

Forget What You Learned in Civics Class: The “Enrolled Bill Rule” and Why It’s Time to Overrule *Field v. Clark*

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Though the Constitution requires that every bill pass both houses of Congress in identical form, this is an empty constitutional promise. The “enrolled bill rule,” adopted by the Supreme Court in 1892, holds that signed authentications by the President, Speaker, and Senate President of the formal printing of the bill (the enrolled bill) provide incontrovertible proof that the law was validly passed. Thus, once a bill has been signed by the President, it no longer matters whether both houses of Congress approved the text as no amount of evidence can persuade a reviewing court that the law is invalid. Indeed, the enrolled bill rule has been determinative in a recent string of cases challenging that the House never passed the Deficit Reduction Act of 2005. This Note argues that the enrolled bill rule is unjustifiable. As such, it argues that the Supreme Court should have granted certiorari in one of the Deficit Reduction Act cases and adopted a probative evidence rule instead.

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I. INTRODUCTION

For a bill to become a law, the identical text must be passed by both houses of Congress and signed by the President.¹ Or at least, that is what we learned in civics class. In practice, if a bill is enrolled — that is, if it is officially printed and signed by the Speaker of the House, the President of the Senate, and the President — a reviewing court will not question whether or not it actually passed Congress. Those three signatures are conclusive evidence that the bill passed. This is known as the “enrolled bill rule.”²

The consequence of this rule, adopted by the Supreme Court in 1892,³ is that courts are bound to uphold a statute even if they and everybody else know it was never legally enacted.⁴ As a result, both courts and scholars have recognized that the bill is “conducive to fraud, forgery, corruption and other wrongdoings in connection with legislation.”⁵

These are not merely theoretical concerns. Evidence suggests that the Deficit Reduction Act of 2005⁶ (“DRA”) was not passed by both houses of Congress.⁷ The House and Senate passed different versions of the bill, the Senate’s version becoming law.⁸ Though at least six cases have challenged the constitutionality of that legislation, each case has been dismissed because the enrolled bill

1. The Bicameralism and Presentment Clause mandates that “[e]very Bill which shall have passed the House of Representatives and the Senate, shall, before it become a Law, be presented to the President of the United States . . .” U.S. CONST. art. I, § 7, cl. 2. In *Clinton v. City of New York*, 524 U.S. 417, 448 (1998), the Court noted that “The Constitution explicitly requires that each of . . . three steps be taken before a bill may ‘become a law’”: a bill containing the “exact text” must be approved by one house; the other house must approve “precisely the same text,” and “that text” must be signed by the President. See also *W. Va. Univ. Hosps. v. Casey*, 499 U.S. 83, 98–99 (1991) (best evidence of statutory purpose is “*statutory text adopted by both Houses of Congress* and submitted to the President”) (emphasis added); CHARLES W. JOHNSON, HOW OUR LAWS ARE MADE, H.R. DOC. NO. 108-93, at 50 (2003) (bill must be “agreed to in identical form by both bodies” before presentation to the President).

2. See J.G. SUTHERLAND, SUTHERLAND STATUTORY CONSTRUCTION § 15:3 (Norman J. Singer ed., West 6th ed. 2000).

3. *Marshall Field & Co. v. Clark*, 143 U.S. 649 (1892).

4. *Bull v. King*, 286 N.W. 311, 313 (Minn. 1939).

5. *Id.*

6. Deficit Reduction Act of 2005, Pub. L. No. 109-171, 120 Stat. 4 (2006).

7. See *infra* Part III.A.2.

8. Carl Hulse, *House Republicans Reject Call to Study Budget Bill Disparities*, N.Y. TIMES, Feb. 17, 2006, at A18.

rule precludes review.⁹ Two appellate courts have upheld these dismissals, and the Supreme Court has denied certiorari.¹⁰

This Note will discuss the continued efficacy of the enrolled bill rule and suggest that, while it may have made sense in 1892 when the Supreme Court adopted it, a different judicial approach is warranted today. Part II will give greater background on the enrolled bill rule. In particular, that Part will discuss the origins of the rule, the Supreme Court's justifications for adopting it, and its scope today. Part III will discuss the danger of the enrolled bill rule as evidenced by the contemporary dispute over the DRA. Part III will also discuss arguments for and against the rule, concluding that the Court's continued reliance on the enrolled bill rule is unjustified. Finally, Part IV will discuss alternative schemes and argue that a probative evidence rule presents not only a tenable alternative but an attractive one. It will thus argue that the Supreme Court should have taken the opportunity presented by the dispute over the DRA to grant certiorari on this issue and abandon the enrolled bill rule; having failed to do so this time, it should not miss the opportunity if a similar case arises in the future.

II. BACKGROUND ON THE ENROLLED BILL RULE

The Supreme Court adopted the enrolled bill rule in 1892. In the seminal case, *Marshall Field & Co. v. Clark*, importers Marshall Field & Co. challenged the constitutionality of the Tariff Act of October 1, 1890.¹¹ Field contended that the law the President had signed omitted a section of the bill that had passed both

9. See *Zeigler v. Gonzales*, No. 06-0080, 2007 U.S. Dist. LEXIS 47134 (S.D. Ala. 2007); *Conyers v. Bush*, No. 06-11972, 2006 U.S. Dist. LEXIS 80816 (E.D. Mich. Nov. 6, 2006); *Cal. Dep't of Soc. Servs. v. Leavitt*, 444 F. Supp. 2d 1088 (E.D. Cal. 2006); *Cookeville Reg'l Med. Ctr. v. Leavitt*, No. 04-1053, 2006 U.S. Dist. LEXIS 68961 (D.D.C. Sept. 26, 2006); *Pub. Citizen v. U.S. Dist. Court for the Dist. of Columbia*, 451 F. Supp. 2d 109 (D.D.C. 2006); *OneSimpleLoan v. U.S. Sec'y of Educ.*, No. 06-2979, 2006 U.S. Dist. LEXIS 38714 (S.D.N.Y. June 9, 2006).

10. See *OneSimpleLoan v. U.S. Sec'y of Educ.*, 496 F.3d 197 (2d Cir. 2007); *Pub. Citizen v. U.S. Dist. Court for the Dist. of Columbia*, 486 F.3d 1342 (D.C. Cir. 2007), *petition for cert. denied*, 76 U.S.L.W. 3303 (U.S. Dec. 10, 2007) (No. 07-141).

11. *Marshall Field & Co. v. Clark*, 143 U.S. 649, 662-66 (1892). The law required the company to pay duties on woolen dress goods, woolen wearing apparel, and silk embroideries. *Id.* Field sought to avoid these tariffs. *Id.*

houses of Congress and was therefore unconstitutional.¹² Field's contention was not a novel one: even if signed by the Speaker of the House and President pro tempore and presented to and approved by the President, a bill does not become a law if Congress has not approved that exact text.¹³ Indeed, the Court recognized that

[i]n view of the express requirements of the Constitution the correctness of this general principle cannot be doubted. There is no authority in the presiding officers of the House of Representatives and the Senate to attest by their signatures, nor in the President to approve, nor in the Secretary of State to receive and cause to be published, as a legislative act, any bill not passed by Congress.¹⁴

As the President had signed a bill differing from that passed by Congress, Field presented a potentially valid claim that the law was unconstitutional and void.

The Court then turned to the matter of proof.¹⁵ Though it recognized its duty "to give full effect to the provisions of the Constitution relating to the enactment of laws,"¹⁶ the Court adopted an extremely limiting evidentiary rule. The Court held that enrollment is "complete and unimpeachable" evidence that a law has been validly passed.¹⁷ Viewing only that evidence, the Court found the law valid.

This section will discuss (a) the origins of this decision, (b) the Court's justifications for it, and (c) the scope of the rule today.

12. *Id.* at 668–69. This omission could be shown by reviewing the "congressional records of proceedings, reports of committees of each house, reports of committees of conference, and other papers printed by authority of congress . . ." *Id.* at 669.

13. *Id.*

14. *Id.*

15. *Id.* at 670 ("[I]t remains to inquire as to the nature of the evidence upon which a court may act when the issue is made as to whether a bill . . . was or was not passed by congress.").

16. *Id.*

17. *Id.* at 672.

A. ORIGINS OF THE RULE

When the Supreme Court adopted the enrolled bill rule in 1892, the justices decided the issue in the first instance for the federal government, but it was by no means a novel question at the time. The position taken by the Court is one that had been in place in England since 1616.¹⁸

The rule in England stemmed from that country's monarchical system of government. Acts that had passed Parliament would receive the King's assent and be marked with the great seal.¹⁹ As John Wigmore explains, this was not merely a certification that a bill had been passed, it was the "effective legal act of enactment."²⁰ Enrollment, J.G. Sutherland counsels, was "a regal act and no official might dispute the king's word."²¹ Whatever might have happened during parliamentary deliberations was meaningless.²²

Moreover, the enrolled document was the original record of enactment, and the "best evidence rule" prohibits challenging the contents of an original record with extrinsic evidence.²³ As such, the legislative journals and any other evidence about the proceedings were inadmissible at trial.²⁴

The justifications for the enrolled bill rule in England however, translate poorly to America's system of government. Eng-

18. England officially adopted the rule in *The King v. Arundel*, 80 Eng. Rep. 258 (K.B. 1617). For a discussion of the case, see *Chicot County v. Davies*, 40 Ark. 200, 209 (1882); *Weeks v. Smith*, 18 A. 325, 327 (Me. 1889).

19. See *Chicot County*, 40 Ark. at 209.

20. 4 JOHN HENRY WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW § 1350, at 816 (Aspen 1998).

21. SUTHERLAND, *supra* note 2, at § 15:3.

22. See *Sherman v. Story*, 30 Cal. 253, 257 (1866) (parliamentary deliberations have "no power to satisfy, destroy or weaken the act").

23. The modern version of this is codified at Federal Rule of Evidence 1002.

24. See *Sherman*, 30 Cal. at 256 (quoting *The King v. Arundel*, 80 Eng. Rep. 258 (K.B. 1617)):

But now suppose that the Journals were in every way full and perfect, yet it hath no power to satisfy, destroy, or weaken the act, which, being a high record, must be tried by itself, *teste meipso*. Now Journals are no records, but remembrances for forms of proceedings to the record; they are not of necessity — neither have they always been. They are like docketts of prothonotaries, or the particular to the King's patent The Journal is of good use for the observation of the generality and materiality of proceedings and deliberations as to the three readings of any bill, the intercourses between the two Houses and the like; but when the act is passed, the Journal is expired.

land's "the word of the King is final" rule is anachronistic in "a government of laws and not of men."²⁵ England lacks a written constitution prescribing the means of enacting legislation, so there can be no such thing as an unconstitutionally passed bill.²⁶ Moreover, while the enrolled bill is an original record of the President's assent, it is merely a certification of what each house of Congress passed.²⁷ As such, the best evidence rule would not exclude extrinsic evidence regarding Congressional actions.²⁸

By 1892, when the Supreme Court heard *Field*, a number of state courts had grappled with these concerns.²⁹ When the Colorado Supreme Court considered the enrolled bill rule in 1881, it noted that "[i]n this country the question, in some form, has been passed upon by the highest courts of twenty-two States, and in over fifty cases."³⁰ Nine states had adopted the enrolled bill rule, finding alternative justifications for it, but thirteen others had rejected it as inconsistent with their constitutional frameworks.³¹ Federal precedent on a similar issue suggested that the Supreme Court, initially, also viewed the enrolled bill rule as inconsistent with the American framework.³²

25. This language, drafted by John Adams for the constitution of the Commonwealth of Massachusetts, has been repeatedly quoted in reference to the federal constitutional system. See *Morrison v. Olson*, 487 U.S. 654, 697 (1988) (Scalia, J., dissenting).

26. See *Chicot County v. Davies*, 40 Ark. 200, 210 (1882) ("The people of England have no written constitution defining and limiting the powers of their government. The Parliament being supreme, there can be no such thing as the passage of laws in an unconstitutional manner.").

27. See 4 WIGMORE, *supra* note 20, at 816 ("The legislature has not dealt by vote with the enrolled document; [it] therefore can be only a certificate and copy of the transactions representing the enactment.").

28. *Id.* at 816.

29. Justice Harlan referenced some of these state court decisions in his opinion. The opinion quotes cases from, in the order appearing, New Jersey, California, Mississippi, and Maine. It further cites leading cases from North Carolina, Nevada, Indiana, Missouri, Louisiana, and Illinois. See generally *Marshall Field & Co. v. Clark*, 143 U.S. 649 (1892).

30. *In re Roberts*, 5 Colo. 525, 528 (1881).

31. *Id.* States having adopted the enrolled bill rule were: California, Connecticut, Indiana, Iowa, Louisiana, Mississippi, Nevada, New Jersey, and New York. Those instead adopting the "American doctrine" (that enrollment is not conclusive) were: Alabama, Arkansas, Illinois, Maryland, Michigan, Minnesota, Missouri, New Hampshire, Ohio, Pennsylvania, South Carolina, Vermont, and West Virginia. *Id.*

32. *Id.* (citing *Gardner v. Collector*, 73 U.S. 499 (1868)).

B. THE SUPREME COURT'S JUSTIFICATIONS

As the original justifications for the rule were unavailing, the Supreme Court advanced a three-part argument for making enrollment conclusive evidence of a law's procedural validity: (1) the Constitution does not prescribe how laws are to be authenticated, (2) enrollment is strong evidence of passage and journals are unreliable, and (3) the cost of allowing collateral attacks on facially-valid laws is less than the danger of invalidly passed bills becoming law.³³ It is not clear from the Court's opinion, however, whether these arguments are independently sufficient to support the rule or if they are only collectively persuasive.³⁴

1. *The Constitution Does Not Prescribe How to Authenticate Laws*

The Court found that the Constitution does not "prescribe the mode in which the fact of the original passage of a bill by the house of representatives and the senate shall be authenticated, or preclude congress from adopting any mode to that end which its wisdom suggests."³⁵ In the absence of a prescribed method in the Constitution for authenticating passage, the Court found that Congress's chosen procedure (enrollment) should be given significant weight.³⁶

The Court rejected a contention that journal entries were the constitutionally mandated record of a law's valid passage. The Constitution requires that "[e]ach House shall keep a Journal of its Proceedings, and from time to time publish the same . . . and the Yeas and Nays of the Members of either House on any question shall, at the Desire of one fifth of those Present, be entered on the Journal."³⁷ The Court determined, however, that the object of this clause was publicizing the proceedings, not authenticating laws.³⁸

33. *Marshall Field & Co. v. Clark*, 143 U.S. 649 (1892).

34. It is possible that the Court believed exclusivity justifiable just on the relative evidentiary values or just for pragmatic reasons. Alternatively, the Court may have viewed none of these to be sufficient on its own to justify a conclusive rule.

35. *Field*, 143 U.S. at 671.

36. *Id.* at 671-72.

37. U.S. CONST. art. I, § 5, cl. 3.

38. *Field*, 143 U.S. at 670-71 (1892) ("[T]he object of the whole clause is to insure publicity to the proceedings of the legislature, and a correspondent responsibility of the

The Court recognized, moreover, that this provision does not prescribe “the particular mode in which, or with what fullness” Congress should keep journal records “relating to matters not expressly required to be entered on the journals.”³⁹ Particularly, the Constitution does not explain “whether bills, orders, resolutions, reports, and amendments shall be entered at large on the journal, or only referred to and designated by their titles or by numbers.”⁴⁰ Had the Framers intended the journal to be conclusive evidence of what had been passed, they would not have left such entries discretionary.⁴¹

2. *Enrollment Is the Best Evidence of Procedural Validity*

The Court’s argument that enrollment is the best evidence of validity is based largely out of the respect due to coordinate branches. Justice Harlan explained:

As the president has no authority to approve a bill not passed by congress, an enrolled act . . . having the official attestations of the speaker of the house of representatives, of the president of the senate, and of the president of the United States, carries on its face, *a solemn assurance by the legislative and executive departments of the government, charged, respectively, with the duty of enacting and executing the laws, that it was passed by congress.* The respect due to coequal and independent departments requires the judicial department to act upon that assurance, and to accept, as having passed congress, all bills authenticated in the manner stated; leaving the courts to determine, when the question properly arises, whether the [content of the] act . . . is in conformity with the constitution.⁴²

members to their respective constituents.”) (quoting JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 838 (1833)).

39. *Id.* at 671.

40. *Id.*

41. *Id.* at 671–73.

42. *Id.* at 672 (emphasis added).

Essentially, if Congress and the President said the bill was passed, the Court will take them at their word.⁴³ But in contrast to England, where the word of the King is actually law, in America, enrollment is simply an *attestation* that the law was passed by Congress.⁴⁴ Despite the “solemn assurance,” the bill may not have been passed according to constitutional mandates.⁴⁵ But the solemn assurance of officers who have sworn an oath to protect the constitution is weighty evidence to that effect.

Buttressing its “respect” argument, the Court recognized that the formal process by which the enrolled bill was certified gave it the trappings of reliability.⁴⁶ The Court emphasized in particular that the enrolled bill was signed in open session.⁴⁷

In contrast, the Court recognized that the evidence that might be used to undercut the validity of the enrolled bill was not necessarily reliable. Journal entries, for instance, are “unauthenticated.”⁴⁸ They could be fraudulently changed for the purpose of invalidating a law.⁴⁹ Even in the absence of fraud, the Court

43. Sutherland argues that this argument is a permutation of the “King’s word is final” principle: “Transposed to our democratic system of government,” courts used separation of powers principals to hold that since “the legislature was an official branch of government the Court must indulge every presumption that the legislative act was valid.” Separation of powers required the Court to “treat the acts of a coordinate branch of government with the same respect as it treats the action of its own officers.” SUTHERLAND, *supra* note 2, at § 15:3.

44. Here, “the effective legal act of enactment is the dealing of the legislature with the original document, i.e., the viva voce [oral] vote. The legislature has not dealt by vote with the enrolled document; [it] therefore can only be a certificate and copy of the transactions representing the enactment.” WIGMORE, *supra* note 20, at 816.

45. The Court’s statement that “the President has no authority to approve a bill not passed by Congress” is surplusage used to give the “solemn assurance” more weight. It does not mean that a bill has necessarily been passed by Congress if it bears the President’s signature. That would rely on the logical fallacy of *post hoc ergo propter hoc* (after this, therefore because of this).

46. *Field*, 143 U.S. at 672.

47. *Id.*

48. *Id.* at 674. As discussed later, this statement is not entirely true. See *infra* note 159 and corresponding text. Congressional rules required the journal to be approved each day. But, unlike the enrolled bill, the journal is not signed by a member of Congress to authenticate it; the journal is thereby more susceptible to alteration.

49. This is not cited directly in *Field*, but in a companion case the Court noted: the speaker might have made a mistake . . . [or] the clerk may have falsified the journal The possibility of such inaccuracy or falsehood only suggests the unreliability of the evidence and the danger of appealing to it to overthrow that furnished by the bill enrolled and authenticated by the signatures of the presiding officers of the two houses and the president of the United States.

United States v. Ballin, 144 U.S. 1, 4 (1892).

noted that the journals “have been constructed out of loose and hasty memoranda made in the pressure of business and amid the distractions of a numerous assembly.”⁵⁰ As such, they are “much more likely to contain errors than the certificates of the presiding officers [are] to be untrue.”⁵¹

3. *The Enrolled Bill Rule Is the Lesser of Evils*

It is possible that the Court viewed the relative evidentiary weight of the journal and enrolled bill as sufficient to justify considering only the enrolled bill.⁵² But the Court also advanced a pragmatic argument to justify the enrolled bill’s exclusivity: making enrollment conclusive as to valid passage is better than allowing laws to be constitutionally challenged. The Court found it

[b]etter, far better, that a provision should occasionally find its way into the statute through mistake, or even fraud, than that every act, state and national, should at any and all times be liable to be put in issue and impeached by the journals, loose papers of the legislature and parol evidence. Such a state of uncertainty in the statute laws of the land would lead to mischiefs absolutely intolerable.⁵³

The Supreme Court argued that absent the enrolled bill rule, the “legal existence of almost every legislative act would be at the

The same idea is raised in a number of state cases adopting the rule. *See, e.g.*, *State ex rel. Attorney Gen. v. Mead*, 71 Mo. 266 (Mo. 1879) (“If integrity is not to be found among the legislative representatives of the people, it would be but an easy matter by a *simulated observance of constitutional forms in the registry of falsehoods upon the journals.*”).

50. *Field*, 143 U.S. at 674.

51. *Id.* at 677 (quoting *Weeks v. Smith*, 81 Me. 538, 547 (1889)).

52. Other conclusive evidentiary rules are based largely on relative evidentiary values, most notably the “best evidence rule.” *See* FED. R. EVID. 1002. If the original document is available, no extrinsic evidence may be offered to show its contents. “The elementary wisdom of the best evidence rule rests on the fact that the document is a more reliable, complete and accurate source of information as to its contents and meaning than anyone’s description” *Gordon v. United States*, 344 U.S. 414, 421 (1953). In England, the enrolled bill was an original record; thus the enrolled bill rule is encompassed in the best evidence rule. But in America, the enrolled bill is not an original record, it is a certification of what was voted on. *See* 4 WIGMORE, *supra* note 20, at 816. The best evidence rule would actually suggest that the enrolled bill should be *excluded* if the original copy of what was voted on is available.

53. *Field*, 143 U.S. at 675 (quoting *Sherman v. Story*, 30 Cal. 253, 275 (1866)).

mercy of all persons having access to these journals.”⁵⁴ This would raise the cost and scope of litigation, as courts and litigants would be forced to investigate the legislative journals to see what laws were actually valid.⁵⁵ Moreover, it would lead to public uncertainty about the content of the law. If statutes, appearing valid on their face, might be found unconstitutional for an underlying procedural flaw, the public could no longer rely on the validity of laws.⁵⁶ The Court argued that these concerns outweighed the danger of relying just on enrollment (potentially allowing an invalid statute to stand).⁵⁷

The Court’s main concern, it appears, was that laws would be “invalidated by the interpolation of a few lines or the obliteration of one name and the substitution of another in its stead.”⁵⁸ The Court suggested that actual legislative fraud was unlikely, explaining that “this possibility is too remote to be seriously considered in the present inquiry.”⁵⁹ But clerical errors were far from unlikely. At the time, laws were hand copied.⁶⁰ The Court was concerned that in the process of being copied, a huge number of laws would have minor discrepancies; were courts to look beyond the face of bills, these insignificant errors might be used to invalidate “almost every legislative act.”⁶¹ The Court thus found it reasonable to rely on a conclusive presumption that properly enrolled bills had been properly enacted. Any evidence to the contrary would be inadmissible.

54. *Id.* at 674. The Court, in making this argument, appears to assume that minor drafting inconsistencies are pervasive, which would result in numerous laws being overturned.

55. *Id.* at 676–77.

56. *Id.* at 677. This argument could easily cut the other way, as the faith one has in the law rests upon democratic processes taking place. Upholding undemocratically passed legislation may preserve people’s ability to rely on the laws but undermine their faith in the government.

57. *Id.*

58. *Id.* at 674.

59. *Id.* at 672–73. The court explained: “It suggests a deliberate conspiracy to which the presiding officers, the committees on enrolled bills and the clerks of the two houses must necessarily be parties, all acting with a common purpose to defeat an expression of the popular will in the mode prescribed by the constitution.” *Id.*

60. In 1893, the year after the *Field* controversy, Congress determined that both the enrolled bill and the engrossed bill should be printed rather than hand copied. See 1 U.S.C. § 106 (2000); CONSTITUTION, JEFFERSON’S MANUAL, AND RULES OF THE HOUSE OF REPRESENTATIVES 106TH CONGRESS § 48, H.R. DOC. NO. 106-320, at 294–95 (2001).

61. *Field*, 143 U.S. at 672.

C. SCOPE OF THE ENROLLED BILL RULE

The exact scope of the enrolled bill rule today is somewhat unclear. The core principle as announced in *Field* has never been overruled. But it was unclear from the outset exactly how far the justices meant the rule to reach. Few cases in the past century have dealt with the issue and those doing so have done little to clarify the Court's position. This section will discuss the principles that can be inferred from these cases.

1. *The Enrolled Bill Rule Is Not Constitutionally Required*

One of the most important cases defining the scope of *Field* was actually decided twenty-four years earlier. In *Gardner v. Collector*,⁶² the Court found that judges “have a right to resort to any source of information which in its nature is capable of conveying to the judicial mind a clear and satisfactory answer” as to whether a law has been passed and what it means.⁶³ The Constitution therefore does not preclude courts from looking to extrinsic evidence in deciding the validity of a statute.⁶⁴

Moreover, the Court has recognized that “any particular State may, by its constitution and laws, prescribe what shall be conclusive evidence of the existence or non-existence of a statute.”⁶⁵ The Court has since invited Congress to do this, writing: “it is competent for Congress to . . . declar[e] under what circumstances, or by what kind of evidence, an enrolled act of congress . . . may be shown not to be in the form in which it was when passed.”⁶⁶ As

62. 73 U.S. 499 (1868).

63. *Id.* at 511. This language was not overruled in *Field* and has been cited in later cases. *See, e.g.*, *Lyons v. Woods*, 153 U.S. 649, 663 (1894); *United States v. Ballin*, 144 U.S. 1, 3 (1892).

64. *Id.*

65. *Duncan v. McCall*, 139 U.S. 449, 457 (1891). One might infer that Congress has prescribed what will be conclusive evidence of passage by its decision to enroll bills; but absent express language from Congress to that effect, the Court does not appear to have taken this to be the case. Moreover, it is not clear that Congress has the power to do so. *See discussion infra* Part II.C.

66. *Harwood v. Wentworth*, 162 U.S. 547, 560 (1896). Despite the Court's language, it is not entirely clear that Congress has the power to overrule the Court on this issue. Congress has the power to impose rules of procedure and evidence on the federal courts; but because of federalism concerns, Congress may not possess the power to impose these in state courts. *See Anthony Bellia, Jr., Federal Regulation of State Court Procedures*, 110 YALE L.J. 947 (2001).

such, the Supreme Court's determination that the enrolled bill is the only appropriate evidence to consider can be overruled by the Court itself, by Congress, or by constitutional amendment.

2. *Enrollment Is Authentication of Passage, Not Passage Itself*

The *Field* Court did not endorse the proposition that enrollment is "passage." The presiding officers of each house do not have the power to pass bills with their signatures. Rather, the Court found that the Constitution left it to Congress to determine how a bill is to be *authenticated* as having passed and that Congress has chosen enrollment. Absent some other requirement, enrollment should be taken as weighty evidence that a bill has passed.⁶⁷ Though it may not be enforced under the enrolled bill rule, a majority vote is still constitutionally required.

Notably, the constitutional text is silent as to what is required for a bill to pass Congress. It provides that two-thirds of each body must vote to override a veto⁶⁸ but never explicitly provides that a majority of a quorum is required to pass a bill. As such, one might imagine a structural argument that, so long as there is a quorum present,⁶⁹ the Speaker and President of the Senate could pass bills without a vote of the body as a whole. Critics of the enrolled bill rule argue that it potentially allows these officers to pass laws without a democratic vote, but could that actually be structurally sufficient?

Professors Adler and Dorf observe that while this argument is beyond the pale in our popular conception of the Constitution — in which "[p]assage is standardly understood to mean being approved by a majority of a quorum of each house"⁷⁰ — it is noteworthy that the Constitution is silent on the requirements for a bill passing Congress. There may be some "interpretative flexibility."⁷¹ They find, however, that the Court "did not offer a radically minimal reading of constitutional bicameralism."⁷²

67. See *United States v. Munoz-Flores*, 495 U.S. 385, 391 n.4 (1990).

68. U.S. CONST. art I, § 7.

69. Article I, Section 5, provides that "a Majority of each [house] shall constitute a Quorum to do Business." U.S. CONST. art I, § 5, cl. 1.

70. Matthew D. Adler & Michael C. Dorf, *Constitutional Existence Conditions and Judicial Review*, 89 VA. L. REV. 1105, 1173 (2003).

71. *Id.*

72. *Id.*

The Supreme Court has twice emphasized that enrollment is simply an attestation that the law was passed and is not itself structurally sufficient. *Field* itself noted: “There is no authority in the presiding officers of the house of representatives and the senate to attest by their signatures . . . as a legislative act, any bill not passed by congress.”⁷³ In *United States v. Ballin*,⁷⁴ a companion case to *Field*, the Court explained: “[T]he general rule of all parliamentary bodies is that, when a quorum is present, the act of a majority of the quorum is the act of the body. This has been the rule for all time.”⁷⁵ Because the Constitution does not provide otherwise, “the general law of such bodies obtains.”⁷⁶

3. *Certain Journal Entries May Not Be Subject to the Rule*

Emphasizing that enrollment alone does not constitute passage, the Court has left open the possibility of reviewing legislative journals to determine if certain quorum and majority vote requirements have been met. In *Field*, the Court explained that the Constitution does not require journal entries except in limited circumstances.⁷⁷ Because the Constitution does not require Congress to record the text of bills being voted on, the Court found that journal entries were not dispositive (or even admissible) on that subject.⁷⁸ But the Constitution does require Congress to record the “yeas and nays” in certain circumstances.⁷⁹ Those entries might deserve greater evidentiary weight. But the Court has expressly avoided determining what weight they should receive.⁸⁰

73. *Marshall Field & Co. v. Clark*, 143 U.S. 649, 669 (1892).

74. 144 U.S. 1 (1892).

75. *Id.* at 6.

76. *Id.*

77. *Field*, 143 U.S. at 671.

78. *Id.*

79. *See* U.S. CONST. art I, §§ 5, 7 (Section 5 requires yeas and nays to be recorded at the request of one-fifth of those present during the vote. Section 7 requires they be recorded during a vote to override a presidential veto.).

80. *Field*, 143 U.S. at 671. Justice Harlan wrote:

With regard to certain matters, the constitution expressly requires that they shall be entered on the journal. To what extent the validity of legislative action may be affected by the failure to have those matters entered on the journal, we need not inquire. No such question is presented for determination.

Id.

In *Ballin*, the Court affirmed the enrolled bill rule but ultimately looked beyond the enrolled bill to determine whether there had been a quorum in the House.⁸¹ This might suggest that the enrolled bill rule does not extend to this evidence, but the Court's decision in that case was cryptic. The Court noted the constitutional requirement that the yeas and nays be entered on the journal.⁸² It then found, "assuming, *though without deciding*, that the facts which the Constitution requires to be placed on the journal may be appealed to on the question whether a law has been legally enacted, [then the journal] must be assumed to speak the truth."⁸³ Indulging this assumption, the Court examined the journal evidence. The journals showed that the bill had been validly enacted. Because both the enrolled bill and journal entries evidenced that the bill had been validly passed, the Court was able to avoid deciding whether "facts [that] the constitution requires to be placed on the journal may be appealed to on the question whether a law has been legally enacted."⁸⁴

The question was presented again in 1919, when a railway alleged that the Webb-Kenyon Act of 1913 had not been legally passed over a presidential veto.⁸⁵ The Court again avoided the question by deciding the case in the alternative.⁸⁶ The Senate journal showed approval by a two-thirds majority of the senators present, but not two-thirds of the body as a whole. The Court determined that a two-thirds vote of the members present was all that was constitutionally required, thus it did not matter whether the Court could review the journal entries; either way the law was valid.⁸⁷

The Court's dicta in *Field* suggests that even when the journal entries are constitutionally mandated, the Court might still extend the enrolled bill rule. The Court explained that the purpose of the journal entry requirement was not determination of whether a bill had passed but rather to ensure transparency in government.⁸⁸ Because the Constitution requires vote tallies to

81. *Ballin*, 144 U.S. 1 (1892).

82. *Id.* at 4

83. *Id.* (emphasis added).

84. *Id.*

85. *See Mo. Pac. Ry. Co. v. Kansas*, 248 U.S. 276 (1919).

86. *Id.*

87. *Id.*

88. *Field*, 143 U.S. at 670–71. The Court explained:

be recorded in limited circumstances,⁸⁹ it is unlikely the Framers intended those records to be used as the definitive means of authenticating passage. As such, the Court found that it was not constitutionally required for courts to rely on this entry.⁹⁰ The journal entry requirement may shift the evidentiary balance (as it might be presumed that where the Constitution requires Congress to record facts it requires Congress to do so accurately), but the Court suggested that the possibility of “inaccuracy or falsehood” in journal entries likely extended to the recording of the yeas and nays.⁹¹ This might warrant extending the enrolled bill rule to required journal entries as well, but the Court did not expressly do so.

4. *It is an Evidentiary Rule Not a Justiciability Doctrine*

In many ways, the enrolled bill rule sounds of the political question doctrine. One basis for finding a case nonjusticiable is the “impossibility of a court’s undertaking independent resolution without expressing lack of the respect due coordinate branches of government.”⁹² However, the Court has rejected the idea that “lack of respect” prevents it from reviewing the procedural validity of a law. In *United States v. Munoz-Flores*,⁹³ the court recognized that its duty to review the constitutionality of congressional enactments outweighs any “conflict that such an adjudication

It was assumed in argument that the object of this clause was to make the journal the best, if not conclusive, evidence upon the issue as to whether a bill was, in fact, passed by the two houses of congress. But the words used do not require such interpretation. On the contrary . . . the object of the whole clause is to insure publicity to the proceedings of the legislature, and a correspondent responsibility of the members to their respective constituents.

Id. (internal quotations and citations omitted).

89. See U.S. CONST. art I, §§ 5, 7 (Section 5 requires yeas and nays to be recorded at the request of one-fifth of those present during the vote. Section 7 requires they be recorded during a vote to override a presidential veto.)

90. *Id.* It would be somewhat ironic that a device adopted to ensure transparency might not be permissible evidence of legislative fraud. But the transparency requirement may be viewed as an electoral tool, not a judicial one.

91. *United States v. Ballin*, 144 U.S. 1, 4 (1892). The Court raised concerns about the “unreliability of the evidence and the danger of appealing to it to overthrow that furnished by the bill enrolled and authenticated by the signatures of the presiding officers of the two houses and the president of the United States.” *Id.*

92. *Baker v. Carr*, 369 U.S. 186, 217 (1962).

93. 495 U.S. 385 (1990).

may cause.”⁹⁴ In *INS v. Chadha*, the Court went further to cite *Field* for the principle that procedural violations were not nonjusticiable just because reviewing them might show disrespect.⁹⁵

The Court complicates this by using language in *Munoz-Flores* that seems to cut the other way. The *Munoz-Flores* Court described *Field*'s holding by saying “the respect due to coequal and independent departments demands that the Courts accept as passed all bills authenticated in the manner provided by Congress.”⁹⁶ But when read in the context of the larger opinion, it is apparent that this phrase is an oversimplification. “Respect” does not make questions of passage nonjusticiable. Rather, together with all of the other factors discussed in Part II.B, respect becomes as a thumb on the evidentiary scales. Though the end result is the same — questions of passage are unreviewable because of “respect” — there is a fine procedural distinction.

5. *Origination Clause Violations Are Exempt*

In the hundred years following *Field* and *Ballin*, few cases had any significant doctrinal impact.⁹⁷ It was not until 1990 that there was any significant new discussion of the rule. In that year, the Court addressed a potential Origination Clause⁹⁸ violation in *United States v. Munoz-Flores*⁹⁹ and found the enrolled bill rule to be inapposite.¹⁰⁰ Only Justice Scalia found the enrolled bill rule to be on point.¹⁰¹

At a minimum, the case limits the enrolled bill rule to bicameralism challenges. The decision may have larger implications, but this is unclear as the Court only addressed the issue in a footnote; and it was a cryptic footnote at best. The Court explained that the enrolled bill rule “concerned the nature of the evidence the Court would consider in determining whether a bill

94. *Id.* at 391 (quoting *Powell v. McCormack*, 395 U.S. 486, 549 (1969)).

95. 462 U.S. 919, 943 (1983). Justice Burger failed to mention that *Field*'s restrictive evidentiary rule ultimately had the same result as a nonjusticiability rule.

96. *United States v. Munoz-Flores*, 495 U.S. 385, 391 n.4 (1990).

97. In 1922, the Court extended the enrolled bill rule to questions concerning the validity of constitutional amendments. *See Leser v. Garnett*, 258 U.S. 130, 137 (1922).

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

99. 495 U.S. 385 (1990).

100. *Id.* at 391 n.4.

101. *Id.* at 408 (Scalia, J., concurring).

had actually passed Congress.”¹⁰² The Court explained further that the Constitution “left it to Congress to determine how a bill is to be authenticated as having passed. In the absence of any constitutional requirement binding Congress . . . the respect due to coequal and independent departments demands that the Courts accept as passed all bills authenticated in the manner provided by Congress.”¹⁰³ That generally follows from *Field*,¹⁰⁴ but the Court went on to state: “Where, as here, a constitutional provision is implicated, *Field* does not apply.”¹⁰⁵ And that was the end of the Court’s discussion.

The meaning of this last sentence changes depending on whether the Origination Clause is a separately acting constitutional provision or a prerequisite for passage. Under the former view, a revenue bill may have “passed Congress” (i.e., been approved by a majority of a quorum in each house) even if it did not originate in the House,¹⁰⁶ but it would be invalid in the same way a law violating the First Amendment would be.¹⁰⁷ Under the lat-

102. *Id.* at 391 n.4 (internal quotations omitted).

103. *Id.* (internal citations and quotations omitted). Though this language suggests political question analysis is being applied, the Court explicitly found that the political question doctrine was inapposite. *Id.* at 385. Rather, as discussed in the previous subsection, respect is a tool used to bolster the evidentiary holding.

104. The court’s language — “authenticated in the manner provided by Congress” — seems to suggest that Congress has made its mode of authentication conclusive in the courts. *Munoz-Flores*, 495 U.S. at 391 n.4. The enrolled bill rule would thus be a congressionally mandated evidentiary presumption. But this does not follow from *Field* nor is it clearly discernable from this language.

105. *Id.*

106. Stevens presents this view in his concurrence. *Munoz-Flores*, 495 U.S. at 401 (Stevens, J., concurring). Moreover, this appears to be the understanding of earlier courts. In *Rainey v. United States*, 232 U.S. 310, 317 (1914), the Court avoided deciding whether there was “judicial power after an act of Congress has been duly promulgated to inquire in which House it originated for the purpose of determining its validity” This language suggests that the Court viewed the origination challenge as a separately acting mandate, unrelated to “passage.”

107. See *Munoz-Flores*, 495 U.S. at 397 (discussing why the law would still be unconstitutional if Stevens’ view was accepted). One might similarly view the journal entry requirement as a separately acting constitutional mandate. If either house had not recorded the yeas and the nays, this structural constitutional violation might require invalidating the law. If this were the Court’s view, it would yield a strange result: courts would be required to review the legislative journals to determine whether the yeas and nays had been recorded, but the tallies would have no evidentiary value on the question of passage. Though strange, that result may be structurally justified. Whereas the Origination Clause is in article I, section 7 (where the Constitution lays out procedures for enacting laws), the journal entry requirement is in article I, section 5 (which pertains to the internal workings of Congress). A violation of these internal procedures may be unrelated to the validity of the law, a structural violation without a remedy. That said, the underlying

ter understanding, which the Court appears to have adopted, a revenue bill not originating in the House has not been passed.¹⁰⁸ Because the Constitution requires this specific procedure, courts cannot rely on the assurances of the legislative officers and President as to whether this has occurred and must look behind the enrolled bill.

Because *Munoz-Flores* suggests that origination in the House is a requirement for “passing” a revenue law, the Court has redefined the scope of the enrolled bill rule. It has indicated that, in certain circumstances, it is willing to (and perhaps required to) look beyond the face of a bill in asking whether it was validly passed. Particularly, it will do so where a certain procedure is constitutionally mandated.¹⁰⁹

It is not clear why, for reasons other than *stare decisis*, the Court chose to distinguish Origination Clause challenges in this fashion. As will be discussed in the next section, in distinguishing Origination Clause violations the Court implicitly undercut its justifications for the enrolled bill rule.

III. TIME FOR AN ALTERNATIVE

To some extent, the best argument in support of the enrolled bill rule is historical. It has been the federal rule for over 100 years and the union has not crumbled as a result. But that does not mean that the rule has been without controversy. Litigants throughout the last century have raised concerns that legislation

objectives of these sections are similar. The Origination Clause ensures that the “Chamber that is more accountable to the people should have the primary role in raising revenue.” The journal entry rule serves equally important accountability concerns by ensuring transparency.

108. The majority refers to Justice Stevens’ view “that § 7 provides that a bill becomes a ‘law’ even if it is improperly originated” as a “contrary view.” *Id.* at 397. By stating “even were we to accept [it] . . .” the Court indicates that it has not accepted this view. *Id.*

109. It is not clear whether required journal entries gain significant bite under this view. One might imagine that because the Constitution requires the yeas and nays be recorded in the legislative journals, it sets out mandatory procedure related to passage and the Court cannot leave it to Congress to determine whether the bill was passed. But, as the Court made clear in *Field*, the journal entry requirement is about transparency, rather than passage. The “where a constitutional provision is implicated” language may be inapplicable.

and even constitutional amendments have been invalidly passed, only to find their lawsuits dead on arrival.¹¹⁰

Nor does the rule's longevity mean that it is the appropriate standard. While some of the Court's pragmatic arguments might have made sense at the time, developments since the rule's adoption in the late nineteenth century have tipped the balance to such a degree that it is time for an alternative rule to be adopted.

This section will argue that the enrolled bill rule is dangerous and cannot be justified. This section will first discuss justifications for the rule — those made by the *Field* Court and other hypothetical justifications — and suggest that none is particularly persuasive. It will then pose several arguments against continued reliance on the enrolled bill rule.

A. ARGUMENTS IN FAVOR OF THE RULE

There are rare circumstances in which a bill becomes law though it was never validly passed. The Court in *Field* accepted this risk, finding it to be outweighed by the costs of invalidating facially valid laws. But arguments in favor of the enrolled bill rule are not persuasive, particularly given developments since *Field* was decided. First, the Court's pragmatic argument is both constitutionally and empirically suspect. Second, the argument that any concerns over the enrolled bill rule are just theoretical — that a bill could never become a law if Congress had not actually passed it — is belied by the contemporary dispute over the DRA. Third, a conclusive evidentiary rule is not justifiable as a matter of evidentiary superiority. Fourth, the constitutional text cannot support the argument that Congress's mode of authentication is unimpeachable. Finally, concerns about "respect" are unfounded.

110. See, e.g., *Mo. Pac. Ry. Co. v. Kansas*, 248 U.S. 276 (1919); see also *supra* text accompanying notes 85-87; *United States v. Thomas*, 788 F.2d 1250, 1253 (7th Cir. 1986) (Petitioners alleged unsuccessfully that the Sixteenth Amendment had not been properly ratified because only four states had repeated the language of the Sixteenth Amendment exactly as Congress approved it. The others contained errors of diction, capitalization, punctuation, and spelling.).

1. *Pragmatic Argument Is Constitutionally, Empirically Suspect*

The Court adopted a conclusive presumption relying largely on pragmatic considerations. In doing so, the Court noted the risk that a bill may not have been passed by Congress. It found this risk to be outweighed by pragmatic concerns over increased litigation costs and uncertainty with the law. Accepting this justification requires adopting a fairly controversial view of the Supreme Court's role.¹¹¹ It is generally accepted that evidentiary rules are based on policy concerns, but it is hard to stomach when the evidentiary rule is used as a license not to enforce the Constitution.¹¹²

As the Supreme Court has itself noted, procedural requirements related to passage protect important substantive values.¹¹³ As Justice Burger noted in *INS v. Chada*: "By providing that no law could take effect without the concurrence of the prescribed majority of the Members of both Houses, the Framers reemphasized their belief . . . that legislation should not be enacted unless it has been carefully and fully considered by the Nation's elected officials."¹¹⁴ In America, it is these procedures, rather than divine right, that make laws legitimate.¹¹⁵

As such, it is incumbent upon the courts to enforce the constitutional rules for enacting legislation. As the Court noted in *Field*, it is "the duty of this court, from the performance of which it may not shrink, to give full effect to the provisions of the constitution relating to the enactment of laws"¹¹⁶ Chief Justice Marshall once eloquently declared: "Questions may occur which we would gladly avoid; but we cannot avoid them. All we can do is, to exercise our best judgment, and conscientiously to perform our duty."¹¹⁷ But while espousing the importance of enforcing the

111. For a discussion of the Court's role in enforcing "due process" procedural requisites for lawmaking, see Hans Linde, *Due Process of Lawmaking*, 55 NEB. L. REV. 197 (1976).

112. A handful of scholars are proponents of constitutional under-enforcement on the grounds of such considerations. See, e.g., MARK TUSHNET, *TAKING THE CONSTITUTION AWAY FROM THE COURTS* 54–71 (1999); Gene Sager, *Fair Measure: The Legal Status of Underenforced Constitutional Norms*, 91 HARV. L. REV. 1212, 1217–28 (1978).

113. See *INS v. Chada*, 462 U.S. 919, 951 (1983).

114. *Id.* at 948–49.

115. See Linde, *supra* note 111, at 240.

116. *Marshall Field & Co. v. Clark*, 143 U.S. 649, 670 (1892).

117. *Cohens v. Virginia*, 6 Wheat 264, 404 (1821).

Constitution, the Court shirks this duty by adopting the enrolled bill rule. The *Field* Court essentially admitted that its rule might allow constitutional violations to go unchecked.¹¹⁸

Even accepting that pragmatic concerns permit constitutional under-enforcement, the Court's fear that "almost every legislative act" could be invalidated¹¹⁹ is no longer a serious concern. At the time of the rule's adoption, the legislature was transcribing bills by hand. The "interpolation of a few lines or the obliteration of one name and the substitution of another in its stead"¹²⁰ was a reasonable concern. Congress responded the year after *Field* by requiring formal printing.¹²¹ Now, with the advent of computers, the likelihood of transcription errors has dropped to almost none. The only real potential for mistake is when there is a floor amendment.¹²²

The *Field* Court also overestimated the danger in terms of litigation costs and uncertainty. The Court feared that "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."¹²³ Belying the Court's claim is the fact that it was not until 1892 that the Court was forced to hear the issue; if it took over 100 years for a serious case to arise, it seems unlikely that challenges will be regular.¹²⁴ Modern experience suggests, moreover, that the flood would not be judicially

118. The Court explained that it was "[b]etter, far better, that a provision should occasionally find its way into the statute through mistake, or even fraud." *Field*, 143 U.S. at 675 (quoting *Sherman v. Story*, 30 Cal. 253, 275 (1866)). Though the Court suggested it was unlikely that this would happen, it did not foreclose the possibility that it might.

119. *Field*, 143 U.S. at 674.

120. *Id.*

121. See 1 U.S.C. § 106 (2000); CONSTITUTION, JEFFERSON'S MANUAL, AND RULES OF THE HOUSE OF REPRESENTATIVES 106TH CONGRESS § 48, H.R. DOC. NO. 108-241, at 300 (2005).

122. Assuming a typed copy exists at the time of the vote, that copy is just printed out and engrossed. If there is a floor amendment, however, the clerk enters the amendment in the typed copy after the vote has been taken. See CONSTITUTION, JEFFERSON'S MANUAL, AND RULES OF THE HOUSE OF REPRESENTATIVES 109TH CONGRESS § 31, H.R. DOC. NO. 108-241, at 223 (2005) ("In reducing numerous, difficult, and illegible amendments into the text the Secretary may, with the most innocent intentions, commit errors which can never again be corrected.").

123. *Field*, 143 U.S. at 676.

124. In fairness, the Court did hear two cases that term raising a procedural validity claim. See *Marshall Field & Co. v. Clark*, 143 U.S. 649 (1892); *United States v. Ballin*, 144 U.S. 1 (1892). Perhaps the Court believed that if it decided the case differently a flood of litigation would follow.

unmanageable, nor would it have a disastrous effect on reliance. In the modern administrative state, hundreds of regulations are challenged each year. Many are challenged on procedural grounds that are not apparent on the face of the regulation.¹²⁵ These challenges have not overwhelmed the courts, and whatever uncertainty there might be has been far from catastrophic.

Similarly, the Court argued that “[n]o man should be required to hunt through the journals of a legislature to determine whether a statute, properly certified by the speaker of the house and the president of the senate and approved by the governor, is a statute or not.”¹²⁶ But standard practice in modern litigation involves a review of legislative histories. Though this has certainly raised litigation costs, it has not brought about the cataclysmic consequences the Court feared.¹²⁷

Though the Court’s pragmatic justification appears entirely overblown, there are real costs to invalidating laws.¹²⁸ The Court is not unreasonable in being wary of the evidence that might be used to invalidate a law. It is simply questionable whether a conclusive presumption is justifiable.

2. *Dangers of Mistakes and Fraud Are Not Just Theoretical*

While the Court vastly overstated the dangers in invalidating the laws, it also downplayed the risk of legislative mistake and fraud. But the contemporary dispute over the DRA demonstrates that mistakes, and potentially even fraud, can happen. Moreover, by announcing that the Court will not rectify mistakes or fraud, the Court may have encouraged carelessness and bad behavior. As such, concerns about the efficacy of a rule of non-review are not merely theoretical.

In order to fully appreciate this danger, it is helpful to explore the specific circumstances in which the DRA was passed. There

125. For example, the Administrative Procedure Act permits regulations to be challenged because notice was inadequate. See 5 U.S.C. §§ 553, 706 (2000).

126. *Field*, 143 U.S. at 677 (quoting *Weeks v. Smith*, 81 Me. 538, 547 (1889)).

127. Though cases today involve minor points of law rather than the entire validity of the statute, in terms of litigation costs, it is unlikely that makes a significant difference. Also, given the preceding analysis that cases in which actual violations occur will be infrequent, the costs are likely far smaller than the multitude of interpretative challenges each year.

128. See discussion *infra* Part IV.B.2.

is an old adage that “if you like laws and sausages, you should never watch either one being made.”¹²⁹ The DRA is one such law.

In late 2005, the prospects for the DRA — a \$40 billion deficit-cutting bill — looked dim.¹³⁰ Senator George Voinovich, normally a budget hawk, had threatened to derail the budget-cutting measure because it drastically curtailed certain Medicare payments.¹³¹ It took some “last-minute, pre-dawn wrangling,” but Republican leaders in the Senate ultimately struck a deal, agreeing to an amendment that scaled back budget cuts to Medicare.¹³² The compromise allowed payments for some personal medical equipment for up to thirty-six months and cut off payments for other equipment at thirteen months.¹³³ The deal gave Senate Republicans just enough votes to pass the bill with Vice President Cheney casting a tie-breaking vote.¹³⁴

After the Senate voted to approve the bill, it sent a formally printed copy (the engrossed bill) to the House to be voted on.¹³⁵ In another exceedingly close vote (216 to 214), the House assented to the Senate amendments,¹³⁶ and the President signed the bill into law on February 8.¹³⁷

In the grand scheme of things, a close vote is not particularly noteworthy. This was the seventh time that Vice President Cheney had cast a tie-breaking vote.¹³⁸ But the narrow margin by which the DRA passed becomes significant in light of the irregularities in the bill’s passage. In particular, the House approved a

129. This quote is widely attributed to Otto von Bismark, but this source is not confirmed. RESPECTFULLY QUOTED: A DICTIONARY OF QUOTATIONS 190 (Suzy Platt ed., 1989).

130. See Associated Press, *Congress Tries to Keep Medicare Coverage for Oxygen Tank Users*, FOX NEWS, Dec. 20, 2005, <http://www.foxnews.com/story/0,2933,179261,00.html>.

131. *Id.*

132. *Id.*

133. Hulse, *supra* note 8, at A18; 151 CONG. REC. S14337, 14346-47 (daily ed. Dec. 21, 2005) (text of amendments).

134. Edward Epstein, *Budget Glitch Ignites Partisan Battle in House; GOP Squelches Bid by Pelosi to Probe How Bill Advanced*, S.F. CHRON., Feb. 17, 2006, at A4.

135. See 1 U.S.C. § 106 (2000).

136. 152 CONG. REC. H68 (daily ed. Feb. 1, 2006); H.R. Res. 653, 109th Cong. (2006) (“the House hereby concurs in the Senate amendment”).

137. Pub. L. No. 109-171, 120 Stat. 4 (2006). See also Press Release, White House, President Signs S. 1923, Deficit Reduction Act of 2005 (Feb. 8, 2006), available at <http://www.whitehouse.gov/news/releases/2006/02/20060208-8.html>.

138. See OCCASIONS WHEN VICE PRESIDENTS HAVE VOTED TO BREAK TIE VOTES IN THE SENATE (2005), <http://www.senate.gov/artandhistory/history/resources/pdf/VPTies.pdf>. John Adams broke Senate ties 29 times during his tenure as Vice President. *Id.*

different version of the bill than the one the Senate passed and the President signed into law. In producing the engrossed bill, the version sent from one house to the other, a Senate clerk set certain reimbursement periods at thirty-six months that the Senate compromise had limited to thirteen.¹³⁹ Law requires the House to vote on the text sent to them by the Senate.¹⁴⁰ Therefore, when the House voted to approve the text before them, it was actually passing a different bill.¹⁴¹

Republicans argued that this was a procedural mistake, a “technical problem,”¹⁴² and that it was essentially meaningless.¹⁴³ It was indeed just the substitution of one number for another in a massive omnibus bill. But this little mistake was by no means insignificant. The House version would have cost the federal government around two billion dollars more than the enrolled version does.¹⁴⁴ For the people this provision would affect, the difference amounts to nearly two years of additional Medicare coverage that the House approved and they will not receive.

As it did in the Senate, the difference between thirteen and thirty-six could have made the difference in a Representative’s vote. Because the bill passed the House by only two votes, what might otherwise look like a typographical error could have made the difference in whether the House passed the bill at all.

Regardless of whether the House might have been willing to pass the version the Senate had approved, what it did pass was the text the Senate sent — a different text than the Senate had passed. The Constitution requires that a law must be passed in

139. Hulse, *supra* note 8, at A18.

140. 1 U.S.C. § 106 (2000) (“Said engrossed bill or resolution shall be signed by the Clerk of the House or the Secretary of the Senate, and shall be sent to the other House, and *in that form shall be dealt with by that House* and its officers.”) (emphasis added). See also 8 CANNON’S PRECEDENTS, ch. 268, § 3343 at 805, available at www.gpoaccess.gov/precedents/cannon/vol8.html (scroll to chapter 268; then follow “pdf” hyperlink) (The House is “bound by the formal interchange of documents between the two bodies . . . and the House can only look at the record as forwarded to it by the Senate . . .”).

141. It is not clear what members actually believed they were approving. The House resolution merely stated: “the House hereby concurs in the Senate amendment.” H.R. Res. 653, 109th Cong. (2006). As such, some members may have believed they were voting for the Senate’s compromise. Others may have been voting for the text on the floor, the one the House was legally required to consider.

142. See Letter from Rep. Henry A. Waxman to Democratic Leader Nancy Pelosi (Feb. 14, 2006), available at <http://oversight.house.gov/Documents/20060214170704-70767.pdf>.

143. Hulse, *supra* note 8, at A18.

144. See Epstein, *supra* note 134, at A4.

identical form by both chambers before it may be presented to the President.¹⁴⁵ As such, the DRA was not validly passed.

Passage in identical form is not just a formality. The Supreme Court has recognized that it “serve[s] essential constitutional functions.”¹⁴⁶ It “protect[s] the whole people from improvident laws” and “assures that the legislative power [is] exercised only after opportunity for full study and debate in separate settings.”¹⁴⁷

In the contemporary era, several scholars have raised concerns about Congress’s deliberativeness. Thomas Mann and Norman Ornstein, for instance, lament the “abandonment of deliberation” in Congress, finding that it results in “poor laws and flawed policy.”¹⁴⁸ They particularly criticize the House’s practice of packing numerous issues into omnibus bills which are brought for up-or-down votes, without notice or time for members to even read the legislation. Such bills are passed during all-night sessions with tight deadlines, where last-minute insertions by committee staff result in “stealth legislation that has not really passed majority muster and frequently has embarrassing consequences.”¹⁴⁹

145. This stems from the Bicameralism and Presentment Clause, which mandates that “[e]very Bill which shall have passed the House of Representatives and the Senate, shall, before it becomes a law, be presented to the President of the United States” U.S. CONST. art. I, § 7, cl. 2. Though the emphasis of this text is on presentment, the bicameralism requirement is not itself without bite. In *Clinton v. City of New York*, the Court noted that “[t]he Constitution explicitly requires that each of [] three steps be taken before a bill may ‘become a law’”: a bill containing the “exact text” must be approved by one house, the other house must approve “precisely the same text,” and “that text” must be signed by the President. 524 U.S. 417, 448 (1998). See also CHARLES W. JOHNSON, HOW OUR LAWS ARE MADE, H.R. DOC. NO. 108-93, at 42 (2003) (bill must be “agreed to in identical form by both bodies” before presentation to the President); *W. Va. Univ. Hosps. v. Casey*, 499 U.S. 83, 98–99 (1991) (statutory purpose determined by “*statutory text adopted by both Houses of Congress* and submitted to the President”) (emphasis added).

146. *INS v. Chadha*, 462 U.S. 919, 951 (1983). See also WILLIAM ESKRIDGE, PHILIP FRICKEY & ELIZABETH GARRETT, CASES AND MATERIALS ON LEGISLATION: STATUTES AND THE CREATION OF PUBLIC POLICY 383–85 (3d ed. 2001).

147. *Chadha*, 462 U.S. at 951.

148. THOMAS E. MANN & NORMAN ORNSTEIN, THE BROKEN BRANCH: HOW CONGRESS IS FAILING AMERICA AND HOW TO GET IT BACK ON TRACK 146 (2006). They note that “bills that in the past would have required weeks of hearings and days of markups are now often reviewed in days of hearings and with little or no visible time spent by the committee on systematic analysis of the legislation line by line and word by word.” *Id.* at 170.

149. *Id.* at 173. In one case, after journalists caught an odd provision in an appropriations bill, the subcommittee chair said he “had no idea that language was in the bill. It turned out that the provision had surfaced between 3 and 5 a.m. during an all-night staff negotiation just before the final 3,000 page document was slapped together and sent to the floor.” *Id.*

Though it might be over-intrusive and impractical for courts to review each piece of legislation to ensure that Congress has been careful and deliberative,¹⁵⁰ the bicameralism requirement is an unobtrusive means to ensure that the legislation is at least read before it becomes law. But the Court's announced policy of non-review defeats this possibility. Congress knows that there is no repercussion for its carelessness.

Perhaps more concerning is that the Court's announced policy of non-review may foster intentional bad behavior. The *Wall Street Journal* reported that the White House was warned that the DRA may not have passed Congress, but White House attorneys nonetheless advised the President to sign the bill.¹⁵¹ Any attempt to fix the error prior to the President signing the bill "would have invited more votes."¹⁵² Because the bill was passed by an extremely narrow margin, any further procedures risked that the bill would not be passed at all or would face further compromises. But because of the rule announced in *Field*, White House lawyers recognized that the President's signature would make any problems go away. The President could sign the DRA with the Court's assurance that it would be enforced. This certainly does not resemble the democratic ideal the Framers had in mind.

In the absence of an announced rule of non-review, the legislative and executive branches might be fearful that a procedurally invalid law would be overturned. This fear might encourage greater care and discourage fraud. The White House, rather than signing the DRA, might have forced Congress to fix its error. But instead, the Court has signaled that bad behavior will go unpunished. As such, the possibility of mistake or fraud is not, as the *Field* Court argued, "too remote to be seriously considered."¹⁵³

150. For a suggestion that the Constitution requires courts to police the process of legislating, see Hans Linde, *Due Process of Lawmaking*, 55 NEB. L. REV. 197 (1976).

151. David Rogers, *Politics & Economics: Watchdog's Suit Could Threaten Budget Cutbacks*, WALL ST. J., Mar. 22, 2006, at A6.

152. *Id.*

153. *Marshall Field & Co. v. Clark*, 143 U.S. 649, 672-73 (1892).

3. Accuracy of the Evidence Cannot Justify the Enrolled Bill Rule

Accepting that the Court both overstated the cost of judicial review and understated the risks of mistake, a conclusive presumption that the enrolled bill is what Congress actually passed might still be justifiable if the evidentiary value of the enrolled bill vastly outweighed the evidentiary weight of any extrinsic evidence.¹⁵⁴ But this is simply not the case. The *Field* Court overvalued enrollment and unfairly discounted the legislative journals.

As a general rule, the enrolled bill is solid evidence of a bill's passage. It is signed in an open session of Congress by a congressional officer who has taken an oath to protect the Constitution.¹⁵⁵ Respect for coordinate branches requires that this attestation be given significant weight; but respect alone should not make it unimpeachable.¹⁵⁶ It is clear from the facts of *Field* itself that the enrolled bill is not infallible.¹⁵⁷ Even if possibility of fraud "is too remote to be seriously considered,"¹⁵⁸ inadvertent error could have equal effect.

While the Court somewhat overstated the reliability of enrollment, its description of extrinsic evidence was much further from the mark. Journal entries are formally approved in much the same manner as an enrolled bill. Congressional rules require that each day the Speaker and President pro tempore approve their respective journals from the previous day.¹⁵⁹ This must be done in the presence of a quorum.¹⁶⁰

154. It is not clear if the *Field* Court believed the pragmatic justifications necessary to buttress its evidentiary findings or if the Court was relying on separate and independently sufficient grounds.

155. *Field*, 143 U.S. at 672.

156. See *United States v. Munoz-Flores*, 495 U.S. 385, 390 (1990) (noting that "respect" alone cannot act as a bar to justiciability).

157. *Field*, 143 U.S. at 669 (the "Congressional record of proceedings, reports of committees of each house, reports of committees of conference, and other papers printed by authority of Congress" demonstrated that section 30 of the bill, passed by each house, was omitted from the enrolled act).

158. *Id.* at 672–73.

159. House rules provide: "Having examined and approved the Journal of the last day's proceedings, the Speaker shall announce to the House his approval thereof. The Speaker's approval of the Journal shall be deemed agreed to unless a Member, Delegate, or Resident Commissioner demands a vote thereon." CONSTITUTION, JEFFERSON'S MANUAL, AND RULES OF THE HOUSE OF REPRESENTATIVES 109TH CONGRESS § 621, H.R. DOC. NO. 108-241, at 333 (2005). This clause was adopted in 1789. *Id.* Senate rules provide: "a quorum

Moreover, even if the Court's description of the journals was justifiable at the time *Field* was decided, the value of extrinsic evidence that might be used to invalidate such a law has changed dramatically over the years. The year after *Field* was decided, Congress required that engrossed bills be formally printed and be dealt with by the receiving house in that form.¹⁶¹ Though this may not be reliable as to what the originating house voted on, because the clerk may have made an error in engrossing the bill,¹⁶² the receiving house is statutorily required to vote on that text.¹⁶³ In that case, the enrolled bill is a mere certification of what was voted upon while the engrossed bill (excluded under the enrolled bill rule) is the original copy. In these circumstances, the engrossed bill is the better evidence.¹⁶⁴

being present, the Journal of the preceding day shall be read . . . the question being, 'Shall the Journal stand approved to date?', and any mistake made in the entries corrected." STANDING RULES OF THE SENATE, S. DOC. NO. 110-9, at 3 (2007).

160. S. DOC. NO. 110-9, at 3. *See also* U.S. CONST. art I, § 5, cl. 1.

161. See 1 U.S.C. § 106 (2000) ("Said engrossed bill or resolution shall be signed by the Clerk of the House or the Secretary of the Senate, and shall be sent to the other House, and *in that form shall be dealt with by that House* and its officers . . .") (emphasis added); Brief of Appellant at 11, *Pub. Citizen v. U.S. Dist. Court for the Dist. of Columbia*, 486 F.3d 1342 (D.C. Cir. 2007) (No. 06-5232) (noting that "[s]uch an official printing was unavailable to the Marshall Field Court in 1892, for the requirement that engrossed bills be formally printed and published — and that the second house deal with the legislation in the form in which it is set forth in the engrossed bill — was not adopted until 1893 and not enacted into positive law until 1947").

162. Indeed, in the DRA cases the plaintiffs argue that the engrossed bill is not what was passed in the Senate. *Pub. Citizen v. U.S. Dist. Court for the Dist. of Columbia*, 451 F. Supp. 2d 109 (D.D.C. 2006). The House has taken note of the unreliability of Senate engrossments as evidence of what passed the Senate. *See* CONSTITUTION, JEFFERSON'S MANUAL, AND RULES OF THE HOUSE OF REPRESENTATIVES 109TH CONGRESS, H.R. DOC. NO. 108-241, at 223–24 (2005) ("But the Senate of the United States is so much in the habit of making many and material amendments at the third reading that it has become the practice not to engross a bill till it has passed — an irregular and dangerous practice, because in this way the paper which passes the Senate is not that which goes to the other House, and that which goes to the other House as the act of the Senate has never been seen in the Senate. In reducing numerous, difficult, and illegible amendments into the text the Secretary may, with the most innocent intentions, commit errors which can never again be corrected.").

163. 1 U.S.C. § 106 (2000). *See also* 8 CANNON'S PRECEDENTS, ch. 268, § 3343 at 805, available at www.gpoaccess.gov/precedents/cannon/vol8.html (scroll to chapter 268; then follow "pdf" hyperlink) (The House is "bound by the formal interchange of documents between the bodies . . . [T]he House can only look at the record as forwarded to it by the Senate . . .").

164. Indeed, the best evidence rule would require its admission to the exclusion of all other evidence, *i.e.* the enrolled bill. *See discussion supra* note 52.

Technological changes since *Field* have completely transformed Congress's recordkeeping. As the Kentucky Court noted in *D & W Auto Supply*:

It is clear to us that the major premise of the [enrolled bill rule], the poor record-keeping of the legislature, has disappeared. Modern equipment and technology are the rule in record-keeping by our General Assembly. Tape recorders, electric typewriters, duplicating machines, recording equipment, printing presses, computers, electronic voting machines, and the like remove all doubts and fears as to the ability of the General Assembly to keep accurate and readily accessible records.¹⁶⁵

Such records are a far cry from the hastily compiled shorthand notes about which the *Field* court warned.¹⁶⁶

Finally, assuming *arguendo* that the enrollment of a bill is generally better evidence of a law's passage than any extrinsic evidence might be, the Court must still justify making it exclusive of all other evidence. The modern trend in the law is to review all available evidence and leave it to the fact-finder to assign the appropriate weight to each piece of evidence.¹⁶⁷ There are cases in which modern evidentiary rules make one type of evidence exclusive,¹⁶⁸ but there must be some justification for doing so.

Professors Matthew Adler and Michael Dorf suggest an alternative evidentiary justification for finding the enrolled bill conclusive. They suggest that the Court might view the Speaker and President *pro tempore* as "robust experts as to what their respective houses have approved."¹⁶⁹ They explain:

A robust expert on some matter is someone whose statements are conclusive (or . . . "exclusionary") even in the face of contrary evidence. Whenever a trained astronomer, in

165. *D & W Auto Supply v. Dep't of Revenue*, 602 S.W.2d 420, 424 (Ky. 1980).

166. *Marshall Field & Co. v. Clark*, 143 U.S. 649, 677 (1892).

167. See SUTHERLAND, *supra* note 2, at § 15:6 (noting that the trend in civil litigation is that "the incontestability of the sheriff's return has given way before the demand for a realistic evaluation of the facts as they exist.").

168. *E.g.*, FED. R. EVID. 1002 (the best evidence rule).

169. Adler & Dorf, *supra* note 70, at 1176.

apparently full possession of her faculties, points to some star and tells you its name, you might rationally believe her, even if based on testimonial evidence from non-astronomers or on your own research you would otherwise believe its name is different.¹⁷⁰

It would similarly be reasonable for a judge to find that a bill has been passed because a legislative expert has said so, even though based on her own research the judge might have come to a different conclusion. But, as Adler and Dorf recognize, this account only works where one has reason to trust the legislative expert; exceptions would be appropriate for “incapacity, insincerity, corruption, or other epistemic failures on the part of the enrolling officers.”¹⁷¹ This account thus cannot fully explain the Court’s rule.¹⁷²

4. *The Constitution Does Not Make Congress’s Chosen Mode of Authentication Unimpeachable*

Attempting to support the enrolled bill rule based on the evidentiary superiority of enrollment is difficult, but this might be avoided altogether if the rule were constitutionally mandated. Perhaps the Constitution commits to Congress the power to decide what will be used to authenticate passage.¹⁷³ The Court has noted that the Constitution does not “prescribe the mode in which the fact of the original passage of a bill by the house of representatives and the senate shall be authenticated, or preclude congress from adopting any mode to that end which its wisdom suggests.”¹⁷⁴ One might reason therefore that the mode of authenti-

170. *Id.* at 1176–77 (footnote omitted).

171. *Id.* at 1177–78.

172. *Id.*

173. This would require a court to find enrollment conclusive “even in cases where the court did not believe [it] to be epistemically warranted — even in cases where the court believed the presiding officers to have lost their status as statutory experts.” *Id.* at 1180.

174. *Marshall Field & Co. v. Clark*, 143 U.S. 649, 671 (1892). However, as discussed earlier, the Court foreclosed the argument that passage is whatever Congress says it is; a majority of a quorum is required. *See supra* Part II.C.2.

ation Congress has chosen — enrollment — is unimpeachable.¹⁷⁵ It is difficult to justify this textually, however.

In certain cases, the Court has found that the Constitution makes Congress authoritative on a given question.¹⁷⁶ For instance, in *Powell v. McCormack*, the Court found Congress authoritative as to whether a member possessed the age, citizenship, and residency qualifications necessary to serve in Congress.¹⁷⁷ The Court relied on the clear language of Article I, Section 5, which provides: “Each House shall be the Judge of the . . . Qualifications of its own Members.”¹⁷⁸ Similarly, in *Nixon v. United States*, the Court found the procedure of an impeachment trial to be a matter of Congress’s discretion, outside the purview of the Courts.¹⁷⁹ It relied on the Constitution’s conferral of impeachment power to Congress in Article I, Section 3, which states, “The Senate shall have the sole Power to try all Impeachments.”

In contrast, the constitutional text here does not give an affirmative conferral of authentication power to Congress. It is simply silent on this point. One might find that authentication is committed to Congress in the mandate of Article I, Section 5 that “Each House shall determine the Rules of its Proceedings,”¹⁸⁰ except that this appears to refer to internal workings only. It does not appear to “make individual legislative officers authoritative as to the application of that framework.”¹⁸¹ Indeed, in *Munoz-Flores*, the Court recognized that the Constitution does not “demonstrably commit” a similar determination to the House.¹⁸² As Adler and Dorf have noted, if the assurance of the Speaker and the President pro tempore that a law originated in the House or

175. Congress has not explicitly chosen enrollment as its preferred method of authentication. It certainly never passed a law to that effect. But it is difficult to discern some other purpose for enrollment.

176. See Adler & Dorf, *supra* note 70, at 1179.

177. 395 U.S. 486, 521–22 (1969).

178. U.S. CONST. art. I, § 5, cl. 1.

179. 506 U.S. 224 (1993).

180. U.S. CONST. art. I, § 5, cl. 2.

181. Adler & Dorf, *supra* note 70, at 1179.

182. *United States v. Munoz-Flores*, 495 U.S. 385, 390 n.3 (1990). The Court rejected the government’s argument that the “House’s passage of a bill conclusively establishes that the House has determined either that the bill is not a revenue bill or that it originated in the House.” *Id.* at 390.

is not a revenue-raising measure is not authoritative, “why should their assurance as to passage be treated differently?”¹⁸³

5. *Checking Congress Is Not Disrespectful*

In *Munoz-Flores*, the government advanced the argument that for the Court to review whether Congress had followed procedure would evidence a level of disrespect for Congress.¹⁸⁴ Scholars have noted, however, that concerns about disrespect are overblown. Congress has not felt particularly resentful of other judicial interventions on procedural grounds.¹⁸⁵ Moreover, Congress can fix a procedural violation if the Court invalidates a law on procedural grounds; a judgment that the substantive provision is unconstitutional, which is impossible to rectify, may show greater disrespect.¹⁸⁶ And there is little debate that the Court can declare a substantive provision unconstitutional.¹⁸⁷

Even if it did evidence some level of distrust for Congress, the Court has recognized that its duty to review the procedural constitutionality of congressional enactments outweighs any “conflict that such an adjudication may cause.”¹⁸⁸ Monitoring whether Congress has followed constitutionally mandated procedures may be viewed as a crucial aspect of the checks and balances structure inherent in the Constitution.¹⁸⁹ The Framers built this system

183. Adler & Dorf, *supra* note 70, at 1179. This is particularly true as the *Munoz-Flores* court found that origination was a prerequisite to passage, not a separately acting requirement. See discussion *supra* Part II.C.5.

184. See *Munoz-Flores*, 495 U.S. at 390. To some extent, monitoring whether Congress has followed constitutional procedures for enactment suggests a certain lack of confidence in Congress’s diligence or even ethics. It is one thing for courts to interpret the Constitution differently than Congress; the Court has more expertise in matters of interpretation than Congress and has long been considered the final arbiter of the Constitution’s meaning. See *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 176–80 (1803). But the procedures Congress must follow to pass laws are pretty clear; it is just a matter of whether or not Congress has followed them.

185. Linde, *supra* note 111, at 243 (noting that Congress did not feel slighted when the Court found faulty procedure in not seating Adam Clayton Powell).

186. *Id.*

187. *Id.*

188. *Munoz-Flores*, 495 U.S. at 391 (quoting *Powell v. McCormack*, 395 U.S. 486, 549 (1969)).

189. As the California Supreme Court eloquently stated:

It is no sufficient answer that we must rely on the integrity of the executive, or other officers, and that the [enrolled bill] is conclusive evidence of the truth of such acts. Our notions of free institutions revolt at the idea of placing so much power in the hands of one man, with no guard upon it but his integrity; and our

knowing it might require disrespectful or even disruptive results.¹⁹⁰

Additionally, judicial review of legislative procedures is not significantly distinguishable from the judiciary's active oversight of the executive. Since the enactment of the Administrative Procedure Act ("APA"),¹⁹¹ courts have been particularly attentive of whether administrative agencies have properly followed the APA's rulemaking procedures.¹⁹² Where evidence suggests that an executive agency failed to follow statutorily mandated procedures, courts have shown little reluctance in vacating the regulation. It is not entirely clear why the Court should not require similar diligence in the passage of statutes.

Finally, "respect" can cut two ways. The North Dakota Supreme Court noted that "it would be a far greater disrespect to the lawmakers to [uphold] a law which their records clearly and unequivocally show that they refused to enact."¹⁹³ In *Conyers v. Bush*,¹⁹⁴ a congressman from Michigan, John Conyers, Jr., and ten of his colleagues¹⁹⁵ sued in federal court alleging that the

constitution has so wisely distributed the powers of government as to make one a check upon the other, thereby preventing one branch from strengthening itself both at the expense of the co-ordinate branches, and of the public.

Fowler v. Pierce, 2 Cal. 165, 171 (1852).

190. Chief Justice Burger explained in *Chadha*:

The choices we discern as having been made in the Constitutional Convention impose burdens on governmental processes that often seem clumsy, inefficient, even unworkable, but those hard choices were consciously made by men who had lived under a form of government that permitted arbitrary governmental acts to go unchecked . . . [W]e have not yet found a better way to preserve freedom than by making the exercise of power subject to the carefully crafted restraints spelled out in the Constitution.

INS v. Chadha, 462 U.S. 919, 959 (1983). Though Chief Justice Burger was describing the importance of bicameralism and presentment, this language is equally applicable to the check provided by the judicial branch.

191. 5 U.S.C. §§ 551–59, 701–06, 1305, 3105, 3344, 4301, 5335, 5372, and 7521 (2000).

192. Courts closely scrutinize agency actions to ensure that both procedural and substantive lines are not crossed. Procedurally, courts monitor agency actions to ensure that there is adequate notice, that the record matches the rule, etc. *See, e.g.*, *Citizens to Pres. Overton Park, Inc. v. Volpe*, 401 U.S. 402 (1971), *abrogated on other grounds by Califano v. Sanders*, 430 U.S. 99, 105 (1977) (mandating a searching review of agency actions); *Natural Res. Def. Council v. EPA*, 279 F.3d 1180 (9th Cir. 2002) (remanding a regulation for inadequate notice).

193. *State v. Schultz*, 174 N.W. 81, 84 (N.D. 1919).

194. No. 06-11972, 2006 U.S. Dist. LEXIS 80816 (E.D. Mich. Nov. 6, 2006).

195. Plaintiffs included John Conyers, Jr., John D. Dingell, Charles B. Rangel, George Miller, James L. Oberstar, Barney Frank, Collin C. Peterson, Bennie Thompson, Fortney Pete Stark, Sherrod Brown, and Louise M. Slaughter. *Id.*

DRA was unconstitutionally passed, disenfranchising them from the legislative process.¹⁹⁶ It shows a certain lack of respect for courts not to consider their argument.

B. ARGUMENTS AGAINST THE ENROLLED BILL RULE

While arguments in favor of the rule are unpersuasive, there are several compelling arguments against it. First, Congress may be unable to cure mistaken enactments. Second, judicial review may serve a valuable informational function. Third, the strict enrolled bill rule results in inconsistent behavior by courts.

1. *Congress May Be Unable to Cure Its Own Mistakes*

It could be argued that the political system is better equipped to fix Conyers's complaints than a court.¹⁹⁷ If a law is improperly codified, truly contrary to democratic intent, the legislature can pass a new law fixing it. If there is evidence that the Speaker defrauded the country, the Speaker can be removed from leadership or even voted out of office.¹⁹⁸

But while this is a strong theoretical argument, it does not take into account practical realities of lawmaking. If the House actually intended the DRA's reimbursement period be for thirty-six months rather than thirteen, internal vetogates make it no easy matter for Congress to pass a new bill to fix this.¹⁹⁹ Internal wrangling within each house might prevent a correcting law from ever reaching a vote.²⁰⁰ Moreover, now that the law has been passed with a 13-month reimbursement, those representatives who wanted the longer reimbursement period would have to build

196. No. 06-11972, 2006 U.S. Dist. LEXIS 80816, at *4 (E.D. Mich. Nov. 6, 2006) (citing Compl. ¶¶ 45–47).

197. See William Lloyd, *Judicial Control of Legislative Procedure*, 4 SYRACUSE L. REV. 6, 25 (1952). Stevens presented a similar argument for Origination Clause violations in *Munoz-Flores*. See *United States v. Munoz-Flores*, 495 U.S. 385, 405 (1990) (Stevens, J., concurring).

198. *State ex rel. Cline v. Schricker*, 228 Ind. 41, 75 (Ind. 1950) (“[I]f the members of the [legislature] violate their constitutional duties . . . they can be defeated the next time such offices come up for election.”).

199. The Senate, which passed the provision at 13 months, might not agree to a 36-month reimbursement. Even if the Senate concurred, the President might veto the bill. See ESKRIDGE, FRICKEY & GARRETT, *supra* note 146, at 66–67 (discussing “vetogates” that make legislation difficult to pass).

200. *Id.*

a new coalition to get the language changed.²⁰¹ Moreover, it is not clear that such behavior will result in members being ousted,²⁰² and that remedy does not fix the underlying problem; there would still be a law in place that had not been democratically passed.

2. *Courts Serve a Valuable Informational Function*

Individual litigants can serve as an additional check on Congress because they may be willing to expend the time, money, and effort necessary to investigate the means by which bills were passed. If such efforts are met by judicial indifference, it is extremely unlikely that individual litigants will undertake such a Herculean task.

Without individuals becoming involved in oversight, it is possible that some errors or even fraud would go undiscovered. If the courts do not permit review, the legislature may never become aware of a defect. And where the legislature may be aware of a defect, there are few incentives for making it public. Congress can sweep it under the rug and do nothing about it. Litigation may thus encourage public awareness or even congressional action that otherwise might not exist.

Judicial review thus encourages good behavior by Congress. The knowledge that the public will become aware of any mistake or fraud will likely encourage Congress to take greater care in passing legislation; and if litigation uncovers congressional improprieties, public pressure may encourage Congress to fix the problem itself.

201. Most scholars believe that an omnibus bill like the DRA results from a series of deals. See SUTHERLAND, *supra* note 2, at § 44A:17 (“A statute is viewed . . . as a ‘bargain’ among the legislators who enact it.”). Perhaps a handful of representatives made a deal to accept a 36-month reimbursement period in order to get some other provision into the bill that they wanted. This would require new deals to be struck, and the resultant bargain would be different than if the original law had been passed as intended.

202. Assuming the fraud benefited the Speaker’s own party, her colleagues might leave her in power. Moreover, the Speaker’s constituents benefit from the power she wields and may choose not to oust her.

3. *Enrolled Bill Rule Results in Inconsistent Application of the Law*

Experience has shown that courts relying on the enrolled bill rule are reluctant to apply it where there has been a clear constitutional violation. In such situations, state courts have often looked at evidence beyond the face of a bill — either carving out an exception to the rule or rejecting it altogether.²⁰³ Federal jurisprudence suggests that the Supreme Court may be no more principled in its application of the rule.

Faced with clear violations of their constitutions, some states have taken the opportunity to reconsider the enrolled bill rule. Kentucky, for example, abandoned the enrolled bill rule in favor of an extrinsic evidence rule where there was clear evidence that a bill had not received a sufficient number of votes.²⁰⁴ Other states have simply carved out exceptions, often with poor explanations of why one exception, but not another, is to be carved out. For instance, the New Mexico Supreme Court, in *Dillon v. King*,²⁰⁵ carved out an exception to the enrolled bill rule for violations of Article IV, Section 5, of the New Mexico Constitution, which governs the timing of the legislative session.²⁰⁶ The court failed to explain why this constitutional provision should be distinguished from other constitutional requirements, such as majoritarian passage.²⁰⁷

In the federal system, two cases discussed in Part II suggest that the Supreme Court may not always play by its own rules either. In *Ballin*, though invoking the enrolled bill rule that it had decided earlier in the term, the Court looked to the legislative journal to show that a quorum and majority were actually present.²⁰⁸ That result can perhaps be justified in that the Court never explicitly ruled out that practice, but the Court's holding in

203. See SUTHERLAND, *supra* note 2, at § 15:2, noting that “[i]n some states different rules have been applied depending possibly on the seriousness of the violation.”

204. See *D & W Auto Supply v. Dep’t of Revenue*, 602 S.W.2d 420 (Ky. 1980).

205. 529 P.2d 745 (N.M. 1974).

206. The *Dillon* court found that if the session had ended, the legislature had no power to pass laws; the Court must invalidate any laws passed in contravention of this provision. *Id.* at 751. This decision overruled a case that had found the enrolled bill rule applicable in that very situation. See *Earnest v. Sargent*, 150 P. 1018 (N.M. 1915).

207. See generally *Dillon*, 529 P.2d 745.

208. *United States v. Ballin*, 144 U.S. 1 (1892).

Munoz-Flores is harder to explain. The result of that ruling is that the enrolled bill rule now applies to bicameralism violations but not Origination Clause violations. This is an odd result. It is not clear on first principles or as a matter of constitutional interpretation why the respect due to co-equal branches requires courts to ignore the possibility that a bill did not receive a majority vote but requires inquiry into whether a bill originated in the House.²⁰⁹ The best explanation may be *stare decisis*; *Field* did not directly apply to Origination Clause violations so the Court carved out a meaningless exception rather than overruling *Field*.

IV. PROPOSAL

Ultimately, the enrolled bill rule is a relic of the English judicial system. Adopting it in America offered the Supreme Court, and a number of state courts, an attractive means to avoid the potential problems that might arise if laws were open to collateral attack. The Court was fearful that the legislative procedures at that time, particularly poor recordkeeping and frequent scrivener errors, left countless laws subject to question. But these problems have faded over time. What is left is a rule, lacking in pragmatic or evidentiary justification, which requires judges to blind themselves to widely recognized constitutional violations.²¹⁰ Continued reliance on the enrolled bill rule seems unjustified. But is it worse than the alternatives? This Section will discuss the alternative rules adopted by state courts and suggest that one — the probative evidence rule²¹¹ — presents an attractive position. This Section thus argues that the Supreme Court should

209. Though the Court did not do so, one might seek to distinguish Origination Clause violations on evidentiary grounds. The Court simply stated that “where . . . a constitutional provision *is* implicated, *Field* does not apply.” *United States v. Munoz-Flores*, 495 U.S. 385, 391 n.4 (1990). But one could at least argue that the evidence of where a bill originated is more reliable and easier for the Court to review than evidence of what text Congress voted on and how many votes it received. For Origination Clause challenges, the evidentiary balancing that justified *Field* might change sufficiently such that a conclusive presumption is unwarranted. But one might similarly imagine certain bicameralism challenges could be decided on reliable evidence. This would suggest that what is truly warranted is a different rule.

210. See *Bull v. King*, 286 N.W. 311, 313 (Minn. 1939).

211. Professor Sutherland refers to this as the extrinsic evidence rule; but to avoid confusion, this Note will adopt the designation used by Professor Lloyd. See SUTHERLAND, *supra* note 2, §§ 15:2-15:7; Lloyd, *supra* note 197, at 17.

have taken the opportunity provided by the DRA cases to reverse *Field* and adopt a probative evidence rule in its place. Should the opportunity arise again – which it undoubtedly will – the Court should not again avoid this significant constitutional issue.

A. ALTERNATIVE CONCLUSIVE PRESUMPTIONS

The alternative to a conclusive presumption in favor of the enrolled bill is to consider extrinsic evidence that might challenge a law's procedural validity. The extent to which extrinsic evidence is admitted varies from state to state based on a variety of different justifications. The majority of states limit the admission of extrinsic evidence to the legislative journals.²¹² Moreover, where courts do consider the legislative journals, they generally do so at the exclusion of all other evidence.²¹³ But an alternative conclusive presumption in favor of journal entries is equally unattractive.

1. *Modified Enrolled Bill Rule*

Some states have adopted the enrolled bill rule in general, but made one or more exceptions based on specific journal entry requirements in their constitutions.²¹⁴ In these states, the enrolled bill is conclusive evidence of the bill's passage, except where the state constitution requires that certain prerequisites to passage be recorded in the legislative journals.²¹⁵ The journal is conclu-

212. See SUTHERLAND, *supra* note 2, at § 15:7.

213. *Id.* § 15:7. Though state rules come in a myriad of permutations, this section will discuss them in terms of their general categories.

214. See, e.g., *Barnsdall Ref. Corp. v. Welsh*, 64 S.D. 647 (1936) (discussing alternative rules and adopting the modified enrolled bill rule). This practice is distinguished from carving out random exceptions as described in the previous section.

215. See, e.g., *State ex rel. McTaggart v. Middleton*, 28 P.2d 186, 187 (Mont. 1933) (“[T]his court can look behind the enrolled bill for one purpose only, and that is to see whether the constitutional mandate requiring that on the final passage of a measure the vote has been taken by ayes and noes, and the names of those voting have been entered on the journal.”). Cf. *Indep. Cmty. Bankers Ass’n v. State*, 346 N.W.2d 737, 742 (S.D. 1984) (The legislative journals showed that a bill had not been “read twice, by number and title, once when introduced, and once upon final passage,” as required by the state’s constitution, but the constitution did not require that procedure be recorded in the journals so the enrolled bill controlled.).

sive evidence of those acts.²¹⁶ This is known as the “modified enrolled bill rule.”

States justify this rule through constitutional interpretation and evidentiary principles. The constitutional argument is that by requiring specific acts to be recorded in the journal, the Framers must have intended the journals to serve as proof that those acts had been performed.²¹⁷ Why else would some constitutional requirements require journal entries and not others?²¹⁸ Moreover, the mandatory nature of certain entries may alter the evidentiary balance. While legislative journals may be inaccurate where the entries are discretionary, the mandatory entries are potentially more reliable.²¹⁹

As discussed in Part II, the Supreme Court has not foreclosed the adoption of a modified rule, though it recognized generally that the journals were intended for transparency, not as the means of authenticating passage.²²⁰ Moreover, doing so would be of little significance; unless an alleged violation occurs with respect to this single exception, this rule is subject to all of the criticisms of the enrolled bill rule discussed in Part III.²²¹

2. Pure Journal Entry Rule

A few states have reversed the conclusive presumption of the enrolled bill rule. Proof of a bill’s passage is held in the legislative journals, which “must affirmatively show that the provisions of the constitution in regard to the passage of any law were sub-

216. *Id.*

217. Lloyd, *supra* note 197, at 14.

218. *Id.*

219. In other contexts, regularly recorded entries are given greater evidentiary weight. See FED. R. EVID. 803(6) (permitting admission of records made if kept in the course of a regularly conducted business activity even if hearsay). However, the Court seems to have recognized that constitutionally mandated journal entries may be no more reliable than optional ones. In *Ballin*, the Court reiterated the potential unreliability of a record of yeas and nays despite the constitutional requirement to keep it. See *United States v. Ballin*, 144 U.S. 1, 4 (1892), discussed *supra* note 49.

220. See discussion *supra* note 88. Extending this argument, the Framers may have believed it particularly important that the public know whether their representatives voted for or against a bill; thus a specific journal entry is required on that point.

221. See Robert F. Williams, *State Constitutional Limits on Legislative Procedure: Legislative Compliance and Judicial Enforcement*, 48 U. PITT. L. REV. 797, 820 (1987).

stantially followed by the Legislature in the passage of an act.”²²² The failure of the journal to show that each step was taken is conclusive evidence that it was not taken.²²³

The basis for this rule stems from recognition that written constitutions require specific procedures be followed.²²⁴ As one of the first courts to adopt the journal entry rule recognized, if courts did not look beyond the enrolled bill, this would “leave the constitutional requirements touching the mode of passing bills, binding only in conscience upon members of the legislature.”²²⁵ As such, the Framers must have written the journal-entry requirement for the purpose of ensuring compliance with constitutional procedures.²²⁶

The Supreme Court has clearly rejected this historical argument,²²⁷ however, and the rule appears no more justifiable on evidentiary grounds. As a theoretical matter, journals may be the better record of what was passed;²²⁸ but most scholars agree that the evidentiary superiority of journals “seems questionable in view of the fact that the methods by which journals are usually kept rarely afford as much assurance of their accuracy as accrues

222. *In re Drainage Dist. No. 1*, 143 P. 299, 301 (Idaho 1914) (citing *Cohn v. Kingsley*, 49 P. 985 (Idaho 1897)).

223. *Id.*

224. The Arkansas Supreme Court put it eloquently:

The people of England have no written constitution defining and limiting the powers of their government. The Parliament being supreme, there can be no such thing as the passage of laws in an unconstitutional manner. And the English rule is the safer in the absence of constitutional restraints upon the legislature in the mode of enacting laws. But to apply it in States whose constitutions contain minute directions about the formalities to be observed in the passage of laws, is to nullify provisions which were intended as safeguards against reckless and vicious legislation, however illusory such protection may prove to be.

Chicot County v. Davies, 40 Ark. 200, 210 (Ark. 1882).

225. *In re Roberts*, 5 Colo. 525, 529–30 (Colo. 1881).

226. This was the argument put forth by Marshall Field that the court rejected. *See generally* *Marshall Field & Co. v. Clark*, 143 U.S. 649. This argument should be distinguished from that of the modified enrolled bill. The modified enrolled bill rule requires that courts look to journal entries in those cases where the constitution has specifically required a journal entry. Here the court will review the legislative journals to protect constitutionally required procedures even where it is not explicitly mandated that such procedures be recorded.

227. *See* discussion *supra* note 88.

228. As the Mississippi Supreme Court recognized, the enrolled bill is “but a certificate of the officers of both houses of the action had,” while the journals “contain the history of the acts themselves.” To find the enrolled bill controlling would be to “make copies better than originals; hearsay better than original evidence.” *Ex parte Wren*, 63 Miss. 512 (Miss. 1886).

to the enrolled bill itself by reason of the formalistic nature of the enrollment process.²²⁹ At the federal level, this can be countered by congressional rules requiring that each day the Speaker and President pro tempore approve their respective journals from the previous day.²³⁰ But the fact that the journals are not necessarily inaccurate falls far short of the evidentiary certainty required to justify a conclusive presumption.²³¹

3. *Affirmative Contradiction Rule*

Another shortcoming of the pure journal entry rule is that silence is ambiguous. Under the pure rule, the absence of vote tally is sufficient to invalidate a bill. But the absence of a vote tally tells the trier of fact nothing. Because there is no tally, an observer cannot determine how many votes the bill received. It may or may not have received majority support. The absence of that record could indicate anything from inadvertent mistake to an attempt to cover up legislative fraud.

For this reason, a number of courts have abandoned the pure journal entry rule for a modified rule under which the legislative journals are conclusive, but are only sufficient to overturn a law where they demonstrate affirmatively that the procedures were not followed.²³² For instance, a journal entry showing that a bill was three votes shy of passage would invalidate that law. But if there was no journal entry at all, the law would stand.

One justification for this rule is that the Constitution has few mandatory journal entry requirements and the Framers left other potential journal entries to the discretion of the legislature. Con-

229. SUTHERLAND, *supra* note 2, at § 15:5.

230. See discussion *supra* note 159. This would seem to provide similar formality to the journals as to the enrolled bill, and it appears no more likely that the presiding officers would actually read the enrolled bill before signing it than that they would read the previous day's journal.

231. There are pragmatic benefits to conclusive presumptions, such as simplifying the fact-finding process, but such pragmatic considerations require at least some foundation in evidentiary weight. A coin toss would similarly simplify the court's job, but that cannot be sufficient process. And as an evidentiary matter, it is difficult to argue that journals will categorically be the best evidence to such an extent as to allow exclusion of other evidence.

232. Compare *Swain v. Fritchman*, 125 P. 319 (Idaho 1912) (affirming the journal entry rule) with *In re Drainage Dist. No. 1*, 143 P. 299 (Idaho 1914) (abandoning it for the affirmative contradiction rule). See also Lloyd, *supra* note 197, at 17 (noting that only Michigan remains committed to the pure journal entry rule).

gress could decide to enter them into the record or not.²³³ As the Louisiana Supreme Court recognized, a legislative *decision* not to record an act “ought not to be held to afford evidence that the act was not done.”²³⁴ Alternatively, Sutherland argues, it might “be presumed that the procedure was taken, but through neglect, misadventure, or inadvertence, a proper record was not made.”²³⁵

At least one commentator has found this latter argument to be empirically descriptive but logically inconsistent.²³⁶ It assumes both that journals are the best evidence and that they are subject to mistakes.²³⁷ If neither the enrolled bill nor the journal entry is inherently more reliable and there is no constitutional requirement making journals conclusive, the high cost of invalidating statutes might tip the balance in favor of the enrolled bill over the journal.²³⁸

More importantly, this rule is of little protection against legislative fraud. Should Congress wish to pass a bill that was not voted on by a quorum, it could simply omit to record the vote tally in the journal.

4. *Mixed Rule*

Where a journal entry is constitutionally mandated, the affirmative contradiction rule is even less persuasive. It is hard to chalk up a missing entry as just a mistake.²³⁹ For this reason,

233. Wall v. Close, 14 So. 2d 19, 24 (La. 1943).

234. *Id.*

235. SUTHERLAND, *supra* note 2, at § 15:4. The Missouri Supreme Court similarly explained:

[Where] no objection or protest is noted upon the journal of either branch of the general assembly, the only natural and reasonable conclusion for us to reach is that benign conclusion of the law itself, sanctioned by the wisdom of ages, which presumes in favor of *right*, and not in favor of *wrong*.

State *ex rel.* Atty. Gen. v. Mead, 71 Mo. 266, 272 (1879) (internal quotations omitted).

236. See Lloyd, *supra* note 197, at 16.

237. *Id.* Where state courts have justified the rule constitutionally, this is of little note; even if the journal may be subject to errors, their constitution makes it conclusive. But where the constitutional mandate is unavailing (i.e. under federal jurisprudence), the conclusive presumption in favor of the journal rests on “an assertion that the journals are less subject to error than the enrolled bill.” *Id.*

238. This presumes that one must be exclusive of the other. As Part B of this section discusses, these could be weighed on a case by case basis.

239. Not only is it of greater evidentiary weight as to the event’s non-occurrence than where the entry is discretionary, but the absence of the journal entry could be viewed as a structural constitutional violation. That might make it a violation without remedy, how-

some states have adopted a mixed rule: if the constitution requires a journal entry, the absence of this entry is prima facie evidence that the law is invalid; but where the constitution is silent as to whether a required act must be recorded in the journals, courts presume that the act was done unless the journal affirmatively shows otherwise.²⁴⁰

While this is an appealing distinction, this rule is subject to the critiques of both the journal entry rule and the affirmative contradiction rule discussed above. Like both of those rules, without a constitutional requirement that the journal be considered best evidence of passage, it is not clear that it can withstand these attacks.

B. PROBATIVE EVIDENCE RULE

All of the rules discussed thus far are conclusive presumption rules. Under these rules, either the enrolled bill or the journal is admissible to the exclusion of all other evidence. But under modern evidentiary rules, conclusive presumptions are disfavored.²⁴¹ Conclusive presumptions still exist (e.g., parole evidence rules), but the trend in modern evidence is to allow the trier of fact to determine the weight to be given each item in relation to the circumstances of the case.²⁴² As such, a probative evidence rule is a more attractive alternative.

ever. In a concurrence in *United States v. Munoz-Flores*, 495 U.S. 385, 401 (1990), Justice Stevens suggested that a violation of the Origination Clause was a violation for which the Constitution provided no remedy. This proposition was joined only by Justice O'Connor. *Id.* (Stevens, J., concurring). Origination in the House is more clearly a prerequisite to passage than is entry in the journal.

240. Louisiana is one such state. In *Wall v. Close*, the Louisiana Supreme court explained:

Some acts performed in the passage of laws are required by the constitution to be entered on the journals, in order to make them valid, and among these are the entries of the ayes and nays on the final passage of every bill [W]here the journal did not show this, the act never became a law. But where the constitution is silent as to whether a particular act which is required to be performed shall be entered on the journals, it is then left to the discretion of either house to enter it or not, and the silence of the journal on the subject ought not to be held to afford evidence that the act was not done. In such a case we must presume it was done, unless the journal affirmatively shows that it was not done.

14 So. 2d 19, 24 (La. 1943).

241. See *D&W Auto Supply v. Dep't of Revenue*, 602 S.W.2d 420, 423 (Ky. 1980); SUTHERLAND, *supra* note 2, at § 15:3.

242. See Lloyd, *supra* note 197, at 17.

Paralleling the trend in civil litigation toward what Sutherland calls “a realistic evaluation of the facts as they exist,” a handful of states have adopted extrinsic or probative evidence rules.²⁴³ Rather than affording any one type of evidence a conclusive presumption, a probative evidence rule “accords to the enrolled bill a prima facie presumption of validity but permits attack by clear, satisfactory, and convincing evidence establishing that the constitutional requirements which the court deems mandatory have not been met.”²⁴⁴ While laws must be given a strong presumption of validity, “[w]hen the doubt is established in uncontrovertible manner, there appears to be no good reason why the act should be enforced.”²⁴⁵

1. *Probative Evidence Rule Makes Any Relevant and Reliable Evidence Admissible*

A probative evidence rule potentially permits impeachment of a law’s validity not only by journal entries, but also “minute books kept by journal clerks, private memoranda of numbers of clerks, the original or engrossed bill, stenographic notes, oral testimony of members, officers or employees, and any extrinsic evidence meeting the usual evidentiary requirements.”²⁴⁶ But while the trend is toward the adoption of probative evidence rules, most states adopting such rules continue to limit admissible evidence to the legislative journals.²⁴⁷ There may be valuable evidence that is not contained in the legislative journals, however, and a few states have questioned why the inquiry should be limited to

243. SUTHERLAND, *supra* note 2, at § 15:6.

244. *Id.*

245. *Id.* In this sense, the probative evidence rule is based on one of the same central understandings that drives journal entry rules, namely that the Constitution’s procedural requirements cannot go un-enforced. Law-making power is limited by the Constitution, and “the power of inquiring [into whether] those exercising the law-making power have proceeded constitutionally” is inherent in the courts. *Fowler v. Peirce*, 2 Cal. 165, 168–69 (Cal. 1852). “If such matters cannot be inquired into, the wholesome restrictions which the Constitution imposes on legislative and executive action, become a dead letter.” *Id.*

246. Lloyd, *supra* note 197, at 17.

247. SUTHERLAND, *supra* note 2, at § 15:7; Lloyd, *supra* note 197, at 17. Distinguishing them from states adopting the journal entry rule is that they do not make the journals conclusive. Rather, the journal will only overcome the presumption of validity if the evidence presented therein is “clear, satisfactory, and convincing.” *Id.* at § 15:6.

the journal.²⁴⁸ For instance, the Constitution requires that the journal include tallies of votes, but not the text of the bill.²⁴⁹ A rule limiting admissible evidence of the journal might exclude the engrossed bill, which in certain situations may be reliable evidence.²⁵⁰ Similarly, there may be cases in which testimony or memoranda of a clerk or even a member of Congress may clarify events that took place that cannot be discerned from the written evidence alone.²⁵¹ In the DRA cases, the House conducted an investigation into the matter.²⁵² The evidence presented therein might clarify what actually took place.²⁵³ The justifications for categorically excluding such evidence are not particularly persuasive,²⁵⁴ as the rules of evidence are sufficient to exclude unreliable evidence without the need for a separate rule.²⁵⁵

2. Downsides to Adoption Are Minimal

Adopting a probative evidence rule is not without potential drawbacks.²⁵⁶ Some less persuasive arguments against the rule, such as disrespecting Congress, were adequately addressed in Part III and merit no further discussion. But there are two concerns that carry more weight.

248. See, e.g., *Franklin Nat'l Bank of Long Island v. Clark*, 212 N.Y.S.2d 942, 964 (N.Y. Sup. Ct. 1961) (admitting "parol or extrinsic evidence"). It is not clear that recording something in the journal should give it more weight than some other extrinsic evidence; the Constitution requires a journal to be kept, but that does not necessarily give journal entries more cachet than other legislative papers or even testimony of representatives or their clerks.

249. See generally U.S. CONST. art I, §§ 5, 7.

250. See SUTHERLAND, *supra* note 2, at § 15:7; see also discussion *supra* note 162 and corresponding text.

251. See SUTHERLAND, *supra* note 2, at § 15:7.

252. See Brief of Appellant, at 19 n.7, *Pub. Citizen v. U.S. Dist. Court for the Dist. of Columbia*, 486 F.3d 1342 (D.C. Cir. 2007) (No. 06-5232).

253. That report might face other evidentiary hurdles such as hearsay, but it does not appear that any presents an insurmountable barrier.

254. See Lloyd, *supra* note 197, at 18 (arguing against the admission of probative evidence).

255. Notably, the federal rules may exclude certain parol evidence. See Fed. R. Evid. 1002.

256. See generally Lloyd, *supra* note 197 (arguing against the adoption of a probative evidence rule).

First, adopting a probative evidence rule replaces a bright line rule with a balancing test.²⁵⁷ While a balancing test may have greater regard for the truth, there is no guarantee that balancing will produce the correct result.²⁵⁸ More importantly, balancing tests bring about uncertainty. With the enrolled bill rule, the public has great certainty about the legal result — a facially valid law will always be upheld. With the journal entry rule and modified versions of it, some amount of investigation would allow interested parties to know whether a court will uphold or invalidate the law. But with a probative evidence rule, those deciding whether or not to rely on the law have to try to piece together all of the evidence, figure how much weight each piece should receive, and make an educated guess as to how a court might decide the case. This uncertainty may persist indefinitely. It may be many years before a law is challenged. Moreover, even if there is immediate trial, different fact-finders might weigh the facts differently and reach different results. If courts in different jurisdictions hear cases challenging the same law, one circuit might invalidate a statute while another allows it to stand.²⁵⁹

These critiques are hardly unique to the probative evidence rule, however. Parties are forced to guess how a fact-finder will decide a case all the time. A party seeking to terminate a contract has to decide whether a court might find this termination wrongful and in breach of the contract.²⁶⁰ A party thinking their patent claim valid has to balance the facts and decide how a court will likely decide the case. Though these examples concern individual litigants, there is often such uncertainty on a national scale where it is unclear how courts will interpret statutory language. In those cases, the same evidence that is excluded by the enrolled bill rule is often relied upon by courts attempting to figure out what Congress intended. Though some members of the Court might prefer that legislative histories be ignored in those

257. Justice Scalia's preference for bright line rules may explain his advocacy for the rule in *Munoz-Flores*. *United States v. Munoz-Flores*, 495 U.S. 385, 408–10 (1990) (Scalia, J., concurring).

258. The test is effectively a trial. In criminal trials, the guilty sometimes go free and the innocent are sometimes incarcerated.

259. This is seen regularly in the administrative law context where circuits are split on the procedural validity of a regulation.

260. Presumably, though, there is the opportunity for a party to ask the court for a declaratory judgment that may not be available for the constitutional challenge.

situations as well, the alternative interpretative mechanisms may provide litigants no greater certainty in how a court will decide the case. Similarly, the fear that a court will find a statute invalidly passed many years after it is enacted ignores that substantive constitutional challenges can be raised at any time, and can sometimes result in significant invalidations after years of reliance.²⁶¹

Second, adopting a probative evidence rule may also impose real costs for litigants and the courts. Whereas the enrolled bill rule allows a quick and easy determination of a legal challenge, a probative evidence rule requires tedious review of legislative documents. This not only raises costs on litigants — who are required, to a degree, to sift through Congress's garbage — but also on the courts. Depending on what kinds of evidence are found admissible, a court applying a probative evidence rule may need to conduct a full-fledged trial. In contrast, a court applying the enrolled bill rule can simply dismiss the case (provided it is not an origination issue) if the case gets brought at all (as litigants knowing the claim to be futile are unlikely to raise it).

But while costs are a concern, this second critique is by no means determinative. Litigants have been able to bear the cost of reviewing legislative histories in other contexts, such as statutory interpretation. Nor have courts or litigants been overwhelmed by litigation challenging the procedural validity of regulations. Those cases often involve millions of pages of material, yet the courts and litigants have proven themselves capable of managing the task.

3. Negative Impacts of a Probative Evidence Rule Can Be Strategically Minimized

One of the biggest concerns with overruling the enrolled bill rule is the practical impact that invalidating laws might have. Even if it is the constitutionally required result, the effects of such invalidation could be enormous. Imagine if the bills estab-

261. See, e.g., *N. Pipeline Constr. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 88 (1982) (plurality opinion) (finding the Bankruptcy Act of 1978 unconstitutional). The Bankruptcy Act was not declared unconstitutional until four years after its enactment and the opinion impacted the entire bankruptcy scheme. See also *Buckley v. Valeo*, 424 U.S. 1, 143 (1976) (finding the Federal Election Commission unconstitutional).

lishing Medicaid or Social Security were found procedurally deficient and the laws invalidated.²⁶² But this concern is largely unfounded; courts possess the tools to prevent such disastrous results while still upholding their constitutional duty.

First, given the potential impacts of invalidating a statute, the standard of proof should be high.²⁶³ The standard that most jurisdictions apply is a “clear and convincing evidence” test.²⁶⁴ This requires the trier of fact to be persuaded by the evidence that it is highly probable that the claim is true.²⁶⁵ One might alternatively imagine a constitutional abuse of discretion review. The Constitution gives Congress the discretion to decide how to authenticate laws that are passed.²⁶⁶ Courts must therefore be deferential to Congress’s determinations.²⁶⁷ But, the Constitution does not give Congress power to authenticate laws that have not been passed.²⁶⁸ If Congress does so, it has abused its constitutional discretion. Abuse of discretion review is extremely deferential of factual determinations but recognizes that “[t]here is some point at which evidence, though it exists, becomes so slight and so thoroughly outweighed by contrary evidence, that it would be an abuse of discretion to base a decision upon it.”²⁶⁹

Second, some errors may be harmless; and in these cases, the Court need not invalidate a statute. If an error is *de minimis* (spelling errors and the like), it should not subject a law to invalidation.²⁷⁰ Similarly, if the language is not substantive, such

262. These laws would likely be immune from invalidation as subsequent laws have ratified the original.

263. 32A C.J.S. *Evidence* § 1299 (2007) (“The function of a standard of proof is to instruct the fact finder concerning the degree of confidence society thinks he should have in the correctness of his factual conclusions for a particular type of adjudication . . .”). See also *Bacon v. Bacon*, 351 S.E.2d 37, 40 (Va. Ct. App. 1986) (“Generally, the greater the alleged conduct deviates from that normally expected, the greater the burden of proof that will be required to prove that conduct.”).

264. See SUTHERLAND, *supra* note 2, at § 15:6.

265. See BLACK’S LAW DICTIONARY 596 (8th ed. 2004) (“This is a greater burden than preponderance of the evidence, the standard applied in most civil trials, but less than evidence beyond a reasonable doubt, the norm for criminal trials.”).

266. *United States v. Munoz-Flores*, 495 U.S. 385, 391 n.4 (1990) (citing *Marshall Field & Co. v. Clark*, 143 U.S. 649, 670–71 (1892)).

267. This comports with the first prong of *Field*. *Field*, 143 U.S. at 670.

268. *Field*, 143 U.S. at 669.

269. *Lauvik v. INS*, 910 F.2d 658, 660 (9th Cir. 1990).

270. See SUTHERLAND, *supra* note 2, at § 15:17 (“Variations in spelling or immaterial and unimportant words . . . do not invalidate the act. In such cases, the rule of *de minimus* [sic] applies.”). This is not a typo exception; as is shown by the DRA, minor typos

as a section title or preamble, it would be unnecessary to invalidate a law. Also, if Congress has subsequently amended a statute, they have implicitly ratified the original statute. Any procedural error in the original would become moot.

Third, it is not entirely clear that the whole statute needs to be invalidated. A few state cases hold that only those provisions that failed to receive affirmative action of both houses are void and the remaining provisions, if severable, are valid.²⁷¹ This matches the remedy where a reviewing court finds a violation of a substantive constitutional provision; the court will sever the offending provision if it appears that Congress would have passed the law notwithstanding the provision's exclusion.²⁷² The general rule set out by the Supreme Court is that "a court should refrain from invalidating more of the statute than is necessary."²⁷³

As a pragmatic matter, severing the language that did not pass both houses makes some sense, but it is technically inapposite to the current problem. Where a substantive constitutional requirement is violated, only the offending language is unconstitutional; in contrast, if a bill did not pass Congress, the entire law is unconstitutional. In fact, it never became law at all. The Supreme Court has recognized that if the Senate votes on one bill and the House votes on a similar but slightly different bill, neither bill has passed both the House and Senate.²⁷⁴ Even if both

might have major substantive impact. But where the error truly would make no substantive difference, the constitutional requirement of passing the same bill seems to have been met. Should a punctuation or spelling error have actual material effect, the error would not fall under this exception.

271. See, e.g., *Gwynn v. Hardee*, 110 So. 343 (Fla. 1926); *Berry v. Balt. & Drum Point R.R. Co.*, 41 Md. 446 (Md. 1875).

272. See, e.g., *Alaska Airlines, Inc. v. Brock*, 480 U.S. 678, 684 (1987) ("Unless it is evident that the Legislature would not have enacted those provisions which are within its power, independently of that which is not, the invalid part may be dropped if what is left is fully operative as a law.").

273. *Id.* (quoting *Regan v. Time, Inc.*, 468 U.S. 641, 652 (1984)).

274. See *Clinton v. City of New York*, 524 U.S. 417, 448 (1998):

The Balanced Budget Act of 1997 is a 500-page document that became 'Public Law 105-33' after three procedural steps were taken: (1) a bill containing its exact text was approved by a majority of the Members of the House of Representatives; (2) the Senate approved *precisely the same text*; and (3) *that text* was signed into law by the President. The Constitution explicitly requires that each of those three steps be taken before a bill may 'become a law.' Art. I, § 7. If one paragraph of that text had been omitted at any one of those three stages, Public Law 105-33 would not have been validly enacted.

(emphasis added).

houses of Congress and the President have assented to 999 of 1000 provisions, the constitutional structure for enacting legislation has been violated if the exact same text is not approved by all three.²⁷⁵ This would suggest the entire statute must be invalidated, not just the offensive provision.

This seems like obtuse formalism, but it is justifiable functionally as well. It returns the law to its original position, allowing the democratic process to unfold properly. Excising one provision from a law forces Congress to decide that single provision in the absence of the larger matrix of deals. A provision that might have passed originally may not do so in this new context.²⁷⁶ Alternatively, the provision might pass with a rider attached that would not otherwise have been enacted.²⁷⁷ Similarly, if a provision is accidentally omitted from the enrolled bill, that provision may have been necessary for certain congresspersons to support the bill; without it, the bill might not have passed Congress. Allowing the omission to stand would defeat the deal-making process.

But even if it is constitutionally required that a reviewing court invalidate the entire law, courts are not without means to limit the impact. In administrative law, courts often remand an offending regulation without vacating it.²⁷⁸ This allows the agency to fix the procedural defect without significantly adverse impact on those relying on the bill.²⁷⁹ Where it has found a major constitutional defect, the Supreme Court has more than once stayed its judgment to allow Congress time to fix the problem.²⁸⁰

275. *Id.*

276. *See* discussion *supra* Part III.B.1.

277. The DRA offers a cogent example. Were the court to sever the offensive section of the DRA, the Medicare reimbursement provision, it would be difficult for Congress to re-pass that single provision. Because cutting Medicare is largely unpopular, Congress is only likely to do so where it is hidden in a larger bill.

278. *See* *Sugar Cane Growers Coop. v. Veneman*, 289 F.3d 89, 98 (D.C. Cir. 2002) (“[T]he decision whether to vacate depends on the seriousness of the order’s deficiencies . . . and the disruptive consequences of an interim change . . .”).

279. *Id.*

280. *See, e.g., N. Pipeline Constr. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 88 (1982) (plurality opinion) (finding the Bankruptcy Act of 1978 unconstitutional but staying the judgment to “afford Congress an opportunity to reconstitute the bankruptcy courts . . . without impairing the interim administration of the bankruptcy laws”). When Congress failed to act, the Court extended the stay. When Congress again did nothing, the Court invalidated the law. *See* *ESKRIDGE, FRICKEY & GARRETT, supra* note 146, at 622. *See also* *Buckley v. Valeo*, 424 U.S. 1, 143 (1976) (finding the Federal Election Commission uncon-

This remedy greatly reduces the impact of finding a statute unconstitutional.²⁸¹

Finally, if the Court did choose to adopt a probative evidence rule, Congress would then have an incentive to become involved to minimize any adverse impacts. For example, Congress might provide for expedited Supreme Court review — allowing a direct appeal to the Supreme Court where any court finds a statute procedurally deficient.²⁸²

C. IMPLEMENTING THIS CHANGE

The Supreme Court recently had the opportunity to address this issue. At least six cases challenging the DRA have been decided on the grounds that the enrolled bill rule precludes reviewing the evidence of procedural defect.²⁸³ The plaintiffs in one such case sought certiorari on the issue, but the Court denied their petition.²⁸⁴

Insofar as the violation in the DRA cases was concerned, the law was clear. *Field* is almost directly on point and the *Munoz-Flores* court failed to overrule that case.²⁸⁵ The Supreme Court has held that where there is direct precedent on point, it should be followed even if subsequent cases undermine the prior case's

stitutional but providing a limited stay to “afford Congress an opportunity to reconstitute the Commission”).

281. If the defect is truly insignificant, it should be of no great consequence for Congress to re-pass the statute. If Congress is unable to re-pass the statute, there will be real-world impacts, but the Court will have defended the substantive values the Constitution was intended to guard.

282. A small number of statutes provide for direct appeal in this fashion. *See, e.g.*, 28 U.S.C. § 3904 (2000) (authorizing direct appeal to the Supreme Court of a judgment, decree, or order of a court “upon the constitutionality of any provision of chapter 5 of title 3”).

283. *See Zeigler v. Gonzales*, No. 06-0080, 2007 U.S. Dist. LEXIS 47134 (D. Ala. 2007); *Conyers v. Bush*, No. 06-11972, 2006 U.S. Dist. LEXIS 80816 (E.D. Mich. Nov. 6, 2006); *Cal. Dep't of Soc. Servs. v. Leavitt*, 444 F. Supp. 2d 1088 (E.D. Cal. 2006); *Cookeville Reg'l Med. Ctr. v. Leavitt*, No. 04-1053, 2006 U.S. Dist. LEXIS 68961 (D.D.C. Sept. 26, 2006); *Pub. Citizen v. U.S. Dist. Court for the Dist. of Columbia*, 451 F. Supp. 2d 109 (D.D.C. 2006); *OneSimpleLoan v. United States Sec'y of Educ.*, No. 06-2979, 2006 U.S. Dist. LEXIS 38714 (S.D.N.Y. June 9, 2006).

284. *See Pub. Citizen v. U.S. Dist. Court for the Dist. of Columbia*, 486 F.3d 1342 (D.C. Cir. 2007), *petition for cert. denied*, 76 U.S.L.W. 3303 (U.S. Dec. 10, 2007) (No. 07-141).

285. The Court's discussion of *Field* precludes arguments that it was overruled by implication. *See United States v. Munoz-Flores*, 495 U.S. 385, 391 n.4 (1990).

legitimacy.²⁸⁶ As such, the two circuit courts having addressed the issue both found *Field* to preclude review.²⁸⁷ Given the lack of circuit split or ambiguity about *Field*'s application, it was not surprising that the Court denied certiorari without comment.²⁸⁸

The Court's decision was unfortunate, however. These cases presented a rare opportunity to reconsider the rule, and it is ripe for reconsideration. Its empirical underpinnings are no longer compelling, and its theoretical framework is anemic, particularly following *Munoz-Flores*.²⁸⁹

It is highly unlikely, though not inconceivable, that Congress will seek to address this issue itself. A handful of states have passed legislation requiring that courts consider extrinsic evidence.²⁹⁰ In 1896, the Supreme Court invited Congress to do so.²⁹¹

286. See *Rodriguez de Quijas v. Shearson/American Express, Inc.*, 490 U.S. 477, 484 (1989) ("If a precedent of this Court has direct application in a case, yet appears to rest on reasons rejected in some other line of decisions, the Court of Appeals should follow the case which directly controls, leaving to this Court the prerogative of overruling its own decisions.").

287. *Pub. Citizen v. U.S. Dist. Court for the Dist. of Columbia*, 486 F.3d 1342 (D.C. Cir. 2007), *petition for cert. denied*, 76 U.S.L.W. 3303 (U.S. Dec. 10, 2007) (No. 07-141); *OneSimpleLoan v. United States Sec'y of Educ.*, 496 F.3d 197 (2d Cir. 2007). See also *United States v. Miles*, No. 06-2899, 2007 U.S. App. LEXIS 16142 (7th Cir. July 3, 2007) (finding the enrolled bill rule precluded review where petitioner alleged that the law was invalid because it had not passed Congress during the same session).

288. It is possible as well that the DRA litigation was simply not compelling enough for the Court to justify overruling a 100-year-old precedent. The multi-billion dollar law at issue was 181 pages long and had an almost-unnoticeable clerical error. See *Deficit Reduction Act of 2005*, Pub. L. No. 109-171, 120 Stat. 4 (2006). Though that error did significantly change the duration of certain Medicare reimbursements, there is no evidence to suggest that any representatives actually read the engrossed text and voted for the bill solely because of the error. See generally MANN AND ORNSTEIN, *supra* note 148. Indeed, it is probable that few members read the text at all. See *supra* note 148 and accompanying text. As such, the Court may have simply viewed this as a problem that could be left for another day (if it even viewed the enrolled bill rule as a problem at all).

289. See discussion *supra* Part III.C.5.

290. For example, Kentucky's General Assembly enacted legislation providing for review of an enrolled bill in the limited situation where the language of the bill as enrolled differs materially from the language of the bill as passed by the legislature. *D&W Auto Supply v. Dep't of Revenue*, 602 S.W.2d 420, 424 n.2 (Ky. 1980). New Jersey's statute requiring review has been in place since 1873. See *In re Session Laws*, 121 A. 736, 736 (N.J. Sup. Ct. 1923) ("[I]f at any time within one year after any law shall have been approved and filed in the office of the Secretary of State, the Governor shall have reason to believe that it was not duly passed by both houses of the Legislature, he may, in his discretion, direct the Attorney General to present a a [sic] petition to this court, setting forth the facts and circumstances and praying that the said law may be declared a nullity; and that thereupon this court, if satisfied that the law mentioned in the petition was not duly and constitutionally passed, shall decree the same to be null and void.").

291. *Harwood v. Wentworth*, 162 U.S. 547, 560 (1896):

But there is little incentive for Congress to adopt such a law. Why would Congress invite such procedural review?²⁹² As such, it likely remains up to the Supreme Court to overrule *Field*, and the Court has once again failed to do so.

The next time an opportunity arises to reconsider the enrolled bill rule, the Court should jump on the opportunity. As discussed above, none of the justifications for the rule can withstand scrutiny. And as a practical matter, there would be significant benefits to encouraging Congress to take greater care in the passage of legislation. The hazards of a Congress that passes legislation without even reading it may be even greater than the dangers of fraud or mistake. Our system of checks and balances gives the Court power to ensure that Congress fulfills its constitutional duties. Should the opportunity come again, the Court should not duck the question as it did with the DRA. Rather, it should grant certiorari, overrule *Field*, and fulfill its constitutional function.

V. CONCLUSION

As the above analysis shows, the Court's continued reliance on the enrolled bill rule is difficult to justify. The *Field* court's pragmatic justification is both constitutionally and empirically suspect. Developments since *Field* was decided have undercut its evidentiary findings. The rule forces courts to ignore constitutional violations that they and everyone else know took place. As such, it is time for the rule to be abandoned. The Court should

[I]f the principle announced in *Field v. Clark* involves any element of danger to the public, it is competent for congress to meet that danger by declaring under what circumstances, or by what kind of evidence, an enrolled act of congress . . . may be shown not to be in the form in which it was when passed by congress or by the territorial legislature.

Despite the Court's language, it is not entirely clear that Congress has the power to overrule the Court on this issue. Congress has the power to impose rules of procedure and evidence on the federal courts, but because of federalism concerns, Congress may not possess the power to impose these in state courts. See Anthony Bellia, Jr., *Federal Regulation of State Court Procedures*, 110 YALE L.J. 947 (2001).

292. The one factor that could conceivably motivate such reform would be Democratic outrage over the DRA. The DRA was passed under a Republican administration and has been challenged in court by 11 Democratic representatives. See *Conyers v. Bush*, No. 06-11972, 2006 U.S. Dist. LEXIS 80816 (E.D. Mich. 2006). It is not inconceivable that Conyers or one of his co-plaintiffs would introduce legislation seeking to overturn the enrolled bill rule. But given that this has not yet made it on the agenda, such reform does not appear to be a priority.

have taken advantage of this historic opportunity but failed to do so.

Should the Court revisit this issue in the future, the adoption of a probative evidence rule is a tenable and attractive alternative to the current regime. A probative evidence rule comports with our modern evidentiary system insofar as it allows courts to weigh evidence on a case by case basis, rather than restraining them with unrealistic presumptions. At the same time, the rule does not take lightly the implications of invalidating laws; an enrolled bill is presumed valid until proven otherwise. While it is possible that this rule will result in the Court striking down some legislation, the rarity of such procedural violations suggests that the impact will be manageable and the Court possesses the tools to limit its effects. Ultimately, it is hard to argue that the invalidation of laws is an unacceptable burden where it is the constitutionally required result.

As far as the DRA is concerned, it is not clear how the statute would fare if the Court were able to review the substantive charges. There is sufficient evidence to suggest procedural error; but without thorough review by a court of law, it is unclear whether the constitutional requirements for passage were violated. Until the enrolled bill rule is overturned, such review is impossible.