



LAWMAKING MADE EASY

John F. Manning

IN A SERIES OF ENGAGING ARTICLES AND BOOKS, Professor William N. Eskridge, Jr. of the Yale Law School has championed the notion that judges should robustly construe statutes to accommodate unforeseen or otherwise unprovided-for factual, moral, and legal contexts – even if doing so cannot be squared with the statutes’ original meaning. Judges, he writes, should be active lawmaking partners with the legislature, not just green-eye-shaded implementers of congressional commands. In one iteration of this theme, Professor Eskridge posits a congressional “meta-intent” that would reconcile his view with the well-entrenched constitutional principle of “legislative supremacy.” The argument runs like this: Congress presumably favors judicial “policymaking discretion” because “legislators have strong incentives to pass hard policy questions on to unelected bureaucrats and judges rather than to resolve them.” Driving his point home, Eskridge adds: “This is in large part because taking a position on the hard issues can harm their reelection chances.” Accordingly, because legislators as a group must favor such an approach, “dynamic statutory interpretation subserves legislative supremacy.”¹

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¹ William N. Eskridge, Jr., *Spinning Legislative Supremacy*, 78 *Geo. L.J.* 319, 324 (1988).

John F. Manning

Although this meta-intent argument is not the mainstay of the important position Professor Eskridge has staked out on dynamic statutory interpretation,² the argument is interesting for present purposes precisely because he makes it so unapologetically. By his lights, legislative supremacy is served by countertextual judicial policymaking precisely because Members of Congress would want judges to relieve them of some accountability for addressing “the hard policy questions” and thus to permit them to accomplish more in the public interest. If that’s what Congress wants, that’s the least a judge as faithful agent should do to oblige his principal.

This argument perhaps inspires some head-scratching among those familiar with the evident aims of the legislative process prescribed by our Constitution. But what has struck me over years of reading in administrative law, federal courts, and legislation, is the extent to which widely respected judges across a range of philosophical and political perspectives take for granted the admissibility of arguments, like Eskridge’s, that are premised on the need to save Congress from the parsimoniousness of its own processes. The Free-Congress-Now! argument has found a home in discussions of the nondelegation doctrine, federal common law, and the use of legislative history in statutory interpretation. Let me be clear about one thing at the outset: I take no position here on the merits of those practices; those matters are for another day. Rather, I make the following observations merely to highlight a culture of argument that uncritically presupposes that, where lawmaking is concerned, more is better, and silently rejects the contrary idea that underlies our constitutional design.

² Indeed, his most significant justifications for that position run the gamut from Gadamerian hermeneutics (“our thrownness in the current world disables us from reconstructing the past”) to a close parsing of the original understanding of the judicial function as applied to interpretation (eighteenth-century Americans expected judges to understand “the letter of a statute in pursuance of the spirit of the law and in light of fundamental values”). See, for example, William N. Eskridge, Jr., *Gadamer/Statutory Interpretation*, 90 *Colum. L. Rev.* 609, 620 (1990); William N. Eskridge, Jr., *All About Words: Early Understandings of the “Judicial Power” in Statutory Interpretation, 1776-1806*, 101 *Colum. L. Rev.* 990, 997 (2001).

I.

MORE IS BETTER

I offer three real-life examples of judges embracing the idea that they should design lawmaking norms to liberate Congress from the process constraints that keep it from being all that it can be. The first comes from the decidedly conservative and, at least in separation-of-powers matters, staunchly originalist Chief Justice, William Howard Taft.³ In *J.W. Hampton & Co. v. United States*,⁴ Taft wrote the Court's leading decision authorizing Congress to delegate binding lawmaking authority to administrative agencies as long as the organic act articulates an "intelligible principle" to guide the agency – a requirement that has turned out to be vanishingly slight. Although the case for a weak nondelegation doctrine certainly has credible historical support, Taft offered an instrumental defense of legislative delegation by invoking the example of ratemaking:

Again, one of the great functions conferred on Congress by the Federal Constitution is the regulation of interstate commerce and rates to be exacted by interstate carriers for the passenger and merchandise traffic. The rates to be fixed are myriad. If Congress were to be required to fix every rate, it would be impossible to exercise the power at all. Therefore, common sense requires that in the fixing of such rates Congress may provide a Commission, as it does, called the Interstate Commerce Commission, to fix those rates, after hearing evidence and argument concerning them from interested parties, all in accord with a general rule that Congress first lays down that rates shall be just and reasonable considering the service given and not discriminatory.⁵

³ See, for example, *Myers v. United States*, 272 U.S. 52 (1926) (painstakingly excavating the original meaning of "the executive Power" to establish an illimitable presidential power to remove executive officers); *Ex parte Grossman*, 267 U.S. 87, 110 (1925) (interpreting the scope of the Pardon Power in light of the powers of the Crown on which the presidential grant was modeled).

⁴ 276 U.S. 394, 409 (1928).

⁵ *Id.* at 407-08.

John F. Manning



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it would be impossible to exercise the power at all.”

– *William Howard Taft*

Lawmaking Made Easy

Notice how similar Taft's argument is to that of Professor Eskridge. If Congress had to do it all itself, then it would be hard – or, in Taft's view, “impossible” – to get done everything that it wished to get done in the realm of ratemaking. This is certainly correct as far as it goes. For anyone who has had the less-than-fully-exciting duty (as I have) of poring over Interstate Commerce Commission ratemaking dockets or examining tariffs in the filed rate room of what used to be the ICC, it is fully evident that a greater truth Taft could not have told. What is odd about his observation, however, is his confidence that we all believe that ratemaking is such an unquestioned good that it should supply a fixed point for our analysis of the nondelegation doctrine. If Congress can't make all the rates itself, then we must allow it to use a commission; otherwise, federal legislators would not be able to reach out to the maximum extension of their ever-growing Commerce Power. Put to one side the fact that we now understand that ratemaking agencies like the ICC may act as the instruments of rent-seeking industry interest groups trying to maintain supracompetitive rates.⁶ What is most striking about Taft's reasoning is the omission of any hint of the possibility that the structural design of the legislative process – the numerosity of the legislators and the division of legislative power among distinctive institutions – is properly understood as a process-based *constraint* upon Congress's capacity to enjoy every last bit of the broadest sweep of its Commerce Power. I do not intend here to delve into the pedigree or the desirability of the nondelegation doctrine; I simply wish to highlight the almost automatic assumption that if some lawmaking practice allows Congress to leverage its power, the result is to be applauded rather than lamented.

A lawmaking-made-easy argument even closer to Eskridge's is found in Judge Henry J. Friendly's famous article, *In Praise of Erie – And of the New Federal Common Law*. Judge Friendly, of course, was

⁶ See Samuel P. Huntington, *The Marasmus of the ICC: The Commission, the Railroads, and the Public Interest*, 61 *Yale L.J.* 467 (1952) (describing railroad lobbying of the Interstate Commerce Commission); George J. Stigler, *The Theory of Economic Regulation*, 2 *Bell J. of Econ. & Man. Sci.* 3 (1971) (using railroad rate regulation to illustrate regulatory capture).

the consummate moderate Republican judge and, more to the point, was widely regarded as the archetypical judge's judge, especially in matters relating to the law of federal courts.⁷ Among his many trenchant observations about the new federal common law, Judge Friendly lavishly endorsed the idea that judges should treat congressional grants of jurisdiction over particular substantive areas as invitations to develop federal common law rules of decision. His unblinking justification was that it will liberate Congress to do more good. Here is what he wrote:

One of the beauties of the ... doctrine [recognizing federal common lawmaking powers] for our day and age is that it permits overworked federal legislators, who must vote with one eye on the clock and the other on the next election, so easily to transfer a part of their load to federal judges, who have time for reflection and freedom from fear as to tenure and are ready, even eager, to resume their historic law-making function – with Congress always able to set matters right if they go too far off the desired beam.⁸

Perhaps there are good arguments for this kind of federal common law. Even more likely, the practical effect of the issue may be small beer, since the delegation of Friendly's brand of federal common lawmaking authority is hardly a pervasive feature of American public law. What is striking, however, is that a judge as serious as Henry Friendly just took for granted the idea that, where lawmaking is concerned, more is better. He stated clearly – and without any hint of irony – that shifting the hard work of detailed lawmaking to federal judges would beneficially shield federal policymaking

⁷ See *Finley v. United States*, 490 U.S. 545, 565 (1989) (Stevens, J., dissenting) (noting that Judge Friendly “is universally recognized not only as one of our wisest judges but also as one with special learning and expertise in matters of federal jurisdiction”). The editors of the third edition of Hart and Wechsler dedicated it to Henry Friendly, whom they described as “man for all seasons in the law; master of this subject.” Paul Bator et al, *Hart and Wechsler's The Federal Courts and The Federal System* xix (3d ed. 1988).

⁸ Henry J. Friendly, *In Praise of Erie – And of the New Federal Common Law*, 39 N.Y.U. L. Rev. 383, 419 (1964).

Lawmaking Made Easy

from the time pressures and demands of accountability that encumber the modern legislator.

My favorite of these examples comes from then-Judge Breyer in his Roth Lectures, where he presented a highly practical view of why, despite modern textualism, judges should still sometimes use legislative history to construe statutes.⁹ Among a slew of other interesting examples, he invoked a controversy about whether an ambiguous provision of the Urban Mass Transit Act of 1964 should be read to preempt state labor law. He declared that a court faced with that question should properly credit the authority of a pre-arranged Senate colloquy in which the floor manager denied any intent to preempt such law. Judge Breyer's reasons were eminently practical:

[W]hat would the effect on Congress be if it knew that courts would not consider legislative history? Suppose, in 1964, that the employers, unions, and states had thought that committee testimony, report language, floor statements, and the like could not influence a later judicial interpretation of the law's text. How would the states and employers have obtained the preemption assurance that they sought and that the unions were willing to give? They might have tried to write a statutory provision that embodied appropriate "preemption" language. But, one can easily imagine that time, the complexity and length of the overall bill, and the difficulty of foreseeing future circumstances (including how courts would interpret "anti-preemption" language) might have made it impossible for the groups to agree on statutory language. It was easier, however, for them to agree about floor statements or report language about an "intent." This language is more general in form, and would not bind courts in cases where it would make no sense to do so.¹⁰

In other words, if legislators had had to resolve the question of preemption through statutory language, that task might have increased the transaction costs of negotiation. Or the contending legislators

⁹ Stephen G. Breyer, *On the Uses of Legislative History in Interpreting Statutes*, 65 S. Cal. L. Rev. 845 (1992).

¹⁰ *Id.* at 860.

and interest groups might not have come to terms. In the end, the bill might not have passed. If the relevant policy question – the desirability and scope of preemption – had to pass through the filter of bicameralism and presentment, Congress might have produced less legislation because its members perhaps couldn't agree – or at least couldn't agree cheaply enough to get the bill through given the competing demands on Congress's resources.

II.

LESS IS MORE

Given the unmistakably cumbersome design of Article I, Section 7's bicameralism-and-presentment requirement, the argument that an institutional practice should be favored *because* it leads to a higher volume of less accountable lawmaking is akin to the argument that an assertive regime of common law libel should be favored *because* it gives state actors more authority to rein in undesirable speech. Perhaps one might find some other justification for either such regime, but I find it unsettling to defend a practice based upon an inverted view of the relevant constitutional design. The “more is better” attitude of helping Congress either to pass the buck (Taft and Friendly) or even to pass more laws itself (Breyer) turns inside out certain structural aims that are readily discernible in the legislative process prescribed by the Constitution.

Even the quickest look at the constitutional structure reveals that the design of bicameralism and presentment disfavors easygoing, high volume lawmaking.¹¹ To pass a law, one must make it past the House, the Senate, and (unless two-thirds of each House is prepared

¹¹ Writing about the process of inferring purpose from the nature of a statute, Max Radin once observed that “the purpose of many entities may be ... something which is evident in the character of the thing itself.” Max Radin, *Statutory Interpretation*, 43 Harv. L. Rev. 863, 875 (1930). Although it is perhaps rare for a legal instrument – particularly at the level of a constitution – to suggest a straightforward purpose, it is near impossible to conclude that a decision-making process consisting of multiple members divided across three largely independent institutions seeks to promote easy rather than labored decision making.

Lawmaking Made Easy

to override a veto) the President. And those three institutions answer to different constituencies, are selected at (mostly) different times, and are made independent of one another's direct control in all but the most extraordinary cases.¹² The cumbersomeness of the process seems obviously suited to interests that contradict the "more is better" attitude that has come to be almost an unconscious assumption of public law.

Pause, and contrast the attitudes of Taft, Friendly, and Breyer with those of earlier worthies who were on the scene when Article I, Section 7 was adopted. I mention some eighteenth-century types not because I wish to unearth the "original intent" behind Article I, but because their accounts of the constitutional design match up so nicely with the evident import of the structure itself.¹³

A recurrent founding-era theme was that dividing up power makes it harder for self-interested interest groups or, indeed, bad actors of any sort to get things they want out of the legislative process.¹⁴ The premise is hardly surprising. If one of the three independent bodies gets corrupted, there are still two others to check it.¹⁵ Madison said it better, of course:

[A] senate, as a second branch of the legislative assembly distinct from and dividing the power with a first, must be in all cases a salutary check on the government. It doubles the security to the people by requiring the concurrence of two distinct

¹² See U.S. Const. art. I, § 7 (prescribing the tricameral structure); see also Jonathan R. Macey, Promoting Public-Regarding Legislation Through Statutory Interpretation: An Interest Group Model, 86 Colum. L. Rev. 223, 247-48 (1986) (describing the tricameral legislature as a way to raise the costs of procuring legislation)

¹³ See John F. Manning, *Textualism and the Role of The Federalist in Constitutional Adjudication*, 66 Geo. Wash. L. Rev. 1337, 1350-60 (1998) (suggesting that founding-era writings may be persuasive but not controlling).

¹⁴ See *INS v. Chadha*, 462 U.S. 919, 951 (1983) (noting that bicameralism addressed the "fear that special interests could be favored at the expense of public needs").

¹⁵ See Gordon S. Wood, *The Creation of the American Republic, 1776-1787*, at 559-61 (1969).

John F. Manning

bodies in schemes of usurpation or perfidy, where the ambition or corruption of one would otherwise be sufficient.¹⁶

Hamilton saw the veto similarly, as a further “salutary check upon the legislative body, calculated to guard the community against the effects of faction, precipitancy, or of any impulse unfriendly to the public good which may happen to influence a majority of that body.”¹⁷

Although the founders almost surely had no idea at the time, modern social science now instructs that a multicameral system accomplishes that objective by imposing the equivalent of a supermajority requirement upon the enactment of legislation.¹⁸ That reality makes it harder even for a majority to enact self-interested or oppressive legislation because it gives political minorities extraordinary blocking power.¹⁹ But of course that means that Congress may

¹⁶ The Federalist No. 62, at 378-79 (Madison) (Clinton Rossiter ed., 1961). Some other important founders had the same idea. See, for example, id. No. 73, at 443 (Hamilton) (deeming it “far less probable that culpable views of any kind should infect all the parts of the government at the same moment and in relation to the same object than that they should by turns govern and mislead every one of them”); 1 The Works of James Wilson 291-92 (Robert G. McCloskey ed., 1967) (“When a single legislature is determined to depart from the principles of the constitution – and its incontrollable power may prompt the determination – there is no constitutional authority to arrest its progress. . . . Far different will the case be, when the legislature consists of two branches. If one of them should depart, or attempt to depart from the principles of the constitution; it will be drawn back by the other.”).

¹⁷ The Federalist No. 73, at 443 (Hamilton). For a similar but later expression of the same idea, see 2 Joseph Story, Commentaries on the Constitution of the United States § 882, at 348 (Boston: Hillard, Gray, and Co., 1833) (“[T]he [veto] power . . . establishes a salutary check upon the legislative body, calculated to preserve the community against the effects of faction, precipitancy, unconstitutional legislation, and temporary excitements, as well as political hostility.”) (citation omitted).

¹⁸ See James M. Buchanan & Gordon Tullock, *The Calculus of Consent* 233-48 (1962).

¹⁹ See Bradford R. Clark, Separation of Powers as a Safeguard of Federalism, 79 *Tex. L. Rev.* 1321, 1371-72 (2001); John F. Manning, Textualism and the Equity of the Statute, 101 *Colum. L. Rev.* 1, 74-78 (2001).

Lawmaking Made Easy

not enact a new law unless a relatively broad segment of society – not a bare majority – assents to change. Simply put, this favors the status quo and disfavors legislative output.²⁰

A second – and somewhat different – theme supposes that bicameralism and presentment might induce legislators to think and deliberate more about legislation, acting less often in hasty response to a momentary public passion. This much also seems apparent in the structure.²¹ And some important founders thought so as well. Hamilton thus wrote that “[t]he oftener the measure is brought under examination, the greater the diversity in the situations of those who are to examine it, the less must be the danger of those errors which flow from want of due deliberation, or of those missteps which proceed from the contagion of some common passion or interest.”²² No one, however, said it better than Washington:

There is a tradition that, on his return from France, Jefferson called Washington to account at the breakfast-table for having agreed to a second chamber. ‘Why,’ asked Washington, ‘did you pour that coffee into your saucer?’ ‘To cool it,’ quoth Jef-

²⁰ See William H. Riker, *The Merits of Bicameralism*, 12 *Int’l Rev. L. & Econ.* 166, 167-68 (1992) (“[T]he effect of breaking the unicameral house into a tricameral body is about the same as going from simple-majority to supermajority rule in the unicameral body, namely delay and stability.”).

²¹ See, for example, *Chadha*, 462 U.S. at 951 (“The division of the Congress into two distinctive bodies assures that the legislative power would be exercised only after opportunity for full study and debate in separate settings.”); *The Pocket Veto Cases*, 279 U.S. 655, 678 (1929) (arguing that it is an “essential . . . part of the constitutional provisions, guarding against ill-considered and unwise legislation, that the President, on his part, should have the full time allowed him for determining whether he should approve or disapprove a bill, and if disapproved, for adequately formulating the objections that should be considered by Congress”).

²² *The Federalist* No. 73, at 443 (Hamilton); see also 1 *Works of James Wilson* at 294 (“In planning, forming, and arranging laws, deliberation is always becoming, and always useful.”).

erson. ‘Even so,’ said Washington, ‘we pour legislation into the senatorial saucer to cool it.’²³

Again, these aspirations do not fit naturally with the premise of a system geared toward easy and copious lawmaking.

But those observations touch only indirectly upon the question here. Madison and Hamilton, at least, explicitly recognized and reported what (I think) the structure makes obvious: bicameralism and presentment make lawmaking difficult *by design*. Their remarks on this point began as concessions. Madison thus acknowledged that “this complicated check on legislation may in some instances be injurious as well as beneficial.”²⁴ Hamilton likewise allowed that “the power of preventing bad laws includes that of preventing good ones.”²⁵ But both quickly claimed those troubling features as virtues. Madison emphasized that “the facility and excess of law-making,” and not the converse, “seem to be the diseases to which our governments are most liable.”²⁶ And for Hamilton, “[t]he injury which may possibly be done by defeating a few good laws will be amply compensated by the advantage of preventing a number of bad ones.”²⁷ The trade-off evident in the structure of Article I, Section 7 was not merely acknowledged, but endorsed by the document’s strongest defenders.

None of this is to suggest that the Constitution forbids the practices that the lawmaking-made-easy proponents defend. For me, the legitimacy of such practices as robust delegation, federal common lawmaking, and the use of legislative history depends on quite specific textual, structural, and historical questions that are not captured by the idea that lawmaking should be made easier or harder.

²³ 3 The Records of the Federal Convention of 1787, at 359 (Max Farrand ed., rev. ed. 1966), quoting Moncure Daniel Conway, Omitted Chapters of History Disclosed in the Life and Papers of Edmund Randolph 91 (1888).

²⁴ The Federalist No. 62, at 378 (Madison).

²⁵ Id. No. 73, at 443 (Hamilton).

²⁶ Id. No. 62, at 378 (Madison).

²⁷ Id. No. 73, at 444 (Hamilton).

Lawmaking Made Easy



“[T]he facility and excess of law-making seem to be the diseases to which our governments are most liable.”

– *James Madison*

John F. Manning

Instead, I think we must recognize that proponents of lawmaking outside the Article I, Section 7 process should stop arguing that their position is justified because such lawmaking will unshackle Congress to do more, free of the sticky constraints that bicameralism and presentment impose. Article I, Section 7's design manifestly places value upon cumbersomeness, high transaction costs, and even (to some extent) gridlock. To say that certain lawmaking practices have merit *because* they lift those burdens is to rest on perceived virtues that are the converse of those implicit in the legislative design.



The doctrine of the separation of powers was adopted by the convention of 1787 not to promote efficiency but to preclude the exercise of arbitrary power. The purpose was not to avoid friction, but, by means of the inevitable friction incident to the distribution of the governmental powers among three departments, to save the people from autocracy.

Louis Brandeis