



# TO THE BAG

## LAWMAKING & LEGISLATION

To the *Bag*:

John Manning’s entertaining “Lawmaking Made Easy” (10 GREEN BAG 2D 191) works only because it conflates legislation and lawmaking. To be sure, those who wrote our Constitution feared a lower house that might be captured by the hoi polloi, and celebrated the cooling influence of the Senate and the veto. But they also expected most of their law to come from courts they did not fear in the same way. At the time, the courts were responsible for the great bulk of the law that would affect them – contracts, property, torts, even (at the time) crime. Henry Friendly, then, was saying nothing that would have surprised them. And neither was William Howard Taft. Unlike the legislature enacting a rate statute, the ICC was required to follow on-the-record trial-like procedures, and its work product was subject to quite exacting judicial review. Yes, it got to the same place as a legislature could, but its lawmaking work getting there was not “legislation.” And this point is at the heart of Stephen Breyer’s reasoning, as well.

One worried about lawmaking made easy should be concerned as well with the extent to which the laws Congress passes are not debated, but slipped into omnibus measures in the dead of night or, like the Patriot Act with its enormous implications, presented as up-or-down fait accompli. Thomas Mann and Norman Ornstein wrote much more broadly, taking these and other flaws into account, in *The Broken Branch*.

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It is indeed easy to block legislation, although once it is enacted its political history earns it a level of judicial respect that administrative action – that is not “legislation,” although sometimes like it in its effects if valid – is not accorded. Conservatives, perhaps anticipating that vetogates will be an important remaining handle on government for them come the fall, may be moved by Manning’s conflation. But one cannot find a national government anywhere that does not, as we do, exhibit a regime for lawmaking of which legislation is only one element. It is a designedly political element, and for that reason it is one at special risk of the mob. But it is only one element; rulemaking, as we call it, is a universal element of government.

As for the courts, they are emphatic that statutory interpretation is lawmaking. That is, once it has decided what a statute “means,” the Supreme Court has insisted, only Congress can change that reading. This is a much more conservative than liberal principle. With the Court constituted as it now is, one can see that it too would have a certain conservative appeal. Bill Eskridge’s view, at which John Manning takes aim, is at root a call to constructive partnership; Manning’s, a call to arms.

Yours truly,  
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## AALL’S EFFORTS ON DIGITAL AUTHENTICATION

To the *Bag*:

The American Association of Law Libraries (AALL) is pleased with the attention our 2007 *State-by-State Report on Authentication of Online Legal Resources* has received, both in Bob Berring’s excellent article, “Losing the Law,” (10 GREEN BAG 2D 279) and the recent letter to the editor by Richard Leiter, “Paper Is Not a Drag.” (11 GREEN BAG 2D 12). Both authors highlight the fact that we have a crisis on our hands. As states eliminate the print versions of their primary legal resources (as a cost-saving measure), they aren’t tak-