

ESSAY

The Obligation of Members of Congress to Consider Constitutionality While Deliberating and Voting: The Deficiencies of House Rule XII and a Proposed Rule for the Senate

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Most scholarly attention on constitutional interpretation is focused on the judicial branch and its role in our system of separation of powers. Nonetheless, constitutional interpretation should not take place solely in the courts. Rather, history suggests our Framers envisioned that members of Congress, as well as the President and the courts, would have an independent and important role to play in interpreting our Constitution. Yet this obligation has eroded such that House Speaker John Boehner, with the support of the Tea Party and his Republican colleagues, called for a “sea change” in the way the House of Representatives operates, with “a closer adherence to the U.S. Constitution.” To that end, Speaker Boehner amended House Rule XII to require members of Congress who introduce bills or joint resolutions to provide a Constitutional Authority Statement (“CAS”) outlining Congress’s authority to adopt the bill or joint resolution.

This Essay identifies, explains, and critically explores four key deficiencies in the House Rule in light of the history of constitutional interpretation in Congress, the incentives of members of Congress, and the

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realities of the legislative process. While the House Rule represents an important step in improving the quality of constitutional deliberation in Congress, it is unnecessarily bureaucratic, underinclusive, and fails to capture the importance of constitutional interpretation for all members of Congress, not just the introducers of legislation. The Rule also reflects a severely limited notion of what constitutional issues need to be considered in voting on legislation by completely ignoring constitutional infirmities involving individual rights, civil liberties, and any other potential constitutional issue aside from Congress's authority.

To address these concerns, this Essay proposes an improved rule for adoption in the Senate. The proposed rule requires a CAS for all legislation—not just bills or joint resolutions—but only when that legislation will actually receive a vote. Furthermore, the proposed rule makes it clear that all members of Congress—not just the introducer—have an individual obligation to consider the constitutionality of legislation on which they vote. Finally, the proposed Senate rule requires a CAS to include not just information about Congress's Article I authority but also to address other possible countervailing constitutional issues, like individual liberties.

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I. INTRODUCTION

There were no dissenting votes in 2006 when the U.S. Senate last voted to reauthorize the Voting Rights Act.¹ Nonetheless, on June 25, 2013, the U.S. Supreme Court decided *Shelby County v. Holder*,² which struck down section 4(b) of the Act³ and, by extension, the preclearance requirement in section 5—both key provisions of the law since its original enactment in 1965.⁴ Yet when several of the senators who had voted for the law were asked before the Court decided *Shelby County* whether they felt the law was constitutional, they neither defended their votes nor expressed any second thoughts. Rather, their consistent reaction to this question can be summarized as “that’s not my job.”

Senator Lindsey Graham of South Carolina was reported to have replied after “a long, awkward pause” that he had not “even thought about it.”⁵ “I’ll leave that to the courts,” he said, “I’m having a hard enough time being a senator, much less a Supreme Court justice.”⁶ Graham, one of the most senior members of the Senate Judiciary Committee, which thoroughly vetted the Voting Rights Act

1. 152 CONG. REC. S8012 (daily ed. July 20, 2006) (showing, in Rollcall Vote No. 212, ninety-eight senators voting in the affirmative, with no senators opposed).

2. 133 S. Ct. 2612 (2013).

3. 42 U.S.C. § 1973C (2012). The Court struck down section 4(b) of the Act, which established coverage formulas to determine which states were subject to Department of Justice preclearance based on the states’ histories of racial discrimination. *Shelby Cnty.*, 133 S. Ct. at 2631 (“[W]e [previously] expressed our broader concerns about the constitutionality of the Act. Congress could have updated the coverage formula Its failure to act leaves us no choice but to declare § 4(b) unconstitutional.”).

4. See *Extension of the Voting Rights Act of 1975: Hearings on S. 407, S. 903, S. 1297, and S. 1443 Before the Subcomm. on Constitutional Rights of the S. Comm. of the Judiciary*, 94th Cong. 75 (1975) (statement of Arthur Flemming, U.S. Comm. on Civil Rights) (“Section 5 [of the Voting Rights Act], the provision requiring preclearance of changes in electoral laws . . . has become the centerpiece of the act.”); see also Pamela S. Karlan, *Georgia v. Ashcroft and the Retrogression of Retrogression*, 3 ELECTION L.J. 21, 21 (2004) (“Section 5 of the Voting Rights Act of 1965 has served as a major legal engine for transforming American democracy over the last forty years.”).

5. Sahil Kapur, *Republican Senators Bob and Weave on Voting Rights Act*, <http://perma.cc/W7SZ-XFR7> (talkingpointsmemo.com, archived Feb. 6, 2014).

6. *Id.*

reauthorization bill before sending it to the floor,⁷ was not alone. His close ally John McCain, the senior senator from Arizona, said, “I haven’t—I’m worried about other things.”⁸ And Tennessee Senator Lamar Alexander similarly disclaimed responsibility for having an answer to this sort of question, saying, “No, I am not going to try to be a Supreme Court [justice] and Senator at the same time.”⁹ And to the follow-up question as to whether he thought the provision was constitutional, Alexander simply reiterated, “That’s the question before the Supreme Court,”¹⁰ almost as if it would be improper for him to comment on this point while the Court was reviewing the law.

Now in fairness, these questions were asked of these senators on the fly. As I well recall from eighteen years of facing similar spontaneous inquiries, reporters asked these questions as part of “the ambush” that always occurs when senators emerge from their Tuesday party caucus lunches in the Capitol. Interesting, though, is that a question that could have been easily and probably inconsequentially met with oft-used dodges such as “no comment” or “I’ll have my press secretary get back to you,” was instead handled with the firm suggestion that the question was misdirected when posed to a member of the legislative branch. Apparently this issue of constitutionality was solely the province of the nine Justices whose majestic building could be seen through the windows near the elevators into which each senator disappeared after speaking to the reporter.

The lack of senatorial interest in the constitutionality of measures on which they cast votes is perhaps no great surprise to observers of modern Congresses.¹¹ As of the commencement of the 112th

7. See S. REP. No. 109-295, at 2 (2006) (concluding, on behalf of the Senate Judiciary Committee, that “the Voting Rights Act is still necessary,” and considering the law’s impact in-depth).

8. Kapur, *supra* note 5.

9. *Id.*

10. *Id.*

11. Various scholars and commentators have noted the decline in constitutional interpretation in Congress. See, e.g., Abner Mikva, *How Well Does Congress Support and Defend the Constitution?*, 61 N.C. L. REV. 587, 588 (1983) (“[T]he legislature has for the most part . . . left constitutional judgments to the judiciary. This willingness to step aside has been due in part to institutional pressures and in part to political convenience.”); Hanah Metchis Volokh, *Constitutional Authority Statements in Congress*, 65 FLA. L. REV. 173, 181 (2013) (noting that “[t]he balance in constitutional interpretation has shifted heavily toward the courts over the past two hundred years”). For a review of the history of early constitutional interpretation in Congress, see DAVID P. CURRIE, *THE CONSTITUTION IN CONGRESS* 120 n.27 (1997) (citing numerous early congressional debates regarding the meaning of the Constitution); Eugene W. Hickok, Jr., *The Framers’ Understanding of Constitutional Deliberation in Congress*, 21 GA. L. REV. 217, 218, 260 (1986) (examining the constitutional deliberation and debate process from 1787 through the First Congress).

Congress in January 2011, however, this is somewhat ironic. While Republican members in the House vowed to renew focus on the constitutionality of legislation, their allies in the Senate appeared to take a very different tack by declining to assess the constitutionality of the Voting Rights Act. Even before formally taking the reins, the new House leadership, headed by Speaker-elect John Boehner of Ohio, announced a series of changes to the House Rules. They claimed to offer a “sea change” in the way the House operates, leading to “greater openness, deliberation, efficiency and *a closer adherence to the U.S. Constitution.*”¹² This change included the adoption of a House rule requiring all bills and joint resolutions to include, at the time of introduction, a Constitutional Authority Statement (“CAS”) outlining the source of Congress’s constitutional authority to adopt the legislation.¹³

This approach was a natural outgrowth of the Republican Party’s highly effective political message from 2010, which was fueled by the Tea Party’s emergence in late 2008 and 2009.¹⁴ The proposed changes were drawn from the Tea Party manifesto known as the *Pledge to America*,¹⁵ which Boehner said represented “the promises . . . [t]o change the way Washington works.”¹⁶ A central theme of the political attack on the new Obama Administration was that the Administration’s push for healthcare reform, as well as other measures, grossly exceeded the federal government’s powers under the Constitution.¹⁷ Indeed, on several occasions in 2009 at the town meetings I held in Wisconsin, I was confronted for the first time in over fifteen years with the question, “Have you ever read the Constitution?”

12. Chad Pergram, *House GOP to Require Legislation Meet Constitutional Standard*, <http://perma.cc/DN4H-DD54> (foxnews.com, archived Feb. 6, 2014) (emphasis added).

13. HOUSE RULE XII 7(c)(1) (112th Cong.) (“A bill or joint resolution may not be introduced unless the sponsor submits for printing in the Congressional Record a statement citing as specifically as practicable the power or powers granted to Congress in the Constitution to enact the bill or joint resolution.”).

14. See Phillip Rucker & Krissah Thompson, *Constitution Is Focus of New GOP House Rules*, WASH. POST, Dec. 30, 2010, at A01, available at <http://perma.cc/ZHJ8-R75A> (“[The House] will require that every new bill contain a statement by the lawmaker who wrote it citing the constitutional authority to enact the proposed legislation. Call it the tea party-ization of Congress.”).

15. *A Pledge to America*, <http://perma.cc/L68Y-5K6P> (gop.gov, archived Feb. 6, 2014).

16. John Boehner, *America It’s Your Turn to Speak Out*, <http://perma.cc/5266-G2YD> (speaker.gov, archived Feb. 6, 2014).

17. See, e.g., Ilya Shapiro, *President Obama’s Top 10 Constitutional Violations*, <http://perma.cc/R6RA-XX2F> (dailycaller.com, archived Feb. 6, 2014) (arguing that “[t]he Obama administration and its allies in Congress have perpetrated more than their share of such mob-like actions” and outlining ten alleged constitutional violations by the Obama administration).

As chairman or ranking member of the Constitution Subcommittee of the Senate Judiciary Committee throughout the two presidential terms of George W. Bush, I had never gotten that question. I was generally assumed to be very focused on constitutional matters, such as the constitutionality of the USA Patriot Act and President Bush's warrantless wiretapping program. But these were not the types of concerns of the Tea Party constituents who questioned me. Consistent with these sentiments, one of the first acts of the new House majority was to amend House Rule XII to prohibit members from introducing a bill or a joint resolution without "a statement citing as specifically as practicable the power or powers granted to Congress in the Constitution to enact [it]."¹⁸

In a December 2010 memorandum sent to all prospective members of the 112th Congress, the House majority's leadership-elect outlined the new requirements in some detail, with the goal of providing "early guidance for complying with this rule."¹⁹ The memorandum announced staff briefings on the proposed rule, revealed the rule's full text, and provided a proposed CAS form to be completed and signed whenever a member introduces a bill.²⁰ It also gave possible sources to assist members in "determining a bill's constitutional authority," along with answers to a series of frequently asked questions about how this is to be achieved.²¹ For example, one question was, "Isn't it the courts' duty to determine whether a law is constitutional and thus doesn't this rule infringe on the power of the courts?"²² The answer begins with a crisp "No." It follows with the statement, "While the courts have the power to overturn an Act of Congress on the basis that it is unconstitutional, Members of Congress have a responsibility, as clearly indicated by the oath of office each Member takes, to adhere to the Constitution."²³

Although some critics have suggested that this new House rule is symbolic at best and meaningless at worst,²⁴ it has generated some

18. HOUSE RULE XII 7(c)(1) (112th Cong.).

19. Memorandum from John Boehner, Speaker-Designate, U.S. House of Representatives, *New Constitutional Authority Requirement for Introduced Legislation* (Dec. 17, 2010), available at <http://perma.cc/7B65-D9UG>.

20. COMM. ON RULES, HOUSE OF REPRESENTATIVES, TEXT AND SECTION-BY-SECTION ANALYSIS OF THE 112TH CONGRESS HOUSE RULES PACKAGE (2011), available at <http://perma.cc/S848-VMUZ>.

21. *Id.*

22. *Id.*

23. *Id.*

24. Abby Brownback & Louis Jacobson, *Lawmakers Abiding by New Constitutional-Justification Rule*, <http://perma.cc/K8AJ-SKUN> (politifact.com, archived Feb. 6, 2014) ("Frankly,

interesting discourse in the House on specific pieces of legislation.²⁵ Rather than being “trivial,”²⁶ the House Rule appears to have opened the door for members of Congress to fulfill a role that most scholars believe was intended to be every bit as obligatory on members of Congress as on members of the judiciary.²⁷ The early scholarship on these new CASs shows substantial compliance with the new rule, with

this is just symbolic, so I have no real feelings one way or the other,’ said Norman Ornstein, a congressional scholar at the conservative American Enterprise Institute.”).

25. For example, Volokh, *supra* note 11, considers a lengthy colloquy between Representatives Anthony Weiner, Henry Waxman, Frank Pallone, and Tom Price discussing the sufficiency of a simple statement that, because the law repealed an unconstitutional law, it was therefore constitutional.

26. Brownback & Jacobson, *supra* note 24 (“David W. Rohde, a Duke University political scientist, added, ‘If you had a category for Promise Kept But Utterly Trivial, it would fit.’”).

27. Most argue that more robust consideration of constitutional issues by members of Congress is desirable either for our system of separation of powers or as a constitutional duty emanating from the oath of office. See, e.g., Larry Alexander & Frederick Schauer, *On Extrajudicial Constitutional Interpretation*, 110 HARV. L. REV. 1359, 1360 (1997) (noting that “[a]ccording to what appears to be the dominant view, nonjudicial officials, in exercising their own constitutional responsibilities, are duty-bound to follow the Constitution as they see it—they are not obliged to subordinate their constitutional judgments to what they believe are the mistaken constitutional judgments of others”); Paul Brest, *Congress as Constitutional Decisionmaker and Its Power to Counter Judicial Doctrine*, 21 GA. L. REV. 57, 62–64 (1986) (offering an argument as to why Congress has “some responsibility to interpret the Constitution” based on the structure of separation of powers and the existence of constitutional questions outside the authority of the judiciary); Louis Fisher, *Constitutional Interpretation by Members of Congress*, 63 N.C. L. REV. 707, 718–23 (1985) (arguing, *inter alia*, that members of Congress have a duty to interpret the Constitution, which emanates from their oath of office); Mark Tushnet, *Some Notes on Congressional Capacity to Interpret the Constitution*, 89 B.U. L. REV. 499, 499–500 (2009) (arguing that, while Congress’s capacity to interpret the Constitution is “larger than one might think,” it is nevertheless “not . . . as large as one would like” and suggesting some structural innovations to improve Congress’s capacity). But see David P. Currie, *Prolegomena for a Sampler: Extrajudicial Interpretation of the Constitution 1789-1861*, in CONGRESS AND THE CONSTITUTION 18, 19 (Neal Devins & Keith Whittington eds., 2005) (noting that “[w]hen we study *Marbury v. Madison*, we learn that [Chief Justice Marshall’s argument that because judges swear an oath to uphold the Constitution, they must strike down unconstitutional legislation] is hollow: that an officer swears to do his constitutional duty does not tell us what that duty is”); Mark Tushnet, *The Constitution Outside the Courts: A Preliminary Inquiry*, 26 VAL. U. L. REV. 437, 437–38 (1992) (noting the existence of this oath argument and suggesting that, “[o]f course non-judicial officials must follow the Constitution, but to say that is to say little. The interesting question is, how should non-judicial officials go about following the Constitution?”). Nonetheless, not all believe constitutional interpretation by nonjudicial actors is desirable, at least insofar as it conflicts with judicial supremacy. See Alexander & Schauer, *supra* note 27, at 1362 (offering a defense of *Cooper v. Aaron* and judicial supremacy in constitutional interpretation “without qualification”). Interestingly, the original oath took a different form than the current oath, which was adopted following the Civil War. See Vic Snyder, *You’ve Taken an Oath to Support the Constitution, Now What? The Constitutional Requirement for a Congressional Oath of Office*, 23 U. ARK. LITTLE ROCK L. REV. 897, 897 (2001) (discussing the lineage of oaths of office throughout our nation’s history).

such statements “suddenly flowing through Congress at the rate of several hundred per month.”²⁸

While the constitutional inquiry inspired by this rule is a positive development, the House Rule is inadequate in at least four respects. First, the House Rule only covers the introduction of legislation.²⁹ Because thousands of bills are introduced that never advance through the legislative process, requiring a CAS at the introduction of a bill is unnecessary and bureaucratic. Second, the House Rule only addresses introduced legislation and ignores the crucial role that amendments often play in the legislative process. Amendments can (and often do) introduce entirely new and unrelated policy changes the original bill did not include.³⁰ Third, the House Rule addresses the interpretive obligation of a bill’s initiator but fails to address every other member’s independent obligation to consider the constitutionality of legislation or amendments.³¹ Since part of the House Republicans’ rationale for their Rule is that the oath of office is taken by each member of Congress individually,³² the Rule should also apply to each individual vote by a member of Congress.

Last and perhaps most critical, the House Rule only requires members to give a constitutional *justification* for proposed legislation based on Congress’s authority (usually under Article I).³³ However, this is a severely limited notion of the full obligation of members of Congress to consider constitutionality. Each member must additionally consider

28. Volokh, *supra* note 11, at 174.

29. HOUSE RULE XII 7(c)(1) (112th Cong.) (“A bill or joint resolution may not be *introduced* unless the sponsor submits for printing in the Congressional Record a statement . . .” (emphasis added)).

30. The reason for this is the absence of a germaneness requirement for amendments under most circumstances in the Senate. As a result, amendments to most bills need not have any relationship whatsoever to the underlying purpose of the bill as introduced. See VALERIE HEITSHUSEN, CONG. RES. SERV., 96-548, *THE LEGISLATIVE PROCESS IN THE SENATE* 6 (2013) (“The rules impose a germaneness requirement only on amendments to general appropriations and budget measures and to matters being considered under cloture, and various statutes impose such a requirement on a limited number of other bills.”).

31. *Id.* at 7 (“The right to offer non-germane amendments is extraordinarily important because it permits Senators to present issues to the Senate for debate and decision, without regard to the judgments of the Senate’s committees or the scheduling decisions and preferences of its majority leader.”).

32. Memorandum from John Boehner, *supra* note 19, at 4:

Q. Isn’t it the courts’ duty to determine whether a law is constitutional and thus doesn’t this rule infringe on the power of the courts?

A. No. While the courts have the power to overturn an Act of Congress on the basis that it is unconstitutional, Members of Congress have a responsibility, *as clearly indicated by the oath of office* each Members takes, to adhere to the Constitution.

(emphasis added).

33. U.S. CONST. art. I.

other constitutional limiting principles, such as civil liberties enshrined in the Bill of Rights, in addition to the source of congressional power. A bill that runs afoul of the Fourth Amendment's proscription on "unreasonable searches and seizures," the Eighth Amendment's bar on "cruel and unusual punishment," or the Second Amendment's protection of the "right to bear arms" would still pass constitutional muster under the House Rule so long as that bill merely cites a source of constitutional authority for its enactment.

This flaw in the House Rule is not only a problem of incompleteness, but also one of imbalance. While conservatives often criticize social legislation as unconstitutional because it is outside the scope of Congress's specifically enumerated powers, progressives and liberals are perhaps more prone to criticize the constitutional flaws of legislation that restricts civil rights or civil liberties. By merely requiring a statement describing *the source* of Congress's constitutional authority but not *a limit* to that authority, the House Rule addresses at best only half of the constitutional equation. Of the various infirmities in the House Rule, this issue most threatens the rule's credibility as a serious attempt to encourage members of Congress carefully to consider whether their actions as elected representatives of the people are fully constitutional.

The purpose of this Essay is to reevaluate the House Rule in light of these objections and to make the case for adopting an analogous rule on CASs in the Senate. In so doing, however, I point out that, while the House Rule opens the door to this kind of inquiry, its shortcomings should be remedied in any Senate rule. A new rule should oblige senators to consider the constitutionality of legislation throughout the *entire* legislative process. To that end, this Essay concludes with a draft rule that both addresses the House Rule's inadequacies and makes senators' constitutional obligations unambiguous from the outset of their senatorial careers.

This Essay proceeds in four parts. Part II discusses both the history and decline of constitutional interpretation in Congress. Part III illustrates both commonly noted and previously unnoticed aspects of the legislative branch's constitutional interpretation by relying on three examples from my personal experience as a federal and state legislator: the debates over the Communications Decency Act of 1995,³⁴ federal

34. The Communications Decency Act is also sometimes known as the "Exon Amendment," or "Exon-Coats," as the law began as an amendment introduced by Sen. James Exon (D-Neb.), and was later reconciled into a joint amendment with language proposed by Sen. Dan Coats (R-Ind.), to the Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 133 (1996) (codified

and state hate crimes legislation, and the meaning of the Second Amendment prior to *District of Columbia v. Heller*.³⁵ Part IV attempts to generalize and offer some guidelines for how members of Congress should consider constitutional questions. Lastly, Part V proposes a new Senate rule with two main purposes: (1) to make a limited level of constitutional consideration mandatory prior to voting on legislation and (2) to guide members of Congress in analyzing constitutional questions.

II. THE HISTORY AND ORIGINS OF CONGRESSIONAL INTERPRETATION OF THE CONSTITUTION

A. *Constitutional Interpretation in Early Congresses and the Origins of a Member's Interpretive Duty*

The House Rule instituted in January 2011 by the newly elected Tea Party faction appears to be the first explicit requirement in congressional history for members to justify the constitutionality of the actions they take.³⁶ From the first Congress, however, such a requirement was understood to be part and parcel of a representative's or senator's duties.³⁷ In fact, in the Framers' eyes, each of the three branches (not just the judiciary) was obligated to uphold, interpret, and explicate the Constitution. For instance, James Madison, in an early debate when he was a member of the House, famously declared:

The Constitution is the charter of the people to the Government; it specifies certain great Powers as absolutely granted, and marks out departments to exercise them. If the constitutional boundary of either be brought into question, I do not see that any one of

as amended at 47 U.S.C. § 223(a)–(e) (2012)). See Exon Amendment No. 1268, 141 CONG. REC. S8120 (daily ed. June 9, 1995).

35. 554 U.S. 570, 570 (2008) (holding that the Second Amendment guaranteed an individual the right to possess a firearm for traditionally lawful purposes like self-defense).

36. At least this is the first example of a universal rule applying to all members of Congress. Nonetheless, as Volokh, *supra* note 11, at n.7, notes, "During the 105th through 111th Congresses (1997-2010), the House of Representatives required that most committee reports must 'include a statement citing the specific powers granted to the Congress in the Constitution to enact the law proposed by the bill or joint resolution.'" See H.R. Res. 5, § 13, 105th Cong. (1997) (adopting rules for the 105th Congress).

37. See Hickok, *supra* note 11, at 217–18 (arguing that, "in the discussions at the Constitutional Convention in 1787, in the essays in *The Federalist*, and during early sessions of Congress, those who helped to craft the Constitution described a Congress that would actively participate in constitutional debate as it deliberated on national issues" without noting an explicit statement that Congress should or must participate in these debates). See also, DAVID P. CURRIE, THE CONSTITUTION IN CONGRESS 120 nn.25–27 (1997) (citing examples of active Congressional debates regarding the constitutionality of exemptions for conscientious objectors from military service, presidential removal of executive officers, and the national bank).

these independent Departments has more right than another to declare their sentiments on the point.³⁸

Apparently some early attempts by members of Congress to suggest that questions of constitutionality should be left to the courts were “quickly shouted down.”³⁹

The Framers did not explicitly instruct members of Congress that they should deliberate over constitutionality. Yet as Eugene Hickok pointed out in his article *The Framers' Understanding of Constitutional Deliberation in Congress*, discussions at the Constitutional Convention, in the Federalist Papers, and in the earliest Congresses all envision a legislative branch “that would actively participate in constitutional debate as it deliberated on national issues.”⁴⁰ In fact, discussions of constitutionality in the congressional debates of that era were so frequent that one commentator said, “Constitutional questions cropped up in the House and Senate every time someone sneezed,” and, “One has the impression [members of Congress] must have had copies of the document at their elbows at all times.”⁴¹ While legislators did not question that the judiciary had a role in determining the constitutionality of federal laws,⁴² they saw the two branches' responsibilities in this regard as coequal.⁴³ Similarly, in determining whether a federal law was valid, the courts of this era

38. 1 ANNALS OF CONG. 520 (1789) (Joseph Gales & William Winston Seaton eds., 1834) (statement of Rep. James Madison).

39. David P. Currie, *Prolegomena for a Sampler: Extrajudicial Interpretation of the Constitution 1789-1861*, in CONGRESS AND THE CONSTITUTION 18, 19–20 (Neal Deavins & Keith Whittington eds., 2005). Currie surveys the early Congressional debates and concluding that:

Indeed in the early Congress occasional speakers suggested that questions as to the constitutionality of proposed legislation should be left to the courts, but they were quickly shouted down; from the first it was understood that legislative and executive officers had a parallel responsibility to determine in the first instance the extent of their own powers.

Id.

40. See Hickok, *supra* note 11, at 217–18.

41. CURRIE, *supra* note 37, at 116, 118.

42. See, e.g., 1 ANNALS OF CONG. 457 (1789) (statement of Rep. James Madison) (“[I]ndependent tribunals of justice will consider themselves in a peculiar manner the guardians of [the Bill of Rights, and] they will be an impenetrable bulwark against every assumption of power in the legislative or executive”); 2 ANNALS OF CONG. 1988 (1791) (statement of Rep. Smith) (“He had never been so absurd as to contend, as the gentleman had stated, that whatever the Legislature thought was expedient, was therefore constitutional,” and that “it was still within the province of the Judiciary to annul the law, if it should be by them deemed not to result by fair construction from the powers vested by the Constitution.”).

43. See Larry Kramer, *Marbury and the Retreat from Judicial Supremacy*, 20 CONST. COMMENTARY 205, 212–13 (2004) (noting that early approaches to judicial review drew on the idea of ‘departmentalism,’ “which recognized that all three branches might have a say, though . . . [i]t did not follow, however, that judicial decisions should . . . acquire any special stature”).

routinely deferred to legislative judgments on the law's constitutionality.⁴⁴

Discussion of Congress's proper role in interpreting the Constitution began with the First Congress, eventually coalescing into Jefferson's and Hamilton's competing views regarding whether Congress or the courts bore the responsibility of limiting legislative power through constitutional interpretation. Jefferson supported a system of coordinate construction, in which "each of the three departments has equally the right to decide for itself what is its duty under the Constitution, without any regard to what the others may have decided for themselves under a similar question."⁴⁵ Hamilton was more wary of a legislator's ability to adjudge the limits of his own power and argued that courts had to exercise a hierarchical constitutional review to check legislative power and protect against the tyranny of the majority.⁴⁶ For the first hundred years, the Jeffersonian view prevailed, and Congress spent a considerable amount of time debating the constitutional limitations on its legislation.⁴⁷

44. Indeed, Supreme Court Justice Bushrod Washington, himself the nephew of George Washington, voiced one of the earliest examples of this deference when he stated the job of the court in reviewing a congressional enactment was to "presume in favour of [the law's] validity, until its violation of the constitution is proved beyond all reasonable doubt." *Ogden v. Saunders*, 25 U.S. (12 Wheat.) 213, 270 (1827). Nonetheless, the presumption of constitutionality was not always worded so broadly as Washington's formulation. See *Fletcher v. Peck*, 10 U.S. (6 Cranch) 87, 128 (1810) (stating that, when reviewing a statute, "[t]he opposition between the constitution and the law should be such that the judge feels a clear and strong conviction of their incompatibility with each other"). Regardless, both formulations read as quite deferential to congressional prerogatives. Relatedly, some have argued that the practice of judicial deference to Congress is "rooted, at bottom, in the [courts'] faith [in] Congress to make adequate constitutional judgments." Neal Kumar Katyal, *Legislative Constitutional Interpretation*, 50 DUKE L.J. 1335, 1355 (2001). If Congress cannot be trusted seriously to consider the constitutionality of legislation, then such judicial deference to Congress may be unjustified.

45. Letter from Thomas Jefferson to Judge Spencer Roane Poplar Forest (Sept. 6, 1819), available at <http://perma.cc/7CS5-PXMF>.

46. THE FEDERALIST NO. 78, at 467 (Alexander Hamilton) (Clinton Rossiter ed., 1961):

If it be said that the legislative body are themselves the constitutional judges of their own powers, and that the construction they put upon them is conclusive upon the other departments, it may be answered, that this cannot be the natural presumption . . . It is far more rational to suppose, that the courts were designed to be an intermediate body between the people and the legislature.

47. Fisher, *supra* note 27, at 710 (citing 1 ANNALS OF CONG. 500 (1789)). The 1789 removal-power debate and the Bank debate were some of the earliest examples of congressmen seeking to fulfill their duties to uphold the Constitution. During the removal debate, James Madison argued:

The Constitution is the charter of the people to the Government; it specifies certain great powers as absolutely granted, and marks out the departments to exercise them. If the Constitutional boundary of either be brought into question, I do not see that any one of these independent departments has more right than another to declare their sentiments on that point.

The extensive congressional debates on the constitutionality of proposed legislation for the first few decades of the nation's history are documented in David P. Currie's four-volume analysis of the Constitution in Congress. The topics of such debates ranged from the profound (e.g., the battle over the Bank of the United States) to the trivial (e.g., how the Vice President, who was also the President of the Senate, should refer to himself in documents or whether the necessary and proper authority permitted Congress to prescribe the oath to be taken by state officials).⁴⁸ Furthermore, as Currie notes, members of Congress took seriously their responsibility of constitutional interpretation by incorporating originalist, purposive, textual, and many other methods of interpretation.⁴⁹

*B. The Decline of Constitutional Interpretation by
Members of Congress*

After the Civil War, the volume of federal regulation increased, doctrine grew more complex, and other demands on individual legislators' time grew.⁵⁰ In practice more than by conscious choice, Congress slowly ceded its authority to judge the constitutionality of legislation first to the Judiciary Committee and then to the courts. Nonetheless, the tradition of considering constitutionality remained robust until well into the twentieth century. But, as Paul Brest noted in *Congress as Constitutional Decisionmaker and Its Power to Counter Judicial Doctrine*, the latter parts of the twentieth century were markedly different:

Fewer members were expounding the Jeffersonian appeal for independent search for principles by Congress. More and more were asserting that doubts concerning constitutionality must be substantial to justify opposition to a measure, especially a

Speech by James Madison to the House of Representatives on the Removal Power of the President (June 17, 1789), in 12 THE PAPERS OF JAMES MADISON 232, 238 (Robert A. Rutledge et al. eds., 1979).

48. See, e.g., CURRIE, *supra* note 37, at 11–12 (discussing a controversy between Senator Maclay and then-Vice President John Adams over the appropriate title the Vice President should use in signing Senate documents. Eventually Adams acquiesced to sign the documents as “Vice President of the United States and President of the Senate,” rather than his earlier “Vice President.” Senators felt the use of the term Vice President unduly interjected the Executive into Congressional debates); *id.* at 13–15 (recounting a debate regarding whether or not the necessary and proper authority permitted Congress to prescribe the oath to be taken by state as well as federal officials).

49. *Id.* at 117 (“Most of the tools of construction we recognize today were employed in [early constitutional debates in Congress]: text, structure, history, purpose, practice, and the avoidance of absurd consequences.”).

50. Brest, *supra* note 27, at 85 (citing DONALD G. MORGAN, CONGRESS AND THE CONSTITUTION (1966)).

politically attractive measure, on constitutional grounds. . . . By the second half of the twentieth century, both the House and the Senate had abandoned the tradition of deliberating over ordinary constitutional issues.⁵¹

Scholars have identified two catalysts for legislators' abdication of their interpretive responsibility: (1) the rise of judicial supremacy and with it a hierarchical (as opposed to coordinate) view of each branch's interpretative powers;⁵² and (2) the institutional and political pressures that have made interpretation more complex, logistically challenging, and politically risky.⁵³

Chief Justice Marshall's famous statement that it is the "province and duty of the judicial department to say what the law is"⁵⁴ is often cited by proponents of judicial supremacy in constitutional interpretation. This view, however, rests on a highly contestable reading of *Marbury*,⁵⁵ and judicial supremacy was not cemented until at least *Cooper v. Aaron* in 1958.⁵⁶ Nonetheless, this formulation of separation of powers has proved politically expedient at times in our nation's history when Congress wished to pass popular legislation and deflect public anger onto unelected judges in the event the legislation was ultimately found to be unconstitutional.⁵⁷ In fact, this "abdication by choice" explanation for Congress's passing the buck to the Court may be more plausible than some notion of reasoned deference to the Court's "appropriate" primacy in this realm.

Serious dialogue on complex constitutional issues has become increasingly difficult over the past several decades. The sheer volume and technical complexity of today's legislation may prevent members

51. *Id.*

52. Rachel E. Barkow, *More Supreme than Court? The Fall of the Political Question Doctrine and the Rise of Judicial Supremacy*, 102 COLUM. L. REV. 237, 240 (2002).

53. Mikva, *supra* note 11, at 609.

54. *Marbury v. Madison*, 5 U.S. (1 Cranch.) 137, 177 (1803).

55. See, e.g., Kramer, *supra* note 43, at 214:

Read in context, this sentence did not say what, to modern eyes, it seems to say when read in isolation. That is it did not say "it is the job of courts, alone, to say what the Constitution means." . . . What it said was "courts, too, can say what the Constitution means."

56. 358 U.S. 1, 18 (1958) ("[*Marbury*] declared the basic principle that the federal judiciary is supreme in the exposition of the law of the Constitution, and that principle has ever since been respected by this Court and the Country as a permanent and indispensable feature of our constitutional system.").

57. For example, during the debate surrounding a bill to stabilize the flagging coal industry in 1935, President Roosevelt urged precisely this argument on a member of the House, stating that "the situation is so urgent and the benefits of the legislation so evident that all doubts should be resolved in favor of the bill, leaving to the courts, in an orderly fashion, the ultimate question of constitutionality." Letter from President Franklin D. Roosevelt to Representative Samuel B. Hill (July 6, 1935), available at <http://perma.cc/Q4RY-JZ7F>.

from fully understanding or reading each bill.⁵⁸ Further, the pressure to raise funds begins on day one of a legislator's term of office, thereby reducing what little time a member actually spends in Washington interacting with colleagues. Legislators' physical absence from the legislative floor has reduced previously spirited debate to speeches before empty chambers. Unfortunately, members of Congress lack not only the time and technical sophistication to fully understand each bill but also the political incentive to inquire into the constitutionality of each piece of legislation.⁵⁹ For example, members are likely quickly to rubber-stamp a bill that condemns hateful speech or strengthens the national security apparatus in a time of war, despite the serious constitutional questions it may raise. Members are often pressured either to vote the party line or to take the safe political route, thereby ignoring the constitutional infirmities of otherwise popular bills.

III. EXAMPLES OF CONSTITUTIONAL INTERPRETATION IN CONGRESS: THE CHALLENGES FOR LEGISLATORS

There are, however, situations in which serious consideration of constitutional matters can be dispositive to a member's vote. While the experience of an individual member of Congress with constitutional issues will vary depending on his interests and committee assignments, several common situations are likely to arise. Among these are the problems of how a member should approach voting on clearly unconstitutional legislation, what members should do if they disagree with the constitutional interpretation reached by the courts, and how to deal with constitutional questions for which the courts have not provided clear answers. In this Part, I briefly describe my own experience in both the Wisconsin State Senate and the U.S. Senate to illustrate the dilemmas.

58. Mikva, *supra* note 11, at 609.

59. *Id.* Mikva, a former judge and member of Congress, argues that besides the institutional difficulty of considering the constitutionality of each piece of legislation, politics highly incentivizes members to pass on constitutional issues to the courts:

Constitutional issues often present the most difficult value conflicts in society. The very knowledge that the courts are there, as the ultimate nay-sayers, increases the tendency to pass the issue on, particularly if it is politically controversial. Such behavior by Congress is both an abdication of its role as a constitutional guardian and an abnegation of its duty of responsible lawmaking.

Id.

*A. The Communications Decency Act: Voting on Clearly
Unconstitutional Legislation*

A key test of a member of Congress's obligation to consider the constitutionality of legislation occurs when he or she encounters a law that is clearly unconstitutional. While doctrines like the presumption of constitutionality⁶⁰ and, to a lesser extent, the constitutional avoidance canon⁶¹ are premised on the notion that members of Congress are unlikely to pursue clearly unconstitutional legislation, there are in fact many examples to the contrary.⁶²

For instance, in 1996, the Senate considered and ultimately passed the Communications Decency Act ("CDA")⁶³ by an 84–16 vote.⁶⁴ The CDA was actually an amendment to the Telecommunications Act of 1996, introduced by Senator James Exon of Nebraska, which attempted to regulate indecency and obscenity on the Internet.⁶⁵ While the CDA certainly attempted to address an issue of public concern at the time, it nonetheless raised serious First Amendment issues.⁶⁶ Chief

60. See, e.g., *Fletcher v. Peck*, 10 U.S. (6 Cranch) 87, 128 (1810) (stating that when reviewing a statute, "[t]he opposition between the constitution and the law should be such that the judge feels a clear and strong conviction of their incompatibility with each other"); see also *Ogden v. Saunders*, 25 U.S. (12 Wheat.) 213, 270 (1827) (stating that the job of the court in reviewing a congressional enactment was to "presume in favour of [the law's] validity, until its violation of the constitution be proved beyond a reasonable doubt").

61. Some have argued that the constitutional avoidance canon serves as effective shorthand for courts attempting to discern legislative intent. So, the argument goes, Congress would not intend to pass a statute that is unconstitutional, therefore when meaning is unclear, we should presume Congress intended the less constitutionally doubtful interpretation. See Trevor W. Morrison, *Constitutional Avoidance in the Executive Branch*, 106 COLUM. L. REV. 1189, 1203–04 (2006) (arguing that this follows from the "presumption that members of Congress, as part of a coordinate branch of government, have kept their oaths to uphold the Constitution"). Nevertheless, some have expressed skepticism at this argument. See, e.g., HENRY J. FRIENDLY, BENCHMARKS 210 (1967) (stating that "[i]t does not seem in any way obvious . . . that the legislature would prefer a narrow construction which does not raise constitutional doubts," because "there is always the chance, usually a good one, that the doubts will be settled favorably, and if they are not, the conceded rule of construing to avoid unconstitutionality will come into operation and save the day").

62. See, e.g., *United States v. Eichman*, 496 U.S. 310, 318–19 (1990) (striking down a federal law passed following the Supreme Court's earlier decision in *Texas v. Johnson*, 491 U.S. 397 (1988), which held that statutes criminalizing flag desecration violated the First Amendment).

63. The Communications Decency Act, Pub. L. No. 104-104, 110 Stat. 133 (1996) (codified as amended at 47 U.S.C. §§ 230, 560–61 (2012)).

64. 141 CONG. REC. S8347 (1996) (daily ed. June 14, 1995).

65. See Exon Amendment No. 1268, 141 CONG. REC. S8120 (daily ed. June 9, 1995) (regulating obscenity on the internet).

66. See, e.g., Robert Cannon, *The Legislative History of Senator Exon's Communications Decency Act: Regulating Barbarians on the Information Superhighway*, 49 FED. COMM. L.J. 51, 75–88 (1996) (reviewing some of the constitutional concerns regarding the bill).

among them was the risk that the law was overly broad and failed to utilize the “least restrictive means” for regulating indecent speech; as a result, the law might infringe other categories of protected speech.⁶⁷ While several of us raised these and other concerns in the floor debate over the CDA,⁶⁸ the amendment was ultimately adopted. Although our concerns were vindicated when the Supreme Court unanimously struck down the indecency provisions in *Reno v. ACLU*,⁶⁹ the failure of most senators to take the constitutional issues seriously was troubling. Proponents’ responses to the constitutional questions we raised were perfunctory at best.⁷⁰ Moreover, the bill’s opponents failed to engage with arguments concerning constitutionality.

There are several reasons why many senators were willing to overlook the obvious constitutional problems with the CDA. First, the bill was popular. Even if members of Congress explains their opposition to the bill on constitutional grounds, a vote against the CDA obviously could be (and would be, by future political opponents) easily recast as a vote against protecting children from pornography and indecency. These concerns are not unique to this context and undoubtedly influence debates over other popular yet clearly unconstitutional legislation, like the debate over a prohibition against flag burning

67. The least-restrictive-means approach to indecent communications permits the government to “regulate the content of constitutionally protected speech in order to promote a compelling interest if it chooses the least restrictive means to further the articulated interest.” *Sable Commc’ns v. FCC*, 492 U.S. 115, 126 (1989); *see also FCC v. Pacifica*, 438 U.S. 726, 729 (1978) (holding that the FCC did have the power to “regulate a radio broadcast that is indecent but not obscene”).

68. *See, e.g.*, 141 CONG. REC. S8334–37 (daily ed. June 14, 1995) (statement of Sen. Feingold) (discussing *Sable* and *Pacifica*, and arguing that those cases foreclosed the approach taken in the CDA); *id.* at S8340–44 (statement of Sen. Leahy) (outlining several legal arguments that the law as proposed was unconstitutionally vague and overbroad); *see also id.* at S8345–46 (statement of Sen. Biden) (noting problems with the least-restrictive-means test for the constitutionality of regulations of protected speech, and arguing that, “[i]f the [CDA] passes, we will have mountains of litigation over its constitutionality, dragging on for years and years—and all the while our kids will be doing what they do best; finding new and better ways to satisfy their curiosity.”); *id.* at S8346 (statement of Sen. Leahy) (again arguing that the CDA is unconstitutional).

69. 521 U.S. 844, 885 (1997).

70. For instance, Senator Exon merely opined that “[t]he principles I have proposed in the Communications Decency Act are simple and constitutional,” and that he would have no motivation for support the legislation if he thought that “in the very near future [it would be] declared unconstitutional by the Supreme Court.” 141 CONG. REC. S8088 (daily ed. June 9, 1995); *see also id.* at S8333 (statement of Sen. Coats) (arguing that the Exon–Coats Amendment “is carefully crafted to be constitutional, to address constitutional questions”). At another point, Senator Exon deflected our concerns by arguing that Senators Byrd and Heflin, whom he was adding as cosponsors, are “two very distinguished lawyers, the latter, Senator Heflin being the former chief justice of the Supreme Court of Alabama. I think both of them would be a cosponsor of this Exon–Coats amendment unless they felt it had adequate constitutional safeguards.” 141 CONG. REC. S8337 (statement of Sen. Exon) (daily ed. June 14, 1995).

following the Supreme Court's decision in *Texas v. Johnson*.⁷¹ Second, and perhaps more interestingly, the CDA was brought up for a vote as a floor amendment and therefore received no consideration in committee.⁷² Comparing contemporary consideration of constitutionality with that done by early Congresses is problematic because today, much of the work on legislation is done in committee.⁷³ Nonetheless, even if the bill had been considered in committee, it still would not absolve any individual senator from his independent obligation to consider seriously the bill's constitutionality before voting.⁷⁴

71. 491 U.S. 397, 420 (1988). The Court's decision in *Texas v. Johnson* touched off a national debate that culminated in Congress considering a constitutional amendment and ultimately adopting a federal statute barring flag burning. See generally Charles Tiefer, *The Flag-Burning Controversy of 1989-1990: Congress's Valid Role in Constitutional Dialogue*, 29 HARV. J. ON LEGIS. 357, 365-68 (1992) (discussing the congressional debate leading to the adoption of the Flag Protection Act of 1989). That statute, the Flag Protection Act of 1989, 18 U.S.C. § 700 (1989), was struck down by the Supreme Court in *United States v. Eichman*, 496 U.S. 310, 318-19 (1990).

72. See *Reno v. ACLU*, 521 U.S. 844, 858 n.24 (1997) (stating that "[n]o hearings were held on the provisions that became law," and that the sole committee hearing on the topic was actually on an unrelated bill that took place after the CDA had already passed the Senate, as seen in *Cyberporn and Children: The Scope of the Problem, the State of the Technology, and the Need for Congressional Action, Hearing on S. 892 Before the S. Comm. on the Judiciary*, 104th Cong. (1995)). Senators may propose amendments both in committee markup or when a bill is being considered on the floor by the full Senate. See *Senate Legislative Process*, <http://perma.cc/D6SV-PX25> (senate.gov, archived Feb. 6, 2014) (discussing the floor-amendment and committee-markup processes). While floor amendments are an important and longstanding part of the Senate legislative process, they lack some of the advantages of committee consideration—namely, they are not considered in the first instance by subject-matter experts on the relevant committees with access to committee hearings and outside expertise.

73. See, e.g., Hickok, *supra* note 11, at 267 (noting that constitutional deliberations in the modern-day Congress likely happen in committee rather than on the floor as in early Congresses).

74. Others have suggested that the most likely place for robust constitutional debate in Congress is in committee. See, e.g., Mikva, *supra* note 11, at 610 ("The most likely place for constitutional dialogue is in the committees; committee size and format are more conducive to debate."). Undoubtedly, committees can play an important role in considering the constitutionality of proposed legislation, particularly in their areas of subject matter expertise. Nevertheless, the review of the history of constitutional consideration in Congress reveals that, even if committees were to undertake more substantial constitutional dialogue, that still would not satisfy the Framers' perception that each members of Congress has an *individual* obligation to consider the constitutionality of legislation. See *supra* Section II.A (discussing the history and origins of Congressional interpretations of the Constitution). Furthermore, as the example of the CDA illustrates, there are times (like in the case of floor amendments), where robust constitutional consideration in committee would still fail to address important constitutional issues in legislation.

B. Federal and State Hate Crimes Legislation: Congressional Interpretation in the Face of Contrary Judicial Authority

While a legislator considering the constitutionality of a measure before him should certainly seek guidance from relevant court decisions, there are occasions when that legislator's own sincere interpretation is different from that of the courts. I ran up against this problem with regard to hate crimes legislation, both as a Wisconsin state senator and as a U.S. senator. In the 1980s, a proposed Wisconsin bill provided that a convicted person's sentence was to be enhanced solely on the basis of the demonstrably hateful animus (e.g., racism or anti-Semitism) motivating the underlying crime.⁷⁵ I was one of only three state senators to oppose the proposed law.⁷⁶ To the consternation of many of my political allies, I could not in good faith vote for the bill because, given my understanding of the First Amendment, it struck me as an unconstitutional punishment of thoughts or beliefs rather than actions. While the law related solely to criminal sentencing and could have been seen as analogous to an aggravating circumstance, I believed that hateful motivations, as well as other reviled thoughts, were exactly the kind of thoughts that must be protected if the First Amendment is to have any real meaning.⁷⁷

After the bill passed overwhelmingly, one of the state senators who voted against the bill successfully challenged the law in the Wisconsin Supreme Court. In *State v. Mitchell*,⁷⁸ the Court agreed with our opposition and struck down the bill on First Amendment grounds, stating, "The constitution may not embrace or encourage bigoted and hateful thoughts, but it surely protects them."⁷⁹ However, the decision was appealed to the U.S. Supreme Court, which unanimously reversed the Wisconsin Supreme Court and concluded that the law was, in fact, constitutional.⁸⁰

75. See WIS. STAT. § 939.645 (2012) (increasing criminal penalties where an individual is affected in whole or in part because of their race, religion, color, disability, sexual orientation, national origin, or ancestry).

76. *Id.*

77. See, e.g., Lynn Adelman & Pamela Moorshead, *Bad Laws Make Hard Cases: Hate Crime Laws and the Supreme Court's Opinion in Wisconsin v. Mitchell*, 30 GONZ. L. REV. 1, 2–5 (1994) (reviewing *Mitchell's* constitutional argument). For a review of a similar line of thinking, see generally JONATHAN RAUCH, *KINDLY INQUISITORS* 4–6 (1995) (examining historical attacks on free speech and how attempts to censor speech may lead to intellectual authoritarianism).

78. 485 N.W.2d 807, 831 (1992), *rev'd*, 508 U.S. 476.

79. *Id.* at 817.

80. *Wisconsin v. Mitchell*, 508 U.S. 476, 489 (1993).

Nonetheless, just a few years later I faced the issue again, this time in the U.S. Senate. The Senate considered an amendment to a major crime bill that created a federal version of the hate crimes bill that Wisconsin had passed at the state level. Although the Supreme Court had already spoken unanimously and I had no reason to believe they were going to reverse course, I and a few other senators briefly urged our colleagues to reject the amendment on the grounds that it was both bad policy and unconstitutional (under our interpretation of the First Amendment).⁸¹ Our policy arguments for defeating the bill raised no constitutional difficulties: even though we knew the Supreme Court would uphold the bill were it passed, Congress was under no constitutional obligation to pass it. Our constitutional argument, on the other hand, seems to raise a problem: Why is it wrong for senators to vote for the CDA without considering its possible unconstitutionality but acceptable to oppose the hate crimes bill on constitutional grounds⁸² when we were all but certain that the Court would hold otherwise?

The relevant difference, I would argue, is that in the hate crimes context, the law passed judicial constitutional scrutiny but could still be considered unconstitutional by individual legislators. In other words, while the Court had already articulated its view that hate crimes legislation is constitutional, Congress need not acquiesce by legislating to the limits of permissibility. In contrast, it was abundantly clear that both legislators and judges alike viewed the CDA as unconstitutional, but it was nevertheless passed for political purposes. When legislation is clearly unconstitutional but politically popular, there is a risk that legislators may “pass the buck” by voting for the bill and leaving it to the courts to strike down or sever unconstitutional portions. There is a meaningful difference between choosing to vote for or against a piece of legislation to express a legitimately held view of the Constitution, and ignoring substantial constitutional defects in the name of political expediency. While members should vote upon legislation based on their own constitutional interpretations, which may be at odds with the Court’s, they should not vote for legislation without any thought whatsoever regarding its constitutionality.

81. 139 CONG. REC. 14983 (1993) (statement of Sen. Feingold).

82. Several years later, with the settled law affirming the constitutionality of hate-crime legislation, the issue turned to whether women, and gays and lesbians, should be protected from hateful speech in this way since the original law was restricted to race, color, religion, or national origin. See 18 U.S.C. § 245(b)(2) (1968) (stating individuals who injure, interfere with, or intimidate others due to race, color, religion, or national origin would violate the statute and could face up to a year of imprisonment). I was able to enthusiastically support such amendments, especially after the horrific Matthew Shepard and James Byrd Jr. crimes. While I still believed the underlying law infringes on the First Amendment, not to support such expansion struck me as a violation of equal protection and an unconstitutional distinction.

*C. The Second Amendment: Congressional Interpretation
Leading the Courts*

Despite the example of the CDA and hate crimes legislation, Congress does not always shirk its obligations to consider seriously the constitutionality of proposed legislation. One example of Congress taking an active interpretive role and reaching a different conclusion than the judiciary is on the meaning of the Second Amendment's guarantee of "the right to keep and bear arms."⁸³

Before the Supreme Court's decisions in *District of Columbia v. Heller*⁸⁴ and *McDonald v. City of Chicago*,⁸⁵ I had long believed that the Second Amendment guaranteed an individual right to keep and bear arms. When I argued in my undergraduate senior honors thesis at the University of Wisconsin in 1975 that the Second Amendment entailed an individual right, I was writing against the backdrop of more than thirty-five years of Supreme Court silence on the issue and an absence of scholarly voices articulating my position.⁸⁶ Since that time, many scholars have examined the issue exhaustively,⁸⁷ but it nevertheless took the Supreme Court until 2008 in *Heller*—almost seventy years

83. U.S. CONST. amend. II.

84. 554 U.S. 570, 635 (2008) (holding that the Second Amendment guarantees an individual right to possess a firearm for traditionally lawful purposes like self-defense).

85. 130 S. Ct. 3020, 3050 (2010) (incorporating the individual right recognized in *Heller* against the states under the Due Process Clause of the Fourteenth Amendment).

86. Between 1939 and 2008, the Supreme Court did not hear a single case in which it interpreted the meaning of the Second Amendment. See Anthony Gallia, Comment, "Your Weapons, You Will Not Need Them." *A Comment on the Supreme Court's Sixty-Year Silence on the Right to Keep and Bear Arms*, 33 AKRON L. REV. 131, 134 (1999) ("The Supreme Court has not entertained a case involving the Second Amendment since 1939 when the Court decided *U.S. v. Miller*"). Nonetheless, there are other cases that at least discuss the Second Amendment, even if in passing. See David B. Kopel, *The Supreme Court's Thirty-Five Other Gun Cases: What the Supreme Court Has Said About the Second Amendment*, 18 ST. LOUIS U. PUB. L. REV. 99, 108–09 (1999) (analyzing dicta in thirty-four other Supreme Court cases that mention the Second Amendment).

87. See, e.g., STEPHEN P. HALBROOK, *THAT EVERY MAN SHOULD BE ARMED* 192 (1984) (explaining the Second Amendment could be recognized as a fundamental and absolute right under the Fourteenth Amendment protected from government infringement); Akhil Reed Amar, *The Bill of Rights as a Constitution*, 100 YALE L.J. 1131, 1162–73 (1991) (relying on an integrated overview of the Bill of Rights to examine populist and Federalist arguments to interpret the Second Amendment); Andrew D. Herz, *Gun Crazy: Constitutional False Consciousness and Dereliction of Dialogic Responsibility*, 75 B.U. L. REV. 57, 62 (1995) (arguing that those espousing what he calls a "broad individual right view" of the Second Amendment are engaged in "deception" regarding the meaning of the Second Amendment); Sanford Levinson, *The Embarrassing Second Amendment*, 99 YALE L.J. 637, 643–57 (1989) (analyzing various rhetorical structures of the right to bear arms, including textual, doctrinal, historical, and ethical arguments).

after its last decision on the topic⁸⁸—to endorse the individual-right view of the Second Amendment.

However, over much of that period and even before, members of Congress actively engaged in interpreting the Second Amendment and often reached at least arguably different conclusions from the Supreme Court. For instance, as one scholar noted, in debates running from the Freedmen's Bureau Act of 1866 to the Firearms Owners' Protection Act of 1986,⁸⁹ Congress periodically either expressly asserted in legislative findings or implied that it considers the Second Amendment to guarantee an individual right to keep and bear arms.

This is not to suggest that Congress spoke with one voice on this issue. On the contrary, before the Supreme Court decided *Heller*, there were many examples of members of Congress arguing that, in keeping with the Supreme Court's precedent under *United States v. Miller*, the Second Amendment speaks primarily to the rights of militias.⁹⁰ No doubt many of these arguments were convenient justifications for the policy preferences of individual members of Congress.⁹¹ But the very fact that the issue was debated vigorously suggests that, at least in

88. The Court had last analyzed the meaning of the Second Amendment in *United States v. Miller*, 307 U.S. 174 (1939).

89. See Stephen P. Halbrook, *Congress Interprets the Second Amendment: Declarations by a Co-Equal Branch on the Individual Right to Keep and Bear Arms*, 62 TENN. L. REV. 597, 598 (1995) (citing Freedmen's Bureau Act, 14 Stat. 176-77 (1866)) (providing, inter alia, that "the . . . right to have full and equal benefit of all laws and proceedings concerning personal liberty . . . including the constitutional right to bear arms, shall be secured to and enjoyed by all the citizens . . . without respect to race or color or previous condition of slavery"); *id.* (citing Firearms Owners' Protection Act, Pub. L. No. 99-308, 100 Stat. 449 (1986) (codified at 18 U.S.C. § 926 (2006)) (stating in the Congressional Findings that citizens have a right to keep and bear arms under the Second Amendment).

90. See, e.g., 145 CONG. REC. 16500 (1999) (statement of Rep. Conyers) (offering for the record a memorandum asserting that "under current constitutional doctrine, as propounded by the United States Supreme Court, the Second Amendment does not establish an individual right to bear arms"); 145 CONG. REC. S14470 (1999) (statement of Sen. Lautenberg) (arguing that the Second Amendment does not support a variety of anti-gun-control positions, and that *Miller* forecloses an absolutist view of the Second Amendment or an interpretation of it as assuring an individual right). Nonetheless, this reading of *Miller* is contested. See, e.g., Brannon P. Denning & Glenn H. Reynolds, *Telling Miller's Tale: A Reply to David Yassky*, 65 LAW & CONTEMP. PROBS. 113, 115 (2002) (disagreeing with David Yassky, *The Second Amendment: Structure, History, and Constitutional Change*, 99 MICH. L. REV. 588, 666-67 (2000), which argued that *Miller* precludes arguments that the Second Amendment provides an individual right to keep and bear arms, and instead concluding that *Miller*, in fact, supports the individual-right point of view). *But see* Brian L. Frye, *The Peculiar Story of United States v. Miller*, 3 N.Y.U. J. L. & LIBERTY 48, 49 (2008) (suggesting that, while most marshal *Miller* in favor of their particular view of the Second Amendment, "[a]ll conclude *Miller* is an impenetrable mess").

91. David Currie notes that this argument was raised even in the founding era. See CURRIE, *supra* note 37, at 121 (explaining that even members of the first Congress had political philosophies and agendas and were not wholly disinterested interpreters of the Constitution).

some circumstances, Congress is capable of engaging constitutional questions at a high level, independent of the Court.

IV. WHAT STANDARDS SHOULD GUIDE CONGRESS'S CONSIDERATION OF CONSTITUTIONALITY?

Having given a few examples of ways in which a legislator might confront issues of constitutionality, the question becomes, "What standard should guide members of Congress in considering the constitutionality of matters on which they vote?" In 1975, in the seminal modern article on constitutional interpretation in Congress, Paul Brest suggested guidelines that a "conscientious legislator" might use to interpret the constitutionality of a given piece of proposed legislation.⁹² In 2013, the mere mention of a "conscientious legislator" is likely to produce laughter.⁹³ Requiring members of Congress to take seriously their responsibility to consider the constitutionality of legislation presumably would not register in any survey of the current problems with Congress. Nonetheless, in an era when the institution is associated in the public mind with gridlock, intense partisanship, a lack of meaningful deliberation, and an obsession with fundraising and reelection, one step in the right direction could be creating and enforcing standards of professionalism for the constitutional analysis of legislation. But what should be taken into account in creating such standards for the "conscientious legislator"?

At the outset, the duty of legislators to consider constitutionality must be explicitly acknowledged. As Brest wrote in a subsequent article on this subject, "[B]oth the structure and text of the Constitution require Congress to determine the constitutionality of proposed enactments."⁹⁴ Brest suggested that "the only plausible argument challenging legislative duty to consider constitutional questions is premised on institutional incompetence."⁹⁵ This concern cannot be dismissed out of hand. Many legislators are not lawyers, and the

92. Paul Brest, *A Conscientious Legislator's Guide to the Constitution*, 27 STAN. L. REV. 585, 589–94 (1975).

93. See, e.g., Frank Newport, *Congress Approval Holding Steady at 15%*, <http://perma.cc/ZCC5-HHB5> (gallup.com, archived Feb. 6, 2014) (explaining present Congressional approval ratings are still low at fifteen percent and well below the historical average approval rating of thirty-three percent); John Stephens, *Congress Approval Rating Lower than Cockroaches, Genghis Khan, and Nickelback, Poll Finds*, <http://perma.cc/KJ9A-ZSCM> (huffingtonpost.com, archived Feb. 6, 2014) (referencing a Public Policy Polling press release wherein the public ranked lice, brussels sprouts, and Genghis Khan more favorably than the current Congress).

94. Brest, *supra* note 27, at 62.

95. Brest, *supra* note 92, at 588.

legislative process is not well suited for systematic and dispassionate examination of constitutional questions. Additionally, many constitutional issues arise only as legislation is being implemented.⁹⁶ But “it would be premature to assume [Congress cannot adequately interpret the Constitution] until legislators recognize their duty to interpret the Constitution and learn how to do it.”⁹⁷

Acknowledgement of the duty raises many other questions. Should legislators rely only on their own interpretation of the Constitution’s plain text or on their own personal understanding of the Founders’ intent? Are they entitled to make their own judgment as to what a “living Constitution” should look like as they seek to represent the modern constituents who elected them? What weight is a legislator obligated to give the decisions of the federal courts, and in particular the U.S. Supreme Court? Brest posited that, because “the judiciary” is the Constitution’s “most skilled, disinterested, and articulate interpreter,” “judge-made constitutional doctrine” should “carry a strong presumption of correctness in legislative chambers.”⁹⁸ A less deferential view is expounded in Larry Kramer’s direct assault on the primacy of judicial review in *The People Themselves*. He strongly suggests that even the measured or mild deference suggested by Brest is unnecessary and perhaps unwarranted given Congress’s independent role in interpreting the Constitution.⁹⁹ Current conventional wisdom supports a third, more Hamiltonian notion of almost complete deference to settled Supreme Court decisions and doctrine. Regardless of which approach is most consistent with the Founders’ intentions, there can be little justification for a legislator simply to ignore relevant case law and fail independently to assess constitutionality. At a minimum, a legislator—particularly a measure’s proponent—presumably hopes to prevent a bill from being subsequently struck down by the courts.¹⁰⁰

96. *Id.*

97. *Id.* at 601.

98. *Id.* at 588.

99. LARRY D. KRAMER, *THE PEOPLE THEMSELVES* 125–26, 247–48 (2004) (discussing *Marbury v. Madison* and arguing that the famous line “[i]t is emphatically the province and duty of the judicial department to say what the law is,” does not mean that the judiciary is the exclusive expositor of the meaning of the Constitution, but rather “[w]hat it said was ‘courts, too, can say what the Constitution means,’” and arguing that “to control the Supreme Court, we must lay claim to the Constitution ourselves . . . [and] publically repudiat[e] Justices who say that they, not we possess ultimate authority to say what the Constitution really means”).

100. Nonetheless, there undoubtedly are examples of legislators either wanting legislation to be struck down or at least heavily altered by the courts.

Thus, ignoring constitutional considerations could result in wasteful legislative effort and expenditure of political capital.¹⁰¹

Questions further arise, therefore, about how a legislator should analyze whether a court will prospectively uphold a new measure as constitutional. Should the legislator consult his own vision of constitutionality to determine what the proper ruling should be, regardless of established precedent? Should our legislators attempt to simply predict a ruling based on the current composition of the Supreme Court? And should that judgment be based on the view that decision would be clear, as in a nine-to-zero or seven-to-two ruling, or would a belief that it could go either way, five to four or four to five, be sufficient or even relevant? Or is it sufficient that the legislator simply have a colorable, good faith argument, even if it may seem like a long shot? May a legislator consider significant movement in the federal circuit courts on the issue, as I did when the question of an individual right to bear arms became relevant to my consideration of some legislation? Is it appropriate to vote for an amendment with the purpose of “testing the limits” of a fairly established judicial doctrine?

I would suggest that there should be significant latitude accorded to members in making these kinds of determinations. Each member may have or may develop over time a different approach to constitutional issues. What matters is that the legislator has some approach and thoughtfully employs it in evaluating legislation. Nonetheless, legislators will not develop these individual approaches without formal guidance. The following proposed Senate rule seeks to provide an important first step toward such formal guidance. However, I recognize that, as with other changes to Senate procedures, further reforms and additional guidance may be necessary over time.

V. A PROPOSAL FOR IMPROVING AND INCREASING CONGRESSIONAL CONSTITUTIONAL INTERPRETATION

A. *The Case for Adopting a Senate Rule*

At least as far back as 1983, those who noticed the lack of serious constitutional consideration in Congress have tried to suggest how the

101. For example, one need look no further than the extensive debates regarding the line-item veto for an extensive and politically taxing debate that was ultimately fruitless on account of the Supreme Court's decision. See generally Brent Powell, *Line Item Veto*, 37 HARV. J. ON LEGIS. 253, 253–54 (2000) (reviewing the history of the Line Item Veto Act of 1996 (LIVA), the Supreme Court's decision in *Clinton v. City of New York*, 524 U.S. 417 (1998), which ultimately struck down the LIVA, and numerous subsequent congressional proposals).

problem could be remedied. After providing an unflattering view of the situation, former Congressman and then-Judge Abner Mikva felt the most likely place to enhance “constitutional dialogue” was within committee proceedings, noting that “committee size and format are more conducive to debate.”¹⁰² Others have suggested that pressure might be brought to bear on Congress if the Supreme Court were to accord “a presumption of interpretive correctness to the Senate’s interpretation only if [it] increases individual constitutional rights and only if there was serious deliberation in the chamber about the constitutional right at stake.”¹⁰³ Still others have proposed that the Court essentially punish Congress for this “gradual abdication of constitutional judgment by the legislative branch to the judicial branch” by not adopting the canon of constitutional avoidance whenever members of Congress pass legislation they believe is unconstitutional simply for political gain.¹⁰⁴ Yet not until the adoption of the new House Rule in 2011 did attention turn to the possibility of establishing formal requirements for members within the context of the power of each House to “determine the rules of its proceedings” under Article I, Section 5 of the Constitution.

In the new academic literature emerging in reaction to this new requirement, praise for the House Rule has been tempered with concern that it is being interpreted to require only “statements of constitutional authority” as opposed to “analyses of constitutionality.”¹⁰⁵ Some have recommended various means of enhancing the rule by creating procedures for amending a CAS to better reflect the relevant constitutional issues raised by the legislation (in the opinion of the member offering the amendment), requiring CASs at multiple stages of the legislative process, or otherwise expanding the number of representatives with input on a CAS.¹⁰⁶

Taking a cue from the House, I propose that the Senate now try its hand at creating a new rule pursuant to Article I, Section 5. In doing so, however, the Senate should broaden the requirements and provide clearer instructions to members of Congress about their responsibilities to consider constitutionality.

102. Mikva, *supra* note 11, at 610.

103. Katyal, *supra* note 44, at 1340.

104. Anant Raut & J. Benjamin Schrader, *Dereliction of Duty: When Members of Congress Vote for Laws They Believe to be Unconstitutional*, 10 N.Y. CITY L. REV. 511, 530 (2007).

105. Marc Spindelman, *House Rule XII: Congress and the Constitution*, 72 OHIO ST. L.J. 1317, 1318–19 (2011).

106. Volokh, *supra* note 11, at 213–21 (discussing several potential reforms of the CAS requirement).

A proposal to further amend the Senate rules may meet some resistance merely on the grounds that the Standing Rules of the Senate have already become too extensive and now cover matters that are pushing or exceeding the boundaries of “determining the rules of proceedings.”¹⁰⁷ As originally written in 1789, there were only twenty rules, all encompassed within six hundred words.¹⁰⁸ The number of rules is now up to fifty-four, and their focus has shifted significantly. The initial rules governed obvious matters, such as the content of the “oath,” the rules for a quorum, the “order of business,” and mundane matters like what a senator could eat on the Senate floor.¹⁰⁹ Beginning in the 1970s, however, a series of lengthy—and I think important—rules were added that now constitute what is in effect a code of senatorial ethics. The rules mandate public financial disclosure, indicate what gifts can be accepted from outside entities, and establish restrictions on foreign travel and conflicts of interest.¹¹⁰ Unlike the original twenty rules, which all concerned internal proceedings, the new rules concern the behavior of senators outside the body itself. A new rule mandating consideration of the constitutionality of proposed legislation therefore fits more naturally in the original conception of the Senate rules. For this reason, the rule may not encounter the resistance faced by more recent additions expanding the rules’ domain. Indeed, had this rule been proposed in 1789, no one would likely have objected, because an obligation to consider constitutionality was simply assumed.

B. Improving on House Rule XII

The central myth and ethos of the U.S. Senate is that of the “cooling saucer.”¹¹¹ In a probably apocryphal anecdote, Thomas Jefferson is said to have returned from his duties in France after the conclusion of the Constitutional Convention and, having not been a part of those deliberations, to have asked George Washington over tea why

107. U.S. CONST. art. I, § 5.

108. See 1 ROBERT C. BYRD, *THE SENATE 1789-1989: ADDRESSES ON THE HISTORY OF THE UNITED STATES SENATE 45-47* (Mary Sharon Hall ed., 1988) (discussing the first Senate and the initial adoption of rules for the body).

109. See *Reid Seeks Permission for Popcorn During Senate Viewing of 'Lincoln,'* <http://perma.cc/LA6F-M5A4> (washington.cbslocal.com, archived Feb. 6, 2014) (noting the efforts of Majority Leader Harry Reid to secure the authority to serve popcorn at a Senate showing of *Lincoln*).

110. See, e.g., SENATE RULE XLI (2008) (110th Cong.) (governing the fundraising activities that can be conducted by employees of the Senate); SENATE RULE XXXV (2008) (110th Cong.) (restricting gifts that Senators, officers, and employees can receive).

111. See *Senate Legislative Process*, *supra* note 72.

the Senate was created and why it was formed in the way it was. In response, Washington asked Jefferson why he had poured some of his tea into his saucer. When Jefferson replied, “to cool it,” Washington said that the Senate was intended to be the “cooling saucer” to the heated passions of the popularly elected House.¹¹² Given the gridlock that now afflicts the Senate, one of my students remarked that it seemed more like a “deep freezer” today. But this gridlock has much to do with partisanship and essentially nothing to do with the careful deliberation clearly implied in the notion of the “cooling saucer.”¹¹³ In other words, the Senate does not seem any more functional than the House and is greatly in need of both a better reputation and a better reality in order to restore its legitimacy in the eyes of the American people. A new Senate rule requiring serious consideration of the constitutionality of proposed measures could give the public at least one reason to believe the Senate is performing one important aspect of the legitimate cooling-saucer function intended by the Founders.

In order to do so, however, the new Senate rule must be both broader and more evenhanded than House Rule XII. While its form (as a House rule) is unprecedented, the House Rule is extremely limited in breadth and scope vis-à-vis both the legislative process and the Constitution itself. There are at least four areas that need expansion or improvement. First, the House Rule requires a CAS only at the time the bill is introduced, one reason that some have criticized the rule as mere symbolism.¹¹⁴ While members of Congress love to send out press releases hailing their introduction of a new piece of legislation, and such press releases are sure to elicit some press coverage, the introduction of a bill is rarely a very significant moment in the legislative process. A bill first must be referred to committee, where it hopefully gets a hearing and a vote before returning to the floor. If subsequently passed by both houses, it is sent to the President for his signature.¹¹⁵ Of course, very few bills make it even to the initial stages after introduction, let alone ultimately get passed. In addition, in any legislative body, legislators commonly introduce bills with the knowledge or perhaps even preference that they go nowhere—for instance, when introduced

112. *Id.*

113. Jonathan Weisman, *New Senate's First Task Will Likely Be Trying To Fix Itself*, <http://perma.cc/FJY9-J5YX> (nytimes.com, archived Feb. 6, 2014) (“The Senate—the legislative body that was designed as the saucer to cool the House’s tempestuous teacup—has become a deep freeze, where even once-routine matters have become hopelessly stuck and a supermajority is needed to pass almost anything.”).

114. See Brownback & Jacobson, *supra* note 24 (quoting Norm Ornstein).

115. *Senate Legislative Process*, *supra* note 72.

simply to satisfy the wishes of a constituency or a special interest. This is not an attractive practice, but a bureaucratic requirement to insist on a CAS seems unnecessary far before there is any reason to believe any member of Congress will ever have to cast a vote on the legislation.

Second, the House Rule, while requiring statements for all introduced bills, has no rules regarding proposed amendments that may be attached to any legislation. As discussed earlier in the example of the Communications Decency Act,¹¹⁶ which was itself an amendment, sometimes an amendment is more consequential constitutionally than the bill itself. Just as it seems unnecessary to require a CAS for the filing of all bills, it would also be unduly burdensome to require the same when any amendment is filed in committee or on the floor. Sometimes hundreds of amendments are filed, often for dilatory purposes.¹¹⁷ Applying the CAS requirement to all amendments might deter that practice. Nonetheless, there seems to be no good reason to require this at the outset. Instead, a CAS should be required for an amendment prior to the time the amendment is actually voted on in committee or on the floor, so that senators are able to consider its constitutionality in a reasonably deliberative manner. This approach strikes the appropriate balance between ensuring that members have time to consider constitutional issues raised by a proposed amendment while still ensuring that a CAS is not required for amendments that will never receive a vote.

Third, the House Rule focuses exclusively on the bill's author to assess its constitutionality. However, this is only a small part of a member of Congress's obligation. After all, only rarely does a member vote on or advance a piece of legislation, or even an amendment, that he authored. Instead, members far more often must decide how to vote on another member's bill or amendment. Whether the obligation to consider constitutionality emanates from the oath of office or Congress's role in the inherent structure of the Constitution, members should be clearly instructed that each time they vote, they should be mindful of any constitutional objections that can be made to an "aye" vote, or more accurately, the passage of legislation that their "aye" vote enables. A proposed Senate rule should explicitly acknowledge this obligation, but with the understanding that a member is not expected to be a constitutional law expert. Each member, however, is expected to work with his staff and the relevant congressional agencies to make a good

116. See *supra* notes 63–74 and accompanying text (providing the Communications Decency Act as an example of an act that raised serious First Amendment issues).

117. See, e.g., *Senators File Hundreds of Amendments to Immigration Bill*, <http://perma.cc/VD5R-5PUW> (foxnews.com, archived Feb. 6, 2014) (providing one example of amendments being filed to delay the progress of proposed legislation).

faith effort to consider the fairly evident constitutional concerns that proposed legislation raises. In other words, a Senate rule should make it clear that this is their job.

A Senate rule should also improve on the House Rule by acknowledging that voting on legislation often involves a wide range of provisions that may have begun as separate bills or amendments but are assembled into one large up-or-down package on which a legislator must vote simply yes or no. Obvious examples of this include the Affordable Care Act, the frequent Omnibus Appropriations bills, and the current immigration proposal. In such situations, some provision will likely prompt a constitutional challenge. The reality for a “conscientious legislator” in that situation is to consider whether any one or combination of provisions is so constitutionally flawed and central to the bill that the defect requires a “no” vote. Many opponents of President Obama’s healthcare law argued exactly that with regard to the so-called individual mandate.¹¹⁸ While the Supreme Court ultimately rejected this challenge,¹¹⁹ if the Court had struck down the individual-mandate provision, it would have then needed to decide whether the rest of the bill could be preserved without the individual mandate.

A Senate rule should make clear to members of Congress that the responsibility to think these implications through is initially theirs and not one simply to be left to the Court. This may affect how Congress decides whether or not to insert a nonseverability clause into a bill—thereby leaving the Court with no discretion, as was unsuccessfully attempted when Congress passed the McCain-Feingold campaign finance bill¹²⁰ in 2001.¹²¹ This is an important determination that all members should understand, because some relatively minor provisions may arguably be unconstitutional but do not go to the core of the bill. In fact, the opponents of the McCain-Feingold bill, led by Senator Mitch McConnell, tried, in effect, to “booby trap”¹²² the bill. By voting for some Democratic amendments of dubious constitutionality, such as the so-called millionaire’s amendment,¹²³ Senator McConnell hoped to force

118. Ezra Klein, *Unpopular Mandate*, <http://perma.cc/C99P-5664> (newyorker.com, archived Feb. 6, 2014) (“In December, 2009, in a vote on the bill, every Senate Republican voted to call the individual mandate ‘unconstitutional.’”).

119. *NFIB v. Sebelius*, 132 S. Ct. 2566, 2676 (2012).

120. Bipartisan Campaign Reform Act of 2002, Pub. L. No. 107-155, 116 Stat. 100 (codified at 2 U.S.C. §§ 431–55 (2012)).

121. See, e.g., Michael D. Shumsky, *Severability, Inseverability, and the Rule of Law*, 41 HARV. J. ON LEGIS. 227, 229–30 (discussing the severability debate in the McCain-Feingold legislation).

122. *Id.*

123. 147 CONG. REC. S2550 (daily ed. Mar. 20, 2001) (showing seventy senators voting in the affirmative including Senator McConnell).

the Court to strike down the entire law even if only one of those provisions was held unconstitutional. Members need more guidance in weighing the relative importance of provisions that may contain some constitutional infirmities.

Fourth, and most importantly, the House Rule is tilted not only constitutionally, but almost certainly politically as well. Why does the House Rule extend only to the question of whether a proposed act is within Congress's enumerated powers under Article I? This is undoubtedly a legitimate consideration that should never have been omitted from congressional discussion throughout the twentieth century. I do not suggest that legislation during the post–New Deal era was by and large unconstitutional, merely that there was an increasing lack of attention paid to the boundaries of federal power. This ultimately played into the hands of those who argued, with some success, that the expansive role of the federal government appeared to have no discernable limits.¹²⁴ Nonetheless, granting such enumerated powers to Congress was a critical and difficult part of the process of convincing the states to give up some of their autonomy and their individual veto power under the Articles of Confederation in favor of a new central government.¹²⁵ On the other hand, we also know that the draft of the Constitution even with its limitations on federal power could not muster the votes necessary for ratification.¹²⁶ To assure ratification, the Constitution's proponents had to promise that the first Congress would immediately consider amending the Constitution to add what is now known as the Bill of Rights.¹²⁷ Accordingly, why would the House Rule only ask the bill's author to identify the provisions of Article I that permit such legislative action without also asking him to consider whether other constitutional provisions prohibit the action? What of the friction between the “sneak and peek” search provisions of

124. Of course, the Supreme Court reversed this trend somewhat with their recent decisions on the limits of the Commerce Clause. See, e.g., *United States v. Morrison*, 529 U.S. 598, 601–02 (2000) (holding that Congress did not have the authority under the Commerce Clause to enact a statute that provided a federal civil remedy for victims of gender-motivated violence); *United States v. Lopez*, 514 U.S. 549, 551–52 (1995) (holding that Congress did not have the authority under the Commerce Clause to enact the Gun Free School Zone Act of 1990).

125. See Thomas B. McAfee, *A Critical Guide to the Ninth Amendment*, 69 TEMP. L. REV. 61, 68 (1996) (noting that “the Constitution's key defenders during the struggle over ratification contended that Article I of the proposed Constitution constituted a ‘bill of rights’ because it granted by enumeration only limited powers to the national government and thereby ‘retained’ a vast range of rights against federal intrusion”).

126. See generally RICHARD E. LABUNSKI, *JAMES MADISON AND THE STRUGGLE FOR THE BILL OF RIGHTS* 3–256 (2006) (discussing the various challenges involved in the ratification of the Constitution).

127. *Id.* at 113.

the USA Patriot Act and the Fourth Amendment?¹²⁸ Or the conflict between the Fifth Amendment's due process protections and the "three strikes and you're out" criminal law proposals?¹²⁹ What of the provisions limiting the ancient right of habeas corpus in the Antiterrorism and Effective Death Penalty Act of 1996?¹³⁰ And what of the guarantees of the First Amendment limiting efforts to restrict objectionable material on the Internet?

A Senate rule should place the consideration of such constitutional objections on the same plane as the question of whether the enumerated powers of Congress permit such actions. To do less is to adopt one set of legitimate concerns about constitutionality (related to limiting federal power) while relegating other concerns (relating to protecting individual rights) to the current haphazard or minimal consideration that characterizes most congressional deliberation on most constitutional matters.

C. The Proposed Rule

Below is a proposed Senate rule that addresses each flaw of the House Rule. In Section I, members are directed to consider the constitutionality of legislation when voting on a bill or an amendment by considering both the constitutional source of authority *and* the bounds of such authority found elsewhere in the Constitution. Section II similarly requires senators to consider sources of authority and bounds of that authority when submitting legislation, and it additionally requires the introducer to submit a statement summarizing this constitutional analysis when the bill is placed on the legislative calendar or an amendment is offered for consideration. The statement of constitutional authority and analysis is therefore only required when it is somewhat likely that a bill or amendment will be debated and voted upon.

128. See Beryl A. Howell, *Seven Weeks: The Making of the USA Patriot Act*, 72 GEO. WASH. L. REV. 1145, 1183–90 (2004) (reviewing the history and constitutional arguments regarding the Patriot Act including the "sneak and peek" provisions).

129. See Rose A. Coonen, Note, *United States v. Gatewood: Does the Three Strikes Statute Violate Due Process and Undermine the Presumption of Innocence?*, 29 AM. J. CRIM. L. 83, 85 (2001) (arguing that the burden of proof placed upon defendants by the Three Strikes Law violates due process).

130. Pub. L. No. 104-132, 110 Stat. 1214 (1996); see also Lyle Denniston, *Is AEDPA Unconstitutional?*, <http://perma.cc/JZL7-4RE7> (scotusblog.com, archived Feb. 6, 2014) (discussing the case *Irons v. Carey* and the constitutionality of the AEDPA).

RULES OF THE SENATE
XLV

I.

- (a) When voting on a bill, joint resolution, amendment, or conference report, a Senator shall consider and independently evaluate the constitutionality of all aspects of the legislation.
- (b) In evaluating the constitutionality of any aspect of a bill, joint resolution, amendment, or conference report, a Senator shall consider:
 - (1) the constitutional power and textual authority of the Congress to enact the legislation;
 - (2) the bounds of such authority found elsewhere in the Constitution, including but not limited to individual rights enumerated in the Bill of Rights, other constitutional amendments, and any powers explicitly reserved to the judicial branch, executive branch, or to the states;
 - (3) Supreme Court or other judicial precedent; and
 - (4) whether any constitutional flaws are severable from the legislation.

II.

When a bill is placed on the Legislative Calendar, or an amendment or conference report is offered for consideration, the sponsor shall submit for printing in the Congressional Record a statement providing the following information:

- (a) Constitutional Power and Textual Authority of the Proposed Bill.
 - (1) As specifically as practicable, the statement must cite the power or powers granted to Congress in the Constitution to enact the bill, joint resolution, amendment, or conference report, including the specific Article, Section,

and Clause of the Constitution from which that power derives.

- (b) Relevant Precedent, Bounds, and Limitations of Authority cited in Section II(a)(1).
- (1) With some depth, the statement must discuss precedent germane to the authority to enact the bill, joint resolution, amendment, or conference report. Examples of precedent include but are not limited to:
 - (i) the Federalist Papers, the Congressional Record, and any other historical texts; and
 - (ii) decisions of the United States Supreme Court, lower courts, or other common-law precedents.
 - (2) The statement may also include constitutional analyses and argument relevant to the application and use of Congressional power in enacting the bill, joint resolution, amendment, or conference report. Examples of useful constitutional arguments may be found in:
 - (i) Congressional Research Service reports, and
 - (ii) academic research or other scholarly constitutional analyses.
- (c) As specifically as practicable, the statement must cite any other Constitutional provisions or relevant precedents that may be in tension with, impose a bound upon, or limit the power cited in Section II(a)(1) of this Rule.
- (1) Constitutional provisions that may limit or bound congressional power include but are not limited to:
 - (i) individual rights enumerated in the Bill of Rights or other constitutional amendments;
 - (ii) decisions of the United States Supreme Court or other courts; and

- (iii) powers explicitly or implicitly reserved by the Constitution as the exclusive province of the executive branch, the judicial branch, or the states.

Before consideration of a House bill or joint resolution, the chair of a committee of jurisdiction may submit the statement required under Section II as though the chair were the sponsor of the House bill or joint resolution. The statement shall appear in a portion of the Record designated for that purpose and be made publicly available in electronic form by the Clerk.

D. Potential Criticisms of the Proposed Senate Rule

Despite the failings of the House Rule and the efforts of this proposed rule to address those failings, members of the Congress may still not take seriously their obligations to consider constitutionality. First, any attempt to alter the behavior of individual members of Congress must confront the ample incentives members have to abdicate their responsibilities.¹³¹ Furthermore, even if Congress begins to take its consideration of constitutional issues more seriously as a result of this rule, it will likely nevertheless choose to allocate the responsibility for that consideration to a committee, as suggested by Mikva,¹³² or to congressional staff or the Congressional Research Service, rather than treat this rule as reflecting their individual obligations.

While these may initially seem to be significant criticisms of this proposed approach, they are, in fact, only one of a range of possibilities that nevertheless address this Article's core concern—that Congress is currently failing in its obligation adequately to consider the constitutionality of legislation. Yet the rule makes clear that the obligation to consider constitutionality is vested in each *individual*

131. See generally Louis Fisher, *Congressional Abdication: War and Spending Powers*, 43 ST. LOUIS U. L.J. 931, 946–1005 (1999) (discussing reasons why Congress has abdicated the War and Spending Powers to the President); Douglas R. Williams, *Demonstrating and Explaining Congressional Abdication: Why Does Congress Abdicate Power?*, 43 ST. LOUIS U. L.J. 1013, 1013 (1999) (focusing on Congress's abdication of the War Powers). Nonetheless, it is important to note that, while these incentives have always existed, Congress did not always act on them. Instead, what has changed is the political culture that allows this abdication by accepting the idea that it is the job of the courts and not Congress to interpret the Constitution. Part of the goal of this proposal is to make it clear to members of Congress that this view is neither historically justifiable nor desirable.

132. Mikva, *supra* note 11, at 610 (arguing that “[t]he most likely place for constitutional dialogue is in the committees; committee size and format are more conducive to debate”).

member of Congress, not only in the Congress as a whole, a committee, staff, or the Congressional Research Service. Unsurprisingly, some may be skeptical that members of Congress will take seriously such an important, even if precatory, obligation. Nevertheless, anecdotal evidence suggests that, at least in the case of similar rules governing the behavior of senators, many members take such obligations seriously.¹³³ Furthermore, even if this proposed rule alters only a few members' deliberations and votes each year, that limited success would nevertheless reflect a deeper and more serious level of consideration of constitutional issues in Congress than currently exists.

VI. CONCLUSION

In an era of significant decline in the credibility and even the perceived legitimacy of Congress, requiring its members to take seriously the constitutionality of their actions is an opportunity to improve its reputation. Some may view this rule as just another process that will "slow things down" in an already log-jammed and highly partisan institution. This sentiment fails to recognize that Congress's reputational problems partially relate to a belief that Congress is not really debating or deliberating in good faith but is simply retreating to partisan battle lines. This concern has been exacerbated by Congress abdicating and leaving to the courts its historic responsibility to consider constitutionality on its own.

In this respect, the House Rule of January 2011 regarding Constitutional Authority Statements at the time bills are introduced is a foot in the door. Under the House Rule, all members of the House are required, essentially for the first time, to take at least one aspect of their obligation to consider constitutionality more seriously. The House Rule, however, is woefully inadequate as a comprehensive guide and requirement. Accordingly, this Essay recommends a new rule for the other body, the Senate, with the thought that the House may ultimately see its value as well and enact it or something like it. The proposed rule's central feature is to require the explicit statement of constitutionality at the actual time of acting upon or voting upon not only bills but also amendments and conference reports. Requiring such statements at the stage of bill introduction seems unduly burdensome, since very few bills that are introduced are ever voted on. On the other

133. For instance, Senate Rule XIX prohibits senators from, *inter alia*, "refer[ring] offensively to any State of the Union." *Rules of the Senate*, <http://perma.cc/A8WR-JAS7> (senate.gov, archived Feb. 6, 2014). Despite the absence of any direct sanction for failing to observe this rule, in my experience members of the Senate respect the rule simply as a reflection of their obligations as members of the Senate.

hand, requiring such explanations substantially prior to a scheduled or anticipated vote in committee or on the floor does make sense.

The proposed Senate rule also makes it clear, as the House Rule does not, that each member is individually responsible for considering as he or she votes the constitutionality of a bill or amendment. Therefore, this consideration is the individual responsibility of a conscientious senator and not just the duty of the institution as a whole. This new Senate rule would apply to all types of constitutional issues, including limitations imposed by the Bill of Rights and other provisions of the Constitution, not just Article I. The proposed rule would stand in contrast to the narrow and politically tilted nature of the House Rule, which does not contain a comprehensive requirement or guidelines indicating the entirety of the obligation the Founders assumed Congress had. For the first time, a house of Congress will have employed its power to “determine its own rules” in order to make it clear that members are to consider all aspects of the constitutionality of what they create before sending it on to the President and perhaps the courts. In other words, there would be no ambiguity as to this obligation—it was intended to be and is part of the job.
