

## Against Mix-and-Match Lawmaking

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### Recommended Citation

Bruhl, Aaron-Andrew P. (2007) "Against Mix-and-Match Lawmaking," *Cornell Journal of Law and Public Policy*: Vol. 16: Iss. 2, Article 3.  
Available at: <http://scholarship.law.cornell.edu/cjlp/vol16/iss2/3>

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## Response

### AGAINST MIX-AND-MATCH LAWMAKING

Aaron-Andrew P. Bruhl\*

#### INTRODUCTION

Some years back there appeared a book entitled *Constitutional Stupidities, Constitutional Tragedies*, in which esteemed constitutional theorists were asked to identify what they regarded as the worst mistake in the United States Constitution.<sup>1</sup> The contributors, most of whom generally revered the Constitution, identified failings ranging from the Electoral College to the exclusion of naturalized citizens from presidential eligibility to an apparent oversight that allows the Vice President to preside over his own impeachment trial.<sup>2</sup>

In a thought-provoking article in this *Journal*, Seth Barrett Tillman presents the surprising argument that the Constitution's script for lawmaking does not require that the House and Senate both pass a particular bill during the term of the same two-year Congress.<sup>3</sup> Rather, as his article's subtitle indicates, the Senate of the 110th Congress could enact a bill passed by the House during the 109th Congress, even over the opposition of the 110th House. Tillman recognizes that this argument—which he presents through the mouth of a puckish imaginary congressional advisor—runs contrary to tradition and the conventional wisdom. If Tillman's argument were right, many people would regard this as a troubling feature of the Constitution, quite possibly a fault befitting a place in a

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<sup>1</sup> CONSTITUTIONAL STUPIDITIES, CONSTITUTIONAL TRAGEDIES (William N. Eskridge, Jr. & Sanford Levinson eds., 1998).

<sup>2</sup> Akhil Reed Amar, *A Constitutional Accident Waiting to Happen*, in CONSTITUTIONAL STUPIDITIES, CONSTITUTIONAL TRAGEDIES, *supra* note 1, at 15–17 (Electoral College); Randall Kennedy, *A Natural Aristocracy?*, in CONSTITUTIONAL STUPIDITIES, CONSTITUTIONAL TRAGEDIES, *supra* note 1, at 54–56 (exclusion of naturalized citizens); Michael Stokes Paulsen, *Someone Should Have Told Spiro Agnew*, in CONSTITUTIONAL STUPIDITIES, CONSTITUTIONAL TRAGEDIES, *supra* note 1, at 75–76 (impeachment of the Vice President). The portions of the original Constitution protecting slavery were ruled ineligible for the competition. William N. Eskridge, Jr. & Sanford Levinson, *Introduction*, in CONSTITUTIONAL STUPIDITIES, CONSTITUTIONAL TRAGEDIES, *supra* note 1, at 2.

<sup>3</sup> Seth Barrett Tillman, *Noncontemporaneous Lawmaking: Can the 110th Senate Enact a Bill Passed by the 109th House?*, 16 CORNELL J.L. & PUB. POL'Y 331 (2007).

future volume dedicated to constitutional blunders. But does the mistake (if that it be) lie not with the Constitution but instead with Tillman's argument? Is Tillman right, or should the Constitution be read to avoid his result, thus averting a potential constitutional tragedy?

In this short response, I will play the role of the sober straight man to Tillman's mischief-maker. The "contemporaneity" requirement is one of those rules that "everyone knows" (or at least thinks they know) but that is seldom defended. I will set out, in brief and somewhat tentative form, what I find to be the strongest counter-arguments to Tillman's position. Although he is correct that the constitutional text is coy (at best) regarding the need for contemporaneity, structural, practical, and historical factors support some type of contemporaneity requirement.

### I. DOES THE CONSTITUTION CONTEMPLATE CONTEMPORANEITY?

There may be plausible political theories that would see the possibility of noncontemporaneous legislative activity as a virtue. So what is wrong with noncontemporaneity, from the point of view of our Constitution? I will begin with a sketch at the level of general principles.

The Constitution is democratic in that sovereignty ultimately rests in the people, but it is not crudely majoritarian in a plebiscitary fashion. To become a law, a bill must win approval from both the House of Representatives and the Senate, and it is then subject to veto by the executive (unless there is a supermajority in both chambers). Each of these bodies represents the people differently: population-based representation in the House, equality among states in the Senate,<sup>4</sup> and a nationwide constituency for the executive. Officeholders in each body serve terms of different lengths, corresponding to varying degrees of accountability to public opinion. What this means is that legislation requires multiple majorities of different kinds.

To be sure, this legislative arrangement is in no small part simply the result of wrangling and compromise between large states and small states, as well as between delegates with different ideas of how democratic the new government should be. But the institutional arrangement they ultimately chose does embody and reflect certain political values. For an explication and defense of that sometimes implicit political theory, it is customary to turn to *The Federalist*.<sup>5</sup> As No. 62 explains, the

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<sup>4</sup> In the original Constitution, Senators were elected by state legislatures. U.S. CONST. art. I, § 3, cl. 1. Today that is no longer true, *see id.* amend. XVII, but the Senate still over-represents the interests of small states. *See generally* Lynn A. Baker & Samuel H. Dinkin, *The Senate: An Institution Whose Time Has Gone?*, 13 J.L. & POL. 21 (1997).

<sup>5</sup> Tillman has previously argued that commentators err in treating *The Federalist* as infallible in its treatment of many details, but he apparently still grants that it is a reliable guide

Constitution, and bicameralism in particular, creates a “complicated check on legislation.”<sup>6</sup> An obvious cost of this check is that problems (as perceived by some of the majorities needed to pass legislation) can go unaddressed. But the benefits—touted in several of the essays in *The Federalist*—are conventionally regarded as greater: more protection for minority interests, more deliberative and measured lawmaking, a double barrier against corruption and faction, and so forth.<sup>7</sup>

Noncontemporaneous lawmaking embodies a rather different and more promiscuous approach to lawmaking: as long as a bill wins the support of one chamber at time  $t_1$  and the other chamber and the President at time  $t_2$ , it may become law whether or not the first chamber still supports it.<sup>8</sup> A law may result even though there is no time at which the people and the states both agree to it. Although Tillman’s example concerns two adjacent Congresses, the two dates might in principle be decades apart. Tillman’s hypothetical advisor lauds the proposal for “expanding democracy by easing . . . constraints” on the lawmaking process,<sup>9</sup> but that justification is problematic on at least two counts. First, as already suggested, one animating principle of our republican Constitution is constraint on lawmaking. Second, Tillman’s proposal actually seems to contradict fundamental democratic principles inasmuch as it contemplates an equal role in lawmaking for legislators whose terms have expired—not just the familiar lame ducks, but dead-and-gone ducks.<sup>10</sup>

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to understanding basic theoretical questions about the structure of the Constitution. See Seth Barrett Tillman, *The Federalist Papers as Reliable Historical Source Material for Constitutional Interpretation*, 105 W. VA. L. REV. 601, 617 (2003).

<sup>6</sup> THE FEDERALIST NO. 62, at 378 (probably James Madison) (Clinton Rossiter ed., 1961).

<sup>7</sup> See, e.g., THE FEDERALIST NO. 51 (James Madison), No. 62 (probably James Madison), No. 64 (John Jay), No. 73 (Alexander Hamilton).

<sup>8</sup> Indeed, it seems that the President need not approve at time  $t_2$  either. If the President at  $t_2$  would veto the bill, the  $t_2$  Senate (assuming it is the second house to act) could instruct a clerk to squirrel away the authenticated enrolled bill until some time  $t_3$  when a favorably inclined President were in office, at which point the agent would present it for signature. After all, the text of the Constitution does not expressly state when presentment is to occur and, as Tillman points out, *Marshall Field & Co. v. Clark* suggests that the courts will not look behind a signed enrolled bill to see if it has been properly passed by Congress. See 143 U.S. 649, 671–73 (1892). Under Tillman’s view, it appears that there is no objection *in principle* to such a bill becoming law at  $t_3$ , even if the  $t_3$  Senate does not continue to affirmatively support it.

<sup>9</sup> Tillman, *supra* note 3, at 336.

<sup>10</sup> The lame-duck problem results from the lag between when elections are held and when newly elected legislators replace the previous legislators. This problem partly motivated the Twentieth Amendment, which shortened the lag time and which many people expected would eliminate lame-duck sessions of Congress. See John Copeland Nagle, *A Twentieth Amendment Parable*, 72 N.Y.U. L. REV. 470, 477–89 (1997). The problem here goes well beyond lame-duckism because the term of the 109th Congress is completely over when the bill one of its houses passed is enacted by the other house during the 110th Congress.

Tillman recognizes that many readers will find noncontemporaneity intuitively jarring for reasons such as those above, and he therefore identifies three cases in which the Constitution is said to embrace noncontemporaneity already: the sometimes lengthy process of ratifying constitutional amendments, presidential power to act on bills after the end of a Congress, and the treaty-formation process. I consider each in turn.

*The Article V Amendment Process.* Tillman is correct that anyone arguing for a constitutional principle of contemporaneity has to grapple with the troublesome Twenty-Seventh Amendment. That amendment, which governs congressional pay raises,<sup>11</sup> was proposed by Congress in 1789 but did not win ratification from the requisite number of states until 1992—a lapse of over 200 years. Assuming that the majority view on this matter is correct and that the Twenty-Seventh Amendment is valid,<sup>12</sup> how can one reconcile that result with a contemporaneity requirement in Article I?

Article V contains no explicit time limit, nor does there appear to be any principled way of picking a date to count as an implied “reasonable” time. All the same, a sensible and powerful argument for a time limit would begin with the premise that the amendment process should be a serious undertaking requiring supermajority, indeed consensus, support. If the process could be stretched out indefinitely, then there might be no point at which even *two* states and their citizens support an amendment. With enough time (200 years, 1000 years, when will the Constitution end?), one could imagine a horrid amendment<sup>13</sup> winning ratification by catching fire in one momentarily deranged state while every other state

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<sup>11</sup> U.S. CONST. amend. XXVII (“No law, varying the compensation for the services of the Senators and Representatives, shall take effect, until an election of Representatives shall have intervened.”).

<sup>12</sup> Notable commentators from across the political spectrum have deemed the amendment valid. See, e.g., Michael Stokes Paulsen, *A General Theory of Article V: The Constitutional Lessons of the Twenty-Seventh Amendment*, 103 YALE L.J. 677 (1993); Laurence H. Tribe, *The 27th Amendment Joins the Constitution*, WALL ST. J., May 13, 1992, at A15. Although it is not clear that it had any proper role in judging ratification, the 1992 Congress overwhelmingly voted to recognize the new amendment. Richard L. Berke, *Congress Backs 27th Amendment*, N.Y. TIMES, May 21, 1992, at A26. For dissenting views on the amendment’s validity, see Stewart Dalzell & Eric J. Beste, *Is the Twenty-Seventh Amendment 200 Years Too Late?*, 62 GEO. WASH. L. REV. 501 (1994); John R. Vile, *Just Say No to “Stealth” Amendment*, NAT’L L.J., June 22, 1992, at 15; cf. *Dillon v. Gloss*, 256 U.S. 368, 375 (1921) (noting in dicta that “ratification must be within some reasonable time after the proposal”). Note that we are here concerned with a case in which Congress did not set any deadline when proposing the amendment. Congress has for some time been in the habit of establishing deadlines, particularly a seven-year deadline, either in the text of the amendment itself or in the accompanying resolution. See Walter Dellinger, *The Legitimacy of Constitutional Change: Rethinking the Amendment Process*, 97 HARV. L. REV. 386, 406–09 (1983).

<sup>13</sup> For example, one of the amendments that was sent to the states but which has not (yet!?) been ratified is a pre-Civil War amendment that would have entrenched slavery against

opposes it, then decades later winning approval in another state while all the rest (including the citizens of the former ratifier) oppose it, and so forth. Indeed, this line of reasoning supports what is probably the strongest argument put forth in *Dillon v. Gloss*, in which the Supreme Court stated in dicta that ratification must be concluded within a “reasonable” time:

As ratification is but the expression of the approbation of the people and is to be effective when had in three-fourths of the states, there is a fair implication that it must be sufficiently contemporaneous in that number of states to reflect the will of the people in all sections at relatively the same period, which of course ratification scattered through a long series of years would not do.<sup>14</sup>

Contemporaneity of consent is thus the way to ensure that there is truly a consensus.

Fortunately, we can honor the need for consensus in the amendment process without inserting an arbitrary time limit. The way to do so is to recognize that a state, once it agrees to an amendment, continues to give assent (though silently) until it tells us otherwise. A state is in this regard like a person. A person is not remade anew every day. I change over time, but I remain the same person. I have the authority to give a temporally open-ended consent: “From now until I tell you otherwise, you may do X.” The question regarding X need not be put to me afresh every day (or every moment) to see if I still consent. Likewise, when Ohio says yes to the Twenty-Seventh Amendment in 1873 and Michigan says yes in 1992, those states’ consent *is* contemporaneous because Ohio’s consent endures. Ohio is still Ohio, and we need not ask it again. At the same time, states (again, like people) can change their minds and withdraw consent; Ohio can rescind its ratification if it later changes its mind (but only up until the time the requisite number of states have consented, for at that point that deal has been sealed and Ohio, like a person, is bound by its word). Thus, the way to give Article V a faithful reading yet also to ensure the contemporaneous consensus that any sensible process requires is not to impose an arbitrary implied time limit on ratification but to combine indefinite ratification periods with the ability to rescind before ultimate ratification of the amendment.<sup>15</sup> So understood, the Twenty-Seventh Amendment does not support noncontemporaneity.

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future abolition. See AKHIL REED AMAR, *AMERICA’S CONSTITUTION: A BIOGRAPHY* 113–14 & n.457 (2006).

<sup>14</sup> 256 U.S. at 375.

<sup>15</sup> I certainly do not claim to be the first to read Article V this way. See, e.g., AMAR, *supra* note 13, at 455–56; Brandon Troy Ishikawa, *Everything You Always Wanted To Know About How Amendments Are Made But Were Afraid To Ask*, 24 HASTINGS CONST. L.Q. 545,

*Delayed Presidential Signatures.* Tillman cites examples in which Presidents have signed bills within the constitutionally prescribed ten days after the bill was presented to them but in which the signature occurred at the beginning of the Congress following the Congress that passed the bill. For example, Congress passes a bill on March 3, presents it to the President, and then finally adjourns that same day; the newly elected Congress begins meeting on March 4, and the President signs the bill on March 8, during the new Congress. Further, in some instances, legislators have delayed the presentment of a bill passed at the end of one Congress until the beginning of the next Congress.<sup>16</sup> Thus there is some history of noncontemporaneity as regards the presidential ingredient in lawmaking. Assuming that this practice is permissible,<sup>17</sup> it does not necessarily follow that noncontemporaneity as to bicameral passage is permissible. There are two reasons.

First, because the Constitution does not actually require presidential approval for lawmaking,<sup>18</sup> it is hard to see how the Constitution could require presidential approval *at some particular time* in relation to congressional passage. In other words, the Constitution can leave some wiggle room for unconventional practices surrounding the timing of the President's role in lawmaking without affecting any requirements regarding bicameralism.

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550 (1997); Paulsen, *supra* note 12, at 724–33. I should note that the position in the text does not necessarily require that Congress be permitted to withdraw an amendment proposal once it is sent to the states; the states' ability to rescind their consent is sufficient to ensure popular consensus. I note as well that rescission may be more complicated in the event that Congress specifies that ratification is to be accomplished by state conventions rather than by state legislatures. Cf. Seth Barrett Tillman, Reply, *Defending the (Not So) Indefensible*, 16 CORNELL J.L. & PUB. POL'Y 370–71 n.26 (2007). But, in my view, the fact that a particular convention may disperse after having ratified an amendment does not necessarily mean that a state convention could not later rescind ratification.

<sup>16</sup> See Tillman, *supra* note 3, at 340–42.

<sup>17</sup> Although Tillman is correct that the prevailing view now allows the practice, see JOHN V. SULLIVAN, CONSTITUTION, JEFFERSON'S MANUAL, AND RULES OF THE HOUSE OF REPRESENTATIVES, H.R. DOC. NO. 108-241, § 111, at 56 (2005) (hereinafter MANUAL), there is some earlier authority that took a contrary view. See IV ASHER C. HINDS, HINDS' PRECEDENTS OF THE HOUSE OF REPRESENTATIVES OF THE UNITED STATES § 3497, at 345 (1907); see also *Edwards v. United States*, 286 U.S. 482, 487–90 (1932) (discussing conflicting views on the matter but deeming a statute signed after final adjournment valid). Tillman believes that the logic of *Edwards*, which concerned delayed presidential action but not bicameral noncontemporaneity, dictates that the two houses need not act during the same two-year term either. See Tillman, *supra* note 15, at 369–70. Needless to say, my position in the text reflects my disagreement: I believe that the case of a bill passed by only one house is sufficiently different from the case of a bill duly passed by both houses such that the *Edwards* result does not control.

<sup>18</sup> U.S. CONST. art. I, § 7, cl. 2 (“If any Bill shall not be returned by the President within ten Days (Sundays excepted) after it shall have been presented to him, *the Same shall be a Law, in like Manner as if he had signed it*, unless the Congress by their Adjournment prevent its Return, in which Case it shall not be a Law.” (emphasis added)); *id.* (providing for veto overrides).

Second, other considerations tend to show that there is still contemporaneity of consent between Congress and the President in the above circumstances, despite the beginning of a new Congress. In cases in which presentment has been delayed until the next Congress, somebody has to present the bill to the President, and the agents who do this are accountable to the current Congress, not the previous one that actually passed the bill. At one time, presentment was made by a joint committee of the House and Senate;<sup>19</sup> presumably, those committee members would not present an old bill of which one or both houses disapproved. Under more modern practice, presentment is made by agents of the originating house,<sup>20</sup> and so presentment carries with it the imprimatur of continuing support from the house that first began the lawmaking process. Further, regardless of when presentment occurs, there is a practice of the houses asking the President to return enrolled bills (such as to amend or correct them), to which requests the President has customarily acceded.<sup>21</sup>

The factors discussed above tend (at least) to diminish any worries regarding noncontemporaneity between bicameral passage and presidential approval. To be sure, it may well be that none of the ameliorative practices just mentioned are constitutionally required. Nonetheless, the point here is that if one wishes to make an argument in favor of bicameral noncontemporaneity on the basis of some history of delayed presidential approval, then one should consider the entirety of the past practice, including those features that tend to ensure that there remains a contemporaneity of actual consent.

*The Treaty Process.* Similar comments apply in the case of treaties, even assuming that the treaty process is relevant notwithstanding its lack of any requirement of bicameralism. True, there is some history of Presidents ratifying a treaty during a Congress following the one during which the Senate gave its advice and consent to the treaty.<sup>22</sup> And it is also certainly true that a treaty may remain in the Senate awaiting advice and consent for many years after the President submits it.<sup>23</sup> The possibility of a lengthy treaty process might well be a cause for concern if the relevant institutions generally disfavored the treaty but temporarily supported it at different times. (In the extreme case of noncontemporaneity, an execu-

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<sup>19</sup> MANUAL, *supra* note 17, § 577, at 301–02.

<sup>20</sup> *Id.*; CHARLES W. JOHNSON, HOW OUR LAWS ARE MADE, H.R. DOC. NO. 108-93, at 51 (2003).

<sup>21</sup> See, e.g., MANUAL, *supra* note 17, § 110, at 55; IV HINDS' PRECEDENTS §§ 3507–18; VII CANNON'S PRECEDENTS § 1091 (all discussing congressional requests that the President return an enrolled bill).

<sup>22</sup> Tillman, *supra* note 3, at 340 n.19 (citing example from 1968-70).

<sup>23</sup> CONG. RES. SERV., TREATIES AND OTHER INTERNATIONAL AGREEMENTS: THE ROLE OF THE U.S. SENATE, S. PRINT 106–71, at 143–45 (Comm. Print 2001) (hereinafter THE ROLE OF THE SENATE).

tive might sign an unpopular treaty and submit it to the Senate for advice and consent at time  $t$ , the treaty would sit in the Senate attracting only scorn until an idiosyncratic Senate finally approves at  $t + 50$  years, and then the treaty sits unratified by sensible Presidents until  $t + 100$  years, at which point the original President's peculiar great-grandson ratifies.)

Once again, however, when one considers the whole picture there are a number of steps that the relevant actors can take, if they wish, in order to prevent temporally extended mix-and-match approval of a treaty. The President evidently can withdraw the country from a signed but unratified treaty that he opposes or that is languishing in the Senate, as President Bush did with the treaty establishing the International Criminal Court, which President Clinton had signed.<sup>24</sup> The President has in some cases asked the Senate to return treaties to him before advice and consent has been given, and the Senate has honored those requests.<sup>25</sup> The Senate could vote to send a disfavored treaty back to the President so that it does not remain on the calendar awaiting approval indefinitely.<sup>26</sup> The Senate has apparently not attempted to withdraw previously given consent from a yet-to-be ratified treaty, and it is unclear if it could do so;<sup>27</sup> nonetheless, at least one President has thought it proper (though not necessarily constitutionally required) to ask for advice and consent again when the Senate had previously given its advice and consent but there

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<sup>24</sup> See Peter Slevin, *U.S. Renounces Its Support of New Tribunal for War Crimes*, WASH. POST, May 7, 2002, at A1. Article 18 of the Vienna Convention, which the United States has not ratified but which has generally been regarded as restating customary international law, provides that a signatory that has not yet ratified a treaty has an interim obligation not to frustrate the purpose of that treaty unless and until it notifies other parties of its intention not to ratify. See Convention on the Law of Treaties art. 18, *opened for signature* May 23, 1969, 1155 U.N.T.S. 331; RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 312 cmt. i (1987). See generally Curtis A. Bradley, *Unratified Treaties, Domestic Politics, and the U.S. Constitution*, 48 HARV. INT'L L.J. \_\_\_ (forthcoming 2007) (discussing effect of signed but unratified treaties). If there is an interim obligation pending ratification, the ability to repudiate the initial signature when ratification is unlikely makes much sense.

<sup>25</sup> FLOYD M. RIDDICK & ALAN S. FRUMIN, RIDDICK'S SENATE PROCEDURE 1307 (1992); Michael J. Glennon, *The Senate Role in Treaty Ratification*, 77 AM. J. OF INT'L L. 257, 277 n.119 (1983). Admittedly, the Senate's compliance is perhaps a matter of comity rather than of presidential right. *But cf.* David C. Scott, Comment, *Presidential Power to "Un-Sign" Treaties*, 69 U. CHI. L. REV. 1447, 1457-74 (2002) (arguing that the President can unilaterally withdraw a treaty from the Senate). The President's other tools for killing a treaty (such as the "unsigning" power mentioned above) mean that the Senate will usually not have much to gain from picking a fight.

<sup>26</sup> THE ROLE OF THE SENATE, *supra* note 23, at 12, 145.

<sup>27</sup> *Id.* at 143. The case against the Senate's ability to rescind is evidently based on the idea that it lacks power to act with regard to a treaty that has left its physical custody. See *id.* There would rarely be occasion for the Senate to attempt to rescind its consent because: (1) ratification usually follows very soon after advice and consent, and (2) the Senate generally would not consent to a treaty that it does not contemplate the President ratifying. *But see* SAMUEL B. CRANDALL, TREATIES: THEIR MAKING AND ENFORCEMENT 101 (2d ed. 1916) (opining that the Senate can rescind advice and consent at any time before ratification).

had been a long lapse without ratification.<sup>28</sup> Thus, treaty practice taken as a whole tends to be characterized by noncontemporaneous formal action but not by noncontemporaneity of consent. Indeed, the leading example of delayed ratification, which Tillman cites,<sup>29</sup> does not reflect noncontemporaneity of consent; advice and consent was given in the 90th Congress but presidential ratification was delayed until the 91st Congress due to the lack of implementing legislation, which the 91st Congress supplied.<sup>30</sup> Things might have gone differently had the Senate of the 91st Congress opposed the treaty that its predecessor supported.

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Here I should add some words by way of clarification and qualification. One version of contemporaneity would hold that a bill must be passed by both houses within the term of a single Congress or else it dies: even if the 110th House were perfectly happy to let the 110th Senate enact a bill passed by the 109th House, the bill died at the end of the 109th Congress and must be passed again now by the 110th House. That is, of course, the conventional view as usually stated.<sup>31</sup> But what one might conclude from the discussion above is that constitutional practice—looking broadly at all modes of lawmaking—is not really typified by formal rules of *contemporaneous action*, but instead displays tolerance for noncontemporaneous action accompanied by practical safeguards to ensure *contemporaneous consent* by all relevant actors. Under that more flexible version of contemporaneity, there might not be a problem with a bill passed by the House during the 109th Congress and by the Senate during the 110th, as long as agents of the 110th House are the ones who take the enrolled bill to the President, thus indicating their support.<sup>32</sup> Or, to reach much the same result in a different way, it might be permissible for each house to pass a bill during a different Congress if and only if a house has a way to withdraw its assent from (i.e., “unpass”) a bill its predecessor house passed but which the other house has not yet enacted.<sup>33</sup> (This would roughly mirror the states’ ability to rescind support for a pending constitutional amendment.) Now, in choosing between

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<sup>28</sup> CRANDALL, *supra* note 27, at 100–01; THE ROLE OF THE SENATE, *supra* note 23, at 151–52.

<sup>29</sup> Tillman, *supra* note 3, at 340 n.19.

<sup>30</sup> THE ROLE OF THE SENATE, *supra* note 23, at 152.

<sup>31</sup> See, e.g., CHARLES TIEFER, CONGRESSIONAL PRACTICE AND PROCEDURE 27–32 (1989).

<sup>32</sup> As noted above, there are indeed historical practices surrounding the act of presentment that do tend to ensure continued consent by both houses. See *supra* notes 19–21 and accompanying text.

<sup>33</sup> There is a practice of one house requesting that the other return bills to it; the requests are usually honored, but this is generally understood to reflect considerations of comity rather than obligation. See Tillman, *supra* note 3, at 338. In Tillman’s hypothetical scenario, the Republican Senate would refuse to return the bill to the newly Democratic House. See *id.*

these two versions of contemporaneity—that of formal action and that of actual consent—it might be that contemporaneous formal action is preferable for various reasons: it is a simpler and clearer rule, it better accords with congressional practice in the statutory context, etc. The point is just that there is perhaps some degree of play in the constitutional joints regarding formal contemporaneous passage as long as there is a mechanism for ensuring continued consent.

Further, we must keep in mind that the real meaning of the Constitution might not align with the judicially enforceable Constitution. The “enrolled bill rule” *generally* prevents courts from looking behind a signed enrolled bill to scrutinize the details of passage.<sup>34</sup> Even if the best reading of the Constitution contemplates contemporaneous formal passage, a court would have a much easier time following the enrolled bill rule if it knew that, although the 110th House had not passed the bill, at least its Speaker had signed it or its agents had taken the bill to the President. In Tillman’s scenario, of course, there is no such continuing consent. The 110th House, with its Democratic majority, does not support the bill but apparently cannot “undo” the vote in the Republican 109th House because that earlier house sent a properly authenticated bill to the Republican Senate, thus departing from the usual practice under which neither chamber’s presiding officer authenticates the bill until after both chambers act. Such a scenario would present a tough and quite likely fatal test for the enrolled bill rule. The courts are generally willing to defer to Congress regarding the details of passage, but they may well choose to intervene when there is manipulation within the Congress.

## II. WHERE DOES THE REQUIREMENT COME FROM?

If there is a constitutional rule of contemporaneity (of some type, either formal or more pragmatic), where does it reside?

Tillman’s argument usefully reminds us that the Constitution says precious little about the nuts and bolts of how laws are made. The key text states:

Every 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; If he approve he shall sign it, but if not he shall return it, with his Objections to that House in which it shall have originated . . . . If any Bill shall not be returned by the

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<sup>34</sup> See *supra* note 8. I say “generally” because it is not entirely clear that the signatures of the presiding officers would be regarded as conclusive evidence of proper passage if the signatures themselves revealed passage by two different Congresses. See *Field v. Clark*, 143 U.S. at 672 (noting that “nothing to the contrary [i.e., nothing impeaching proper passage] appear[ed] upon [the bill’s] face”).

President within ten Days (Sundays excepted) after it shall have been presented to him, the Same shall be a Law, in like Manner as if he had signed it, unless the Congress by their Adjournment prevent its Return, in which Case it shall not be a Law.<sup>35</sup>

One finds in this text no mention of committees, no discussion of legislative calendars, not even an explicit statement that majority rule is the governing principle. Much of the detail is therefore left to internal rules, to tradition, and occasionally to statutes that regulate proceedings—all sources that are in some cases longstanding and venerable but that are also ultimately subject to the legislature's will.<sup>36</sup> What matters for present purposes is that the constitutional text is at best coy in telling us the permissible amount of temporal separation between passage in the two houses. Where, if anywhere, is a contemporaneity requirement located?

If a textual basis is needed, we are not without options.<sup>37</sup> Professor Akhil Amar gives the following explanation for why Article I, but not Article V, requires contemporaneous action:

Partly because Article I is organized around *bright-line rules for contemporaneousness* that have no Article V counterpart. An ordinary statute must pass within a single term of Congress, and a bright legal line separates the last day of one term from the first day of the next, regardless of how close together these two days lie on an ordinary calendar. But no such bright lines punctuate the Article V amendment process . . . .<sup>38</sup>

This is initially puzzling, because in reading Article I, Section 7—the most on-point provision—one finds a paucity of textually obvious rules addressing timing, bright-line or not. The text describing how laws are made does not indicate how soon after passage a bill must be presented, nor does it specify that both chambers must pass a bill within any particular length of time. The lone provision in Section 7 setting a time limit is the clause giving the President ten days to act on a bill after present-

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<sup>35</sup> U.S. CONST. art. I, § 7, cl. 2.

<sup>36</sup> See Aaron-Andrew P. Bruhl, *Using Statutes To Set Legislative Rules: Entrenchment, Separation of Powers, and the Rules of Proceedings Clause*, 19 J.L. & POL. 345, 346 (2003).

<sup>37</sup> There are a number of rather thin textual reeds that one could attempt to press into service. The constitutional provision regarding presidential vetoes, for example, states that the President shall return a vetoed bill “to *that House* in which it shall have originated.” U.S. CONST. art. I, § 7 (emphasis added). One could read this as referring to the same term of the particular house (e.g., “the House of the 109th Congress”), but the more natural reading would be that the clause merely distinguishes between the House and Senate without carrying any temporal connotation. We are at the moment seeking something more than a mere hook on which to hang a principle derived from other sources.

<sup>38</sup> AMAR, *supra* note 13, at 455 (emphasis added).

ment.<sup>39</sup> That limit could well support an inference that no *other* time limits exist.

Looking more broadly, however, other portions of Article I do speak to timing and do arguably provide a rule of contemporaneity. Sections 2 and 3 provide that all Representatives and one-third of Senators shall “be chosen every second Year.”<sup>40</sup> Congress is in this way temporally segmented; each new two-year term brings a new message from these agents’ principals (not to mention some new agents). Every two years there comes a new mandate from the principals, and one must seek the agents’ views anew. The two houses of the legislature, to pick up a thread from earlier, are in this sense unlike people and unlike states.<sup>41</sup> Thus, one could use the electoral cycle clauses to require some form of bicameral contemporaneity.<sup>42</sup> And such a reading gains strength when the above clauses are read in light of the Twentieth Amendment’s preference for rule by newly elected representatives rather than by repudiated ones.<sup>43</sup> One could further enliven the text with higher-level structural or normative arguments such as those sketched earlier.<sup>44</sup>

But perhaps the contemporaneity requirement, like some other constitutional rules, resides not so much in an explicit textual command as in pre-constitutional usage, the framers’ expectations, and implicit understandings.<sup>45</sup> Certainly there is a strong case to be made that contempora-

<sup>39</sup> U.S. CONST. art I, § 7, cl. 2. To be sure, Amar refers to the “bright line” that separates one term of Congress from the next. AMAR, *supra* note 13, at 455. That may be a bright line *in fact*, but Article I, Section 7 does not by itself make that fact into a *legal rule*.

<sup>40</sup> U.S. CONST. art. I, § 2, cl. 1; *id.* § 3, cl. 2.

<sup>41</sup> The idea of legislative discontinuity admittedly seems to conflict with the notion that the Senate is a “continuing body.” Tillman’s impish advisor and I both think that is a phrase that cannot mean what it says. *See* Tillman, *supra* note 3, at 337 n.15. What it would mean for a collective entity like the Senate to be the same entity over time is of course a question that implicates deep philosophical questions. *See generally* DEREK PARFIT, REASONS AND PERSONS 199–306 (rev. ed. 1987) (discussing various factors that affect identity over time).

<sup>42</sup> The clauses creating the electoral cycle have also been invoked as the basis for the rule against irrepealable legislation (i.e., the anti-entrenchment rule), which is another rule that “everyone knows” but that is hard to locate textually. *See* Julian N. Eule, *Temporal Limits on the Legislative Mandate: Entrenchment and Retroactivity*, 1987 AM. B. FOUND. RES. J. 379, 403–05 (1987); *cf.* Eric A. Posner & Adrian Vermeule, *Legislative Entrenchment: A Reappraisal*, 111 YALE L.J. 1665, 1673–83 (2002) (attacking various purported textual sources for the rule).

<sup>43</sup> *Cf.* BRUCE ACKERMAN, THE CASE AGAINST LAMEDUCK IMPEACHMENT 10–32 (1999) (arguing that democratic principles animating the Twentieth Amendment require that articles of impeachment voted by a lame-duck House expire at the end of that Congress).

<sup>44</sup> *See supra* text accompanying notes 4–10.

<sup>45</sup> *See, e.g.*, Alden v. Maine, 527 U.S. 706, 713 (1999) (“[T]he sovereign immunity of the States neither derives from, nor is limited by, the terms of the Eleventh Amendment.”); Blatchford v. Native Village of Noatak, 501 U.S. 775, 779 (1991) (“[W]e have understood the Eleventh Amendment to stand not so much for what it says, but for the presupposition of our constitutional structure which it confirms . . . .”); Addington v. Texas, 441 U.S. 418, 423–24 (1979) (stating that the rule of proof beyond reasonable doubt in criminal cases is justified “historically and without any explicit constitutional requirement”); Anderson v. Dunn, 19 U.S.

neity was thought too obvious to require explicit mention. It had been the practice in Britain that bills died unless all steps—assent by Commons, Lords, and Crown—occurred before the end of a Parliament.<sup>46</sup> And if contemporaneity was regarded as an obvious requirement, perhaps that is why the first Congress adopted rules that assume it.<sup>47</sup>

Tillman recognizes that what he is discussing has not been done before in our nation's history. Some might find this determinative, but he gives it surprisingly little weight. In his view, the long practice of contemporaneity (or the non-practice of noncontemporaneity?) is beside the point because historical practice resolves a constitutional ambiguity only when "the asserted meaning was actually contested and the non-prevailing institution acquiesced or otherwise adopted the practice."<sup>48</sup> Tillman is certainly correct that the mere absence of use of a constitutional procedure does not eliminate the procedure: the states have never called a constitutional convention as permitted by Article V, but the power still endures. He is also correct that a paradigmatic case in which one can bring in evidence of historical practice in order to settle a constitutional dispute occurs when there is a clash between two contending branches and one branch recedes in the face of the other. But surely the absence of a controversy can be somewhat illuminating too. As Tillman's hypothetical story shows, noncontemporaneous lawmaking is the sort of thing that mischievous legislators might find attractive under various electoral and

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204, 225–32 (1821) (recognizing that the House of Representatives possesses an inherent power, based on practical and historical considerations, to imprison a citizen for contempt while the House remains in session, despite the lack of any express constitutional grant of contempt authority); John O. McGinnis & Michael B. Rappaport, *The Constitutionality of Legislative Supermajority Requirements: A Defense*, 105 YALE L.J. 483, 504–05 (1995) (locating the anti-entrenchment rule in "traditional understanding[s] of the limits of legislative power" and in constitutional structure). I do not give these examples in order to endorse the particular constitutional propositions they represent but instead just to illustrate the familiarity of the method.

<sup>46</sup> Or at least that is how Americans likely would have understood British practice, based on the presentation in leading authorities. See WILLIAM BLACKSTONE, 1 COMMENTARIES \*177–82; MANUAL, *supra* note 17, § 516, at 270, § 588, at 306. Both Blackstone and Jefferson indicate that pending bills died not only at the end of a Parliament but also when the monarch closed different sessions of a single Parliament through prorogation. The fact that our system lacks a royal prerogative of suspending legislative activity does not mean, in my view, that the separate time-based limitation on the life of pending legislative business cannot be a background norm of our system. I note also that Tillman points to some departure from a rule of contemporaneity, in the form of delayed executive assent, in this country before the advent of the Constitution. Tillman, *supra* note 3, at 343–44. That differs from evidence of noncontemporaneity as regards bicameralism.

<sup>47</sup> 1 JOURNAL OF THE HOUSE OF REPRESENTATIVES 67 (July 27, 1789); 1 JOURNAL OF THE SENATE 54 (Aug. 6, 1789). As Tillman recognizes, the rules assume that both chambers contemporaneously approve of the bill because authentication by the two chambers' respective presiding officers occurs after both have passed it. Tillman, *supra* note 3, at notes 31–34 and accompanying text.

<sup>48</sup> Tillman, *supra* note 3, at 342.

political circumstances, such that prudential calculations might make it worth attempting. Why, then, has it never been tried? One reason might be that the legislators, including the long-gone legislators who were closer to ratification, always believed it was impermissible. For instance, suppose there is an inkblot on my copy of the Constitution and I therefore cannot tell whether it allows a single Senator unilaterally to increase his pay without the public knowing about it until after he is dead; the relevant text is obscured. Suppose I know that this event—the sneaky pay raise—has never happened, because many Senators have died and such pay raises have not been revealed. Maybe all of our Senators throughout history have been extremely virtuous people who never took advantage of this power. Or maybe the Senators believed the Constitution did not give them that power. Constitutional interpretation is, to be sure, not a matter of counting noses, but such consensus should lead us to question whether we are correct in embracing a novel interpretation. Absence of evidence is sometimes evidence (which is not to say conclusive evidence) of absence, notably when the evidence is expected.

#### CONCLUSION

Tillman has presented a thought-provoking argument that we are very wrong about how laws can be made. I have done my best to defend our conventional assumptions. I must admit that I am not as confident in my arguments as one might like; it is easy to convince oneself of just-so constitutional stories that justify our preconceptions, confusing the familiar with the required. Thus, we should not dismiss the possibility that the Constitution leaves some room for modes of passage that differ somewhat from those to which we are accustomed, even if we should condemn the specific scenario Tillman's impish hypothetical advisor proposes.