor the other can be regarded as a legislative act which is enforceable by the courts."[360]

The New Jersey statute has not resulted in a flood of destabilizing lawsuits,[361] as some defenders of the enrolled bill rule argue would inevitably result from the admissibility of extrinsic evidence. Possibly, the New Jersey legislature is more diligent in complying with constitutionally prescribed procedures due to the potential for judicial review. The judiciary too has played a role in curtailing excessive litigation by establishing a high burden of proof for petitioners. The 1915 case *In re Low* declared that the party seeking invalidation of a statute must prove his case by clear and convincing evidence.[362] The *Low* court had "no difficulty" finding that the petitioner had not satisfied his burden of proof. Petitioner George Low challenged a 1915 statute on the grounds that it appeared in the legislative journals under two different titles, thus making it unclear which version (the original or the committee substitute) was actually enacted.[363] The court agreed that the journals were confusing and misleading, but it also stressed that the journals "although a competent source of evidence, are not the sole source, and when the proper inferences are drawn from other sources . . . of equal, if not superior, character . . . we are satisfied that [the bill] was duly passed."[364] Noting that if the legislature had borne the burden of proof it would have failed, the court reiterated that the burden fell on Low, and accordingly rejected his petition.[365]

The practical mechanics of a challenge under the New Jersey system are illustrated by *In re McGlynn*, a challenge to a 1959 statute modifying the state's college scholarship system.[366]

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[360] *Id.* at 216.
[361] *See* Grant, *supra* note 357, at 409-410.
[362] 95 A. 616, 617 (N.J. 1915).
[363] *Id.* at 616.
[364] *Id.* at 618.
[365] *Id.*
[366] 155 A.2d 289 (N.J. Super. Ct. App. Div. 1959).

Three citizens, dissatisfied with the manner in which the bill was enacted, petitioned the court of appeals, asking for invalidation of the statute. Upon receiving the petition, the court ordered public notices to be published, inviting any interested citizens to intervene to defend the law.[367] While no citizens responded to the notice, the court did allow several legislators and one representative of an interest group to intervene in defense of the bill.[368] The challenged law, Senate Bill 2, had been returned by the governor with 35 suggested amendments (under New Jersey's conditional veto procedure). The legislature overrode the veto with the required two-thirds majority. Shortly after the veto override, each chamber also approved Senate Bill 264, which amended certain provisions of S.B. 2. The petitioners challenged S.B. 2 on three points. Their main argument was that S.B. 264, despite its status as a stand-alone bill, was an amendment to S.B. 2, in which case S.B. 2 could not be enacted via override, but needed to be re-presented to the governor in its amended form. Second, the petitioners alleged that when the General Assembly reconsidered S.B. 2, they did not hold the second and third readings on separate days, as required by the constitution. Finally, the bill's opponents alleged that the senate failed to deliver the governor's veto message to the assembly, as required by the constitution's veto provisions.[369] The court rejected the petitioners' argument concerning S.B. 264, stressing that the two bills had been considered and acted upon separately. The petitioners pointed to S.B. 2's enrollment certificate upon which the assembly speaker had hand-written the annotation "as amended by Senate #264." The petitioners argued the speaker's interpretation of S.B. 2 was binding on the court.[370] The court rejected this argument by examining the assembly minutes and concluding that the speaker was authorized only to certify that the assembly had

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[367] *See* N.J. Rev. Stat. §§ 1:7-2 (notice procedures) and 1:7-5 (intervention procedures).
[368] *Id.* at 292.
[369] *Id.* at 292-295.
[370] *Id.* at 301.

overridden the governor's veto, and any additional notes written on the certificate were made without authority. Ironically, the petitioners, despite the fact that they were proceeding under the authority of the statutory abrogation of the enrolled bill rule, argued (unsuccessfully) that the court could not look beyond the enrolled bill, and thus was bound by the speaker's amendment to the certificate.[371] The court rejected the readings-clause challenge, construing the clause as applicable to bills on initial passage, not override. It also ruled against the claimed omission of the veto message by determining from parol evidence that the message had been delivered to the assembly as required.[372]

The New Jersey courts have also curtailed the potential for abuse by articulating a *de minimus* exception. The court of appeals used the *de minimus* rule to reject the petition in *In re Fisher*.[373] The challengers in *Fisher* objected to a liquor control law which was incorrectly engrossed in the assembly. As a result of clerical error, the bill that passed on third reading contained the phrase "such interest" where the version approved on second reading had read "such an interest." Although the state argued the petition proved the legislation's validity (since the assembly, senate, and governor all acted on the same, albeit incorrect, version of the bill), the court specifically avoided this argument in favor of asserting the *de minimus* rule. Holding that errors in bill text are fatal only where the variance is material,[374] the court also reiterated the broader rule (applicable to all procedural challenges) that legislation will be invalidated only if "the unconstitutionality of what has been done is manifest."[375]

The New Jersey experience shows that establishing a structure for challenges to legislation's enactment procedure and allowance of extrinsic evidence can be orderly and

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[371] *Id.* at 302-303.
[372] *Id.* at 297.
[373] 194 A.2d 353 (N.J. Super. Ct. App. Div. 1963).
[374] *Id.* at 355 (citing *Bull v. King*, 286 N.W. 311 (Minn. 1939)).
[375] *Id.* at 357 (quoting *In re McGlynn*, 155 A.2d 289, 303 (N.J. Super. Ct. App. Div. 1959)).

manageable. Constitutionally prescribed procedures are given meaning by allowing any two citizens to seek judicial enforcement. Stability is promoted by imposing a one-year statute of limitations. And abuse is curtailed through the burden of proof and *de minimus* rule. Together, these procedures work to give meaning to mandatory procedures while preventing destabilizing or frivolous litigation.

IV. Conclusion

The right of a legislative body to establish its own procedures is a tradition worthy of defending. As illustrated throughout this paper, courts have frequently made persuasive and well-reasoned arguments for not reviewing internal legislative procedure. The independence of the legislature, however, lead to abuses of power in early U.S. history. As a result, the largely unfettered rulemaking power that legislatures enjoyed under older constitutions was tempered by the enactment of numerous constitutional provisions governing the mechanics of the lawmaking process.

Due to their placement in the constitution, such provisions should be interpreted and enforced by the judicial branch. Sometimes they are. Often, however, courts find reasons to avoid reviewing legislative non-compliance. Separation of powers is often cited as a reason for such deference; however, this argument is incongruous with the normal willingness of courts to assert their power as ultimate interpreters of the constitution. Some courts have cited rules-of-proceedings clauses as a commitment of rulemaking power to the legislative branch, but this misses the point of constitutionally mandated procedures, which were intended to curtail the problems which grew out of unchecked legislative power.

The enrolled bill rule, although endowed with a lengthy historical pedigree, currently serves to perpetuate a legal fiction that is no longer compatible with sound public policy. Early American moves to curtail the problems inherent in this rule resulted in the modified enrolled bill rule. The modified rule still falls short of solving the ultimate problem since courts are limited to evidence contained in certain journal entries. The jurisdictions which have allowed the use of extrinsic evidence, especially New Jersey, have proven that such a change can be implemented without destroying judicial respect for the legislature or throwing the legal system into chaos.

Legislative procedure, as a body of legal practice, is shaped by the politics and history of ninety-nine state legislative chambers and must be responsive to unique local needs. The vast majority of parliamentary procedure is undisputedly beyond the scope of judicial review. Specific enumerated procedures, however, have been placed in every state constitution and should be interpreted and enforced by courts in the same manner as any other constitutional provision. Only when state courts become comfortable with the fact that constitutionally prescribed procedures play a vital role in preventing legislative abuse will such provisions be fully effective.