LEGISLATIVE DUE PROCESS AND SIMPLE INTEREST GROUP POLITICS: ENSURING MINIMAL DELIBERATION THROUGH JUDICIAL REVIEW OF CONGRESSIONAL PROCESSES

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Federal statutes are enacted that, in whole or in part, have failed to receive even minimal attention from Congress. Because the most obvious solution to this problem—procedural reform of Congress's internal legislative rules—has not been forthcoming, Victor Goldfeld attempts to put forth the strongest possible case for a judicial approach to addressing this problem. Drawing on recent Supreme Court decisions, Goldfeld outlines "legislative due process"—a form of judicial review in which courts would examine the legislative process by which federal statutory provisions are enacted to ensure that such provisions received at least a minimal level of congressional deliberation. This would improve the quality of congressional policymaking, and help minimize the ability of special interest groups to game the legislative process. He eschews coming to a firm conclusion on whether legislative due process is a viable model of judicial review, instead providing the reader with a framework for approaching that question.

The Constitution does not and cannot guarantee that legislators will carefully scrutinize legislation and deliberate before acting. In a democracy it is the electorate that holds the legislators accountable for the wisdom of their choices.[1]

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I see no reason why the character of the [Congress's] procedures may not be considered relevant to the decision whether the legislative product has caused a deprivation of liberty or property without due process of law. . . . [I]t seems to me that judicial review should include a consideration of the procedural character of the decision-making process.[2]

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1 INS v. Chadha, 462 U.S. 919, 997 (1983) (White, J., dissenting).

2 Fullilove v. Klutznick, 448 U.S. 448, 550–51 (1980) (Stevens, J., dissenting).

INTRODUCTION

In January 2003, Congress passed the Fiscal-Year 2003 omnibus spending bill, authorizing $397 billion of appropriations. Tucked away in the 3000-page document was a paragraph-long provision—added as a rider just several hours before the bill was put to a vote, when passage was all but certain—significantly loosening the standards that livestock and livestock products must meet in order to be marketed as "organic." The provision undermined standards put into effect by the Department of Agriculture in October 2002 under the Organic Standards Act, after "twelve years of debate, public comment, regulation and legislation,"[3] yet the Department of Agriculture was not asked to comment on the amendment, nor was there any public debate. A Representative had added the provision to benefit a single chicken company in his home state, which had donated $4000 to his last election.[4]

What exactly is disturbing about this story? Certainly complaints about the influence of special interest groups are not uncommon.[5]

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[3] Elizabeth Becker, *Both Parties Begin Effort to Restore Organic Standard*, N.Y. TIMES, Feb. 27, 2003, at A28.

[4] The story did not quite end there. The burgeoning organic food industry—one of the fastest growing in the country, with nearly $12 billion in annual sales, of which organic meat sales make up $400 million—was up in arms, fearing that the looser standards would destroy it. On April 16, 2003, after several months of intense political lobbying, President Bush signed the Organic Restoration Act into law, repealing the burdensome provision.

Interestingly, the repealing provision was itself part of a $79 billion spending bill—appropriations for the military efforts in Iraq—which included a different provision, similar to the one being repealed, allowing those who catch and sell wild fish to use the "organic" label. That provision was added by Alaska's two Senators, one of whom "used his position as chair of the Senate Appropriations Committee to bottle up the repeal of [the first provision] unless the fish-labeling exemption sought by Alaska[s'] commercial salmon industry was approved." John Krist, *Changes in Law Could Destroy Organic Label's Credibility*, SCRIPPS-MCCLATCHY W. SERVICE, Apr. 25, 2003.

Moreover, "dozens of pork-barrel projects and special interest provisions . . . were inserted at the last minute . . . into the bill to pay for the war in Iraq." David Firestone, *Senate Rolls a Pork Barrel into War Bill*, N.Y. TIMES, Apr. 9, 2003, at B11. Just forty minutes before the bill was passed, members of the Senate Appropriations Committee added riders for their "personal projects," including: $10 million for a research station at the South Pole; $3.3 million to fix a leaking dam in Vermont; a provision allowing Senators to spend more to send notices of town meetings to voters; and a provision allowing the Border Patrol to accept body armor donations for dogs. *Id.* Of course, the bill was passed, pork and all, with some Senators not even reading the amendments. *Id.*

[5] The National Election Survey, a University of Michigan research institute, conducts a biannual survey in which it asks Americans, "Would you say the government is pretty much run by a few big interests looking out for themselves or that it is run for the benefit of all the people?" In 1964, less than a third adopted the interest group theory. By 1982, the number was over sixty percent. Daniel A. Farber & Philip P. Frickey, *The Jurisprudence of Public Choice*, 65 TEX. L. REV. 873, 873 & nn.1–3 (1987). In 1998, the number had reached seventy-five percent. ALAN ROSENTHAL ET AL., NATIONAL CONFER-

"We live in a time of widespread dissatisfaction with the legislative outcomes generated by the political process. Too often the process seems to serve only the purely private interests of special interest groups at the expense of the broader public interest it was ostensibly designed to serve."[6] But the story recounted above is disturbing not merely because special interests played a role, but because Congress appears to have abdicated its responsibility—the legislative process seems to have failed. How could the rest of Congress stand idly by while a single legislator manipulated that process? Of course, an obvious response is that this is "politics as usual," and it is simply unrealistic to expect Congress to deliberate every time it enacts legislation. But is it truly naïve to hold Congress to a higher standard?

This Note suggests that something can be done about unthinking legislative responses to special interest group pressures. In particular, this Note argues that if Congress is required to deliberate at least minimally before enacting legislation, important benefits can inure to the legislative process. One of those benefits is a minimization of the harmful effects caused by special interests. Moreover, placing a floor on the level of deliberation required to enact a law could help improve the quality of congressional policymaking and political accountability.

How might such a requirement of minimal deliberation be enforced? The simplest and most direct approach would be for Congress to prescribe its own internal rulemaking procedures. For example, Congress might enact rules requiring all of the provisions of a bill to address a single subject, requiring all bills to be read three times on three separate days before being enacted, or barring the introduction of new legislation after a certain point in the legislative session. Rules such as these have long been employed by various state legislatures,[7] and can improve the quality of legislative deliberation

ENCE OF STATE LEGISLATURES, THE CASE FOR REPRESENTATIVE DEMOCRACY (2001), http://www.ncsl.org/public/trust/casebody.htm.

[6] Jonathan R. Macey, *Promoting Public-Regarding Legislation Through Statutory Interpretation: An Interest Group Model*, 86 COLUM. L. REV. 223, 223 (1986).

[7] For a discussion and analysis of state constitutional "three-reading rules" and timing provisions limiting the introduction of new legislation after a certain point in the legislative session, see ADRIAN VERMEULE, THE CONSTITUTIONAL LAW OF CONGRESSIONAL PROCEDURE 52–56 (U. Chi., Public Law Working Paper No. 39, 2003), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=382461. For a discussion of the "single-subject rule", and a proposal for adopting such a rule as an amendment to the Federal Constitution, see generally Brannon P. Denning & Brooks R. Smith, *Uneasy Riders: The Case for a Truth-in-Legislation Amendment*, 1999 UTAH L. REV. 957. Professors Farber and Frickey also discuss judicial enforcement of state constitutional rules dealing with the legislative process. *See* Farber & Frickey, *supra* note 5, at 922.

and restrict legislators' ability to sneak provisions past their unsuspecting colleagues.

Unfortunately, Congress has been unwilling to confine itself in this way. Perhaps some highly publicized instance of significant legislation being passed with an egregious lack of deliberation might build the political momentum for procedural reform within Congress, but that has not yet occurred. Nonetheless the problem remains: Some legislation is passed not because a majority of Congresspersons thought it worthy of passage, but because a small group of representatives was able to game the lawmaking process to get it passed, perhaps at the behest of special interest groups, while the rest of Congress sat idly by.

Because Congress is unwilling to do anything about this problem, and the public at large also seems uninterested, this Note argues that the judiciary might be able to play a part. Courts might be able to help ensure minimal congressional deliberation by reviewing the legislative process that led to a policy's enactment. If a particular policy did not receive even minimal deliberation, a court can issue a "suspensive vet[o]"[8] that would provisionally invalidate the law, but would not prevent Congress from reenacting the very same policy after using an appropriate legislative procedure. The result, hopefully, would be an increase in the proportion of legislation that is enacted because a majority of our representatives consider it in the public interest, and a corresponding decrease in the amount of legislation that is the product of unthinking legislative responses to interest group pressures.

Of course, the idea that courts might tell Congress how to do its job raises significant separation-of-powers concerns, as well as practical concerns about the consequences of subjecting the flexible lawmaking process to the rigid judicial process. Indeed, no matter how important it is to ensure congressional deliberation and minimize interest group influence, it might be impossible for courts to get involved without betraying the constitutional design and, quite simply, making things worse.

The purpose of this Note is to put forth the strongest possible case for judicial involvement that would go the farthest toward improving deliberation and minimizing interest group influence while avoiding some of the more obvious negative consequences of such an approach. Plainly, subjecting Congress to yet another form of judicial supervision is a drastic step that should not be taken without serious

[8] Terrance Sandalow, *Judicial Protection of Minorities*, 75 MICH. L. REV. 1162, 1189 (1977).

consideration of the drawbacks. This Note identifies some of those drawbacks and evaluates how significant they really are, but, importantly, does not come to a conclusion on whether they ultimately outweigh the benefits of judicial involvement. This Note only aims to provide an analysis that will aid the reader in making that decision.

The question of whether courts can or should play such a role takes on particular significance in light of a series of recent Supreme Court cases seeming to endorse a form of judicial review of the legislative process. The main examples are federalism decisions in which the Court invalidated federal statutes partly because of Congress's failure to make sufficient findings justifying the use of federal legislative authority.[9] Academic commentary already has begun to address the propriety of this form of review, which appears to be a clear departure from the traditional model of substantive judicial review, in which a court evaluates whether a statute violates judicially defined substantive constitutional norms without any consideration of the process by which the statute was enacted.[10]

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[9] The Court has analyzed the legislative record in several cases involving legislation predicated upon Congress's power under the Commerce Clause and section five of the Fourteenth Amendment. The most dramatic examples are *United States v. Lopez*, 514 U.S. 549 (1995), and *Board of Trustees of the University of Alabama v. Garrett*, 531 U.S. 356 (2001). Other examples include *United States v. Morrison*, 529 U.S. 598 (2000), *Florida Prepaid Postsecondary Education Expense Board v. College Savings Bank*, 527 U.S. 627 (1999), and *Kimel v. Florida Board of Regents*, 528 U.S. 62 (2000). For an analysis of these and other recent decisions involving judicial review of the legislative process, see Philip P. Frickey & Steven S. Smith, *Judicial Review, the Congressional Process, and the Federalism Cases: An Interdisciplinary Critique*, 111 YALE L.J. 1707, 1718–28 (2002).

Thus far, the Court has employed this form of review primarily in relatively narrow areas. Aside from these federalism decisions, the Court imposed similar procedural obligations upon Congress in two cases challenging federal telecommunications and media regulation under the First Amendment. *See* Turner Broad. Sys., Inc. v. FCC, 520 U.S. 180 (1997); Turner Broad. Sys., Inc. v. FCC, 512 U.S. 622 (1994). For an analysis of the *Turner Broadcasting* decisions, see A. Christopher Bryant & Timothy J. Simeone, *Remanding to Congress: The Supreme Court's New "On the Record" Constitutional Review of Federal Statutes*, 86 CORNELL L. REV. 328, 332–39 (2001); Comment, *Constitutional Substantial-Evidence Review? Lessons from the Supreme Court's* Turner Broadcasting *Decisions*, 97 COLUM. L. REV. 1162, 1165–70 (1997); Note, *Deference to Legislative Fact Determinations in First Amendment Cases After* Turner Broadcasting, 111 HARV. L. REV. 2312, 2313–15 (1998).

[10] For discussions of congressional-findings requirements in the wake of *United States v. Lopez*, see Philip P. Frickey, *The Fool on the Hill: Congressional Findings, Constitutional Adjudication, and* United States v. Lopez, 46 CASE W. RES. L. REV. 695 (1996); Barry Friedman, *Legislative Findings and Judicial Signals: A Positive Political Reading of* United States v. Lopez, 46 CASE W. RES. L. REV. 757 (1996); Harold J. Krent, *Turning Congress into an Agency: The Propriety of Requiring Legislative Findings*, 46 CASE W. RES. L. REV. 731 (1996). Some of the more recent articles addressing this trend, which take into account the post-*Lopez* cases, are Bryant & Simeone, *supra* note 9; William W. Buzbee & Robert A. Schapiro, *Legislative Record Review*, 54 STAN. L. REV. 87 (2001); Ruth Colker & James J. Brudney, *Dissing Congress*, 100 MICH. L. REV. 80 (2001); Frickey & Smith, *supra* note 9.

Although these cases do not directly deal with the role of special interests in the legislative process, nor how greater deliberation can improve that process, "they reflect the idea that judges can force more democratically legitimate actors to improve the quality of their decisionmaking processes."[11] Commentators have described a variety of judicial techniques that perform similar functions, labeling them "due process of lawmaking,"[12] "structural due process,"[13] and otherwise.[14] The recent cases are particularly notable because they exemplify a particular form of due process of lawmaking that has been termed the "due deliberation model."[15] Under this model, "courts scrutinize the quality of the decisionmaking processes within the legislature that led to the statute under review."[16]

This Note draws on the due deliberation model of due process of lawmaking in putting forth a model of judicial review that would serve

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[11] Frickey & Smith, *supra* note 9, at 1710. This Note draws heavily on the work of Professors Frickey and Smith. But, while Professors Frickey and Smith are (justifiably) critical of the Court's recent foray into the legislative process, this Note argues that the Court's federalism decisions may provide a valuable groundwork for a new and different form of judicial review from that employed in those decisions.

[12] Hans A. Linde, *Due Process of Lawmaking*, 55 NEB. L. REV. 197 (1976). Although Professor Linde did not necessarily intend such a meaning to be attached to the phrase "due process of lawmaking," this Note uses the term to refer to judicial evaluation of the process through which laws are enacted.

[13] Laurence H. Tribe, *Structural Due Process*, 10 HARV. C.R.-C.L. L. REV. 269 (1975).

[14] This Note will discuss just a few of these doctrines in Part III.D, *infra*. For a succinct overview of such techniques, see generally Frickey & Smith, *supra* note 9. For an exhaustive study presenting both due process of lawmaking and structural due process, along with a range of related models, under the name of "second-look" or "structural" rules, see Dan T. Coenen, *A Constitution of Collaboration: Protecting Fundamental Values with Second-Look Rules of Interbranch Dialogue*, 42 WM. & MARY L. REV. 1575, 1588 (2001) [hereinafter Coenen, *A Constitution of Collaboration*] (discussing wide range of doctrines that "invite a deep collaboration between judicial and nonjudicial authorities in the elaboration of constitutional law"). *See also* Dan T. Coenen, *The Rehnquist Court, Structural Due Process, and Semisubstantive Constitutional Review*, 75 S. CAL. L. REV. 1281 (2002) [hereinafter Coenen, *Semisubstantive Constitutional Review*]; Dan T. Coenen, *Structural Review, Pseudo-Second-Look Decision Making, and the Risk of Diluting Constitutional Liberty*, 42 WM. & MARY L. REV. 1881 (2001) [hereinafter Coenen, *Structural Review*].

[15] *See* Frickey & Smith, *supra* note 9, at 1716–18. Professors Frickey and Smith use a taxonomy of models of due process of lawmaking developed in DANIEL A. FARBER & PHILIP P. FRICKEY, LAW AND PUBLIC CHOICE: A CRITICAL INTRODUCTION 118–31 (1991). *See* Frickey & Smith, *supra* note 9, at 1710 n.8 (noting reliance on Farber and Frickey's taxonomy).

[16] Frickey & Smith, *supra* note 9, at 1710. Professors Frickey and Smith also discuss the "procedural regularity" model, in which "courts should at least sometimes require the legislature to follow procedural lawmaking rules, especially those specified in the constitution under which the legislature operates." *Id.* For further discussion of the procedural regularity model, see *infra* text accompanying note 125. The third model of due process of lawmaking, called the "institutional legitimacy" model, "concerns the identity of the policymaking institution appropriate for a given decision." Frickey & Smith, *supra* note 9, at 1710. That model is not particularly relevant to the issues discussed in this Note.

two interrelated goals. The first and primary goal is to improve the quality of congressional deliberation generally.[17] The second goal is to minimize the influence of special interest groups. This second goal, although also significant, is qualified by the first. Thus, under the model of judicial review proposed in this Note, the specific problem that courts would address is not special interest politics per se. The concern lies not with Congress merely favoring certain interests, but favoring those interests *without adequately considering*[18] the costs that such favorable treatment will impose on others. For convenience, this Note will refer to this specific type of legislative behavior as "simple interest group politics."[19]

The model of judicial review proposed in this Note, what is here called "legislative due process,"[20] entails judicial review of the legislative process that led to the enactment of legislation, rather than substantive review of the outcome of that process. This distinction

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[17] For reasons discussed in Part II, the model of judicial review described in this Note would apply only to Congress, and not state legislatures.

[18] Of course, a proposal to inquire into the process by which Congress considered a policy suggests an analogy to judicial development of "hard look" review of administrative action. For a discussion of the similarity between legislative due process and administrative law, see *infra* Part IV.A.2.

[19] The term is an intentional play on the phrase "simple racial politics," coined in *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 493 (1989). Despite the different context, the underlying point is similar: Constitutional concerns may arise when Congress unthinkingly responds to pressure by particular groups, rather than fully considering the implications of its actions. However, this Note does not necessarily endorse the specific limitations that the Court has imposed in the affirmative-action context.

[20] This Note uses the term "legislative due process" for several reasons. First, as will be discussed below in Part II, the doctrine is premised on the value of legislative deliberation, and would apply only to congressional legislation. Thus, broader terms such as "structural review," which imply judicial review of all forms of official policymaking, are inappropriate. *Cf.* Coenen, *A Constitution of Collaboration*, *supra* note 14; Coenen, *Semisubstantive Constitutional Review*, *supra* note 14; Coenen, *Structural Review*, *supra* note 14; Tribe, *supra* note 13. Second, the doctrine is primarily designed to facilitate legislative deliberation, but not to protect any particular substantive constitutional value, such that "semi-substantive" review would also be a misnomer. *Cf.* Coenen, *Semisubstantive Constitutional Review*, *supra* note 14. Third, although the term "due process of lawmaking" might be appropriate, that term might confuse the doctrine proposed in this Note with Professor Linde's intended meaning for the term, which was to describe the constitutional obligations of legislators to follow certain procedures in the lawmaking process, obligations which should only be judicially enforced (if at all) to the extent that they are explicitly provided for in the legislature's relevant constitution (state or federal) or internal procedural rules. *See* Linde, *supra* note 12. The doctrine discussed herein, however, would allow courts to consider the legislative process by which Congress enacted a statute in more holistic terms, without necessarily focusing only on whether Congress followed explicit constitutional and legislative rules. Finally, "procedural due process" is inappropriate simply because the doctrine proposed in this Note has little to do with the existing doctrine that certain adjudicatory procedures must be provided prior to the deprivation of life, liberty, or property.

between substance and procedure, often maligned in legal scholarship,[21] is central to the case for legislative due process. As the discussion of "political process" theories of judicial review and Lochnerism[22] in Part III.A.2 will suggest, judicial review of the legislative process "ameliorate[s] the tension between judicial review and democracy"[23] caused by most forms of substantive review. In particular, this approach avoids charges of Lochnerism and countermajoritarianism[24] because it "seek[s] to avoid any conclusive judicial evaluation of the [merits] of the policy in question,"[25] instead focusing on the processes through which such policies are formulated into law. Moreover, democratic judgments would not be permanently displaced, because the result of a violation of legislative due process, unlike that for a violation of substantive constitutional standards, would not be the permanent invalidation of the challenged legislation. Rather, the remedy would be a "suspensive veto," or "remand to the legislature," which allows Congress to reenact identical legislation so long as it follows appropriate procedures and deliberates properly.[26] Although this would appear to be a novel and unprecedented judicial role, the Court currently employs a wide range of doctrines that serve to encourage legislative deliberation and impact the legislative process, as Part III.D will show.

This Note does not ignore the fact that judicial interference in the legislative machinery raises significant issues and should not be undertaken lightly. Aside from charges of Lochnerism, judicial review of the legislative process may be difficult to square with conventional understandings of the separation of powers, and may lead to other harmful consequences. In Justice Souter's dissent from one of the federalism cases that provides support for legislative due process, he stated these issues succinctly:

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21 *See, e.g.,* Laurence H. Tribe, *The Puzzling Persistence of Process-Based Constitutional Theories*, 89 YALE L.J. 1063 (1980) (arguing that process-based theories are themselves ultimately substantive). For a defense of process-based theories of judicial review, see Michael J. Klarman, *The Puzzling Resistance to Political Process Theory*, 77 VA. L. REV. 747 (1991).

22 *See* Lochner v. New York, 198 U.S. 45 (1905). The term "Lochnerism" certainly carries several connotations. As discussed in Part III.A.2, *infra*, this Note uses the term to refer to instances in which courts evaluate the wisdom of legislative policy choices without clear constitutional warrant for doing so.

23 Frickey & Smith, *supra* note 9, at 1710.

24 On the countermajoritarian difficulty, see ALEXANDER M. BICKEL, THE LEAST DANGEROUS BRANCH (1962).

25 Frickey & Smith, *supra* note 9, at 1709–10.

26 Of course, this is theoretically appropriate: Since the primary aim of legislative due process is improved deliberation, the judicial role should reach an end once that deliberation occurs.

> If, indeed, the Court were to make the existence of explicit congressional findings dispositive in some close or difficult cases something other than rationality review would be afoot. The resulting congressional obligation to justify its policy choices on the merits would imply either a judicial authority to review the justification (and, hence, the wisdom) of those choices, or authority to require Congress to act with some high degree of deliberateness, of which express findings would be evidence. But review for congressional wisdom would just be the old judicial pretension discredited and abandoned in 1937, and review for deliberateness would be as patently unconstitutional as an Act of Congress mandating long opinions from this Court. Such a legislative process requirement would function merely as an excuse for covert review of the merits of legislation under standards never expressed and more or less arbitrarily applied.[27]

Legislative due process aims to take these concerns into account. Part I outlines the connections between deliberation, the role of special interest groups in the legislative process, and legislative procedure. Part II lays out a doctrinal framework that courts can employ to ensure congressional deliberation. Part III discusses the foundations for judicial review of the legislative process. It argues that political process theory supports legislative due process, and that the doctrine is preferable to other models of judicial review that have been proposed to address the problem of interest group influence because it is not subject to charges of Lochnerism. After discussing the theory of due process of lawmaking as laid out by Professors Laurence Tribe and Hans Linde and Justice Stevens, Part III argues that courts already employ a variety of judicial tools to encourage legislative deliberation, such as the requirement that gender classifications be the product of a "reasoned congressional judgment." Part III also describes the Court's recent federalism decisions in more detail.

Finally, Part IV examines some potential objections to legislative due process and offers possible responses. It discusses constitutional objections—based on separation of powers and specific constitutional provisions governing internal congressional procedures—as well as practical concerns of whether legislative due process might cause more harm than good, either by increasing interest group influence or by allowing judges to use the doctrine as a covert means of substituting their own political preferences for those of Congress.

In the end, the reader might conclude that no form of judicial involvement in the legislative process, even if constitutionally permissible, can offer benefits that justify its costs. Hopefully, this Note and

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[27] United States v. Lopez, 514 U.S. 549, 613–14 (1995) (Souter, J., dissenting).

the model of judicial review it develops will illuminate some of the salient issues and enable the reader to perform the calculus.

I
DELIBERATION, SPECIAL INTEREST GROUPS, AND CONGRESSIONAL PROCESS

This Part discusses the connection between deliberation, special interest groups, and legislative procedures. Some of the questions that arise in this regard are: Is "deliberation" so inherently important a value that it could form the foundation for such a novel form of judicial review? Even if it is, the connection between deliberation and special interest group influence is not immediately apparent—why would the fact that Congress "really" thought about a particular policy make it less likely that the policy is intended to serve purely private interests? And, how exactly does legislative process connect to either improved deliberation or decreased interest group pressures? This Part aims to answer these questions.

One account of the appropriate congressional role draws on the conception of "deliberative democracy," in which elected representatives make public policy through a process characterized by informed, public-spirited debate. Indeed, this is a central aspect of "Madisonian republicanism,"[28] in which legislators deliberate to "refine and enlarge the public views."[29] Some go so far as to argue that "the American Constitution was designed to create a deliberative democracy."[30] On this account, deliberation is a value accorded constitutional status. Thus, when legislators behave merely as the servants of interest groups, they fail to perform their constitutionally assigned function,[31] because "the representative must deliberate rather than respond mechanically to constituent pressures."[32]

Others take far more cynical (or perhaps realistic) positions. They reject the view that interest groups are the antithesis of democracy, suggesting that such groups are its defining feature:

> Many public policies are better explained as the outcome of a pure power struggle—clothed in a rhetoric of public interest that is a mere figleaf—among narrow interest or pressure groups. . . . Yet it

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[28] On Madisonian republicanism and deliberative democracy, see generally Cass R. Sunstein, *Interest Groups in American Public Law*, 38 STAN. L. REV. 29 (1985).

[29] THE FEDERALIST NO. 10, at 44 (James Madison) (Cambridge Univ. Press ed., 2003); *see also* THE FEDERALIST NO. 70 (Alexander Hamilton).

[30] CASS R. SUNSTEIN, THE PARTIAL CONSTITUTION 19–20 (1993).

[31] *See* Cass R. Sunstein, *Naked Preferences and the Constitution*, 84 COLUM. L. REV. 1689, 1691 (1984) ("Under [the Madisonian] conception, the task of legislators is not to respond to private pressure but instead to select values through deliberation and debate.").

[32] Sunstein, *supra* note 28, at 45.

> would be odd, indeed, to condemn as unconstitutional the most characteristic product of a democratic (perhaps of any) political system.[33]

But, even assuming that the Madisonian conception is a realistic one and that deliberation is a constitutional value, how exactly does deliberation relate to the problems posed by interest groups? The underlying theory of Madisonian republicanism is that well-informed deliberation is the method most likely to further the public interest.[34] Special interests pose a risk to deliberative democracy in that some legislators might propose legislation in order to favor some powerful private interest, which is then enacted by Congress without a consideration of its overall effects.[35]

Moreover, special interests can "capture" legislators, through contributions and other means, using them to push through legislation that is beneficial to interest groups but perhaps harmful to the public interest as a whole. Deliberation is one method by which such private pressure can be diffused—if other legislators are aware that a particular policy is intended to benefit a particular narrow interest, they may intervene. The more attention a policy proposal receives, the more its proponents must justify it to persuade other congresspersons.[36] Greater attention to legislative proposals would also likely lead to increased accountability—after all, if legislators with a reputation of favoring private interests are routinely unable to put forth plausible public-regarding justifications for the policies they support, the electorate will likely take note of this fact at the polls.

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[33] Richard A. Posner, *The* DeFunis *Case and the Constitutionality of Preferential Treatment of Racial Minorities*, 1974 SUP. CT. REV. 1, 27.

[34] Hamilton held similar views. *See, e.g.*, THE FEDERALIST NO. 71, at 349 (Alexander Hamilton) (Cambridge Univ. Press ed., 2003) ("When occasions present themselves in which the interests of the people are at variance with their inclinations, it is the duty of the persons whom they have appointed to be the guardians of those interests to withstand the temporary delusion, in order to give them time and opportunity for more cool and sedate reflection."). Thus, one could argue that the Framers adopted the theory that legislators should deliberate about the public interest. Of course, it is not necessarily true that Madison's views were unanimously shared by the Framers. *See* Larry D. Kramer, *Madison's Audience*, 112 HARV. L. REV. 611, 671 (1999) (arguing that Framers generally were "deaf to Madison's theory").

[35] *See* Sunstein, *supra* note 28, at 46 ("[T]he federalists did not believe that representatives would or should respond mechanically to private pressure. Instead, the national representatives were to be above the fray of private interests. Above all, their task was deliberative.").

[36] Of course, legislators may turn a blind eye to special interest proposals, with the understanding that others will reciprocate when they themselves support legislation solely to benefit private interests. But, the more scrutiny legislative proposals receive, the less likely it is that such a cycle can be sustained.

Deliberation also has value even where special interests play little or no role. The quality of the legislative product can likely be increased through greater consideration of legislative proposals.[37] Through discussion of legislative means and ends, legislators inform themselves of the precise nature of the problems they are addressing and come to agreement on specific ways to address those problems. Greater scrutiny is also likely to produce fairer and more efficient legislation and block inequitable or inefficient policies whose burdens outweigh their benefits. Additionally, public perception of increased Congressional deliberation would improve public faith in the representative process.

Where does legislative process—the procedures employed by lawmakers in enacting legislation—fit in? Legislative process is instrumental to "well-informed and cognitively undistorted deliberation," which is a "widely-shared criteri[on] for evaluating legislative performance."[38] By improving the legislative process itself, perhaps stories like the one recounted at the beginning of this Note will become more rare.

However, this Note does not argue that interest groups must play no role at all in the legislative process. First, this is simply an unrealistic demand. It is not an overstatement to say that interest groups are simply here to stay. Second, a properly functioning legislative process requires interest groups to supply valuable information and expertise to time-constrained legislators.[39] Finally, interest groups can be viewed as exactly what their name implies: highly organized and effective groups representing the interests of some sector of the population. To the extent that the interests affected by proposed legislative action generally receive proper representation in the legislative process via special interest groups, lobbying arguably might produce leg-

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[37] *See* Vicki C. Jackson, *Federalism and the Uses and Limits of Law:* Printz *and Principle*, 111 HARV. L. REV. 2180, 2240 n.261 (1998) (arguing that requiring Congress to gather certain facts during legislative process "may lengthen time for deliberation, providing, for those who believe that the quality of decision is improved through deliberation, a further reason to support the process-based approach").

[38] VERMEULE, *supra* note 7, at 15. Professor Vermeule's study, however, focuses on congressional procedure from the standpoint of constitutional design, and he "move[s] decisively away from [the] court-centered discourse" of due process of lawmaking, which, he believes, "unfortunately tends to entangle itself in questions about how courts should conduct judicial review, and whether such review might be used to improve congressional performance." *See id.* at 1 n.6. Nonetheless, his work does propose that "the performance of [legislatures] is a function of the information they possess and of the quality of deliberation," goals that can be promoted through legislative procedure. *See id.* at 15.

[39] *See* Victoria F. Nourse & Jane S. Schacter, *The Politics of Legislative Drafting: A Congressional Case Study*, 77 N.Y.U. L. REV. 575, 610–12 (2002) (reporting comments of legislative staffers on value of lobbyists in drafting process, some of whom suggest that "the point of lobbyist involvement [is] actually a form of deliberation and participation").

islative deliberation that is as informed and participatory as the idealized deliberative democracy might demand. What is to be minimized, then, is not simply the influence of interest groups, but rather the detrimental consequences of such influence. Legislative due process seeks to minimize the possibility that Congress will unthinkingly pass legislation whose mere purpose and effect is to serve the interests of powerful factions.

II
SKETCHING A DOCTRINE OF LEGISLATIVE DUE PROCESS

This Part sketches how the doctrine of legislative due process might work in practice. Stated in its simplest form, the doctrine would require a court to examine the legislative process leading to a challenged policy's enactment for evidence that a minimally satisfactory level of deliberation occurred. The doctrine would apply to all congressional legislation, even where no particular constitutional interest is at stake, just like the existing rational basis test. The standard that courts would apply is uniformly weak—legislative due process would not take a tiered form whereby certain classes of constitutional interests would trigger heightened scrutiny. Finally, although one of the purposes of the doctrine is to minimize simple interest group politics, no finding of interest-group influence would need to be made.

These characteristics are intended to structure judicial review of the legislative process in such a way as to maximize its benefits while minimizing its costs. Indeed, because it is unclear whether legislative due process would deliver benefits that exceeded its costs even if employed in the precise form described in this Note, this Note argues that any form of judicial review of the legislative process that does not adhere to these broad outlines—including the form exemplified in the Court's recent federalism decisions—is unjustified. In outlining a more active judicial role, this Note does not ignore that one cannot control how courts might approach that role.[40] One can, however, analyze the benefits and risks of the various ways in which courts might review the legislative process, and suggest that the judiciary should become involved, if at all, only if that involvement takes a certain form. That is the goal of this Note.

Part II.A discusses the considerations that shape both the doctrinal requirements and the broad structural features of the doctrine. Part II.B lays out the particular evidence of deliberation that courts

[40] *See* Laurence H. Tribe, *A* Constitution *We Are Amending: In Defense of a Restrained Judicial Role*, 97 HARV. L. REV. 433, 435 n.7 (1983) ("[I]t is illegitimate to argue for a more active judicial role as though one could control judicial decisions by fiat.").

would search for in evaluating a legislative due process challenge. Part II.C outlines the general structural characteristics of the doctrine, such as where it would apply and how it would relate to currently existing substantive constitutional standards of review.

First, however, a preliminary comment is in order. Although there is potential for "simple interest group politics" at the state level, this Note focuses on the propriety of judicial review by the federal courts of congressional legislative processes, for two primary reasons. First, federal court review of state legislative procedures could raise significant federalism issues not involved in the review of congressional procedures.[41] Second, state-court review of state legislative procedures also raises additional issues. Some state legislatures must comply with more extensive procedural rules governing the legislative process that are found in state constitutions or imposed by the legislatures themselves.[42] Indeed, state courts even enforce these rules in certain circumstances.[43] Given federalism concerns, the relative lack of legislative procedures at the federal (as compared to the state) level, and the general absence of a federal judicial role in congressional procedure, this Note focuses on what federal courts might do to minimize simple interest group politics in Congress.

A. Considerations

There are several competing considerations that must be taken into account in structuring judicial review of the legislative process.[44]

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[41] On the other hand, textual authority for judicial review of state, as opposed to federal, legislative processes could be found in the clause providing that: "The United States shall guarantee to every State . . . a Republican Form of Government . . . ." U.S. CONST. art. IV, § 4. However, the Supreme Court has held the Guarantee Clause nonjusticiable since *Luther v. Borden*, 42 U.S. (7 How.) 1 (1849). For an argument that the Guarantee Clause authorizes judicial review of some state action, see Thomas C. Berg, Comment, *The Guarantee of Republican Government: Proposals for Judicial Review*, 54 U. CHI. L. REV. 208, 209 (1987). As the author of that Comment argued,

> The Court has underestimated the constitutional force of the argument that the representative scheme is designed to ensure a form of deliberative government: "due process of lawmaking" is merely shorthand for the type of decision making that the framers sought to ensure by requiring a republican form of state government.

Id. at 237.

[42] *See supra* note 7.

[43] *See* Farber & Frickey, *supra* note 5, at 922 (discussing state court enforcement of various state constitutional provisions governing legislative process).

[44] Requirements of standing and justiciability may prevent many legislative due process challenges from getting into court. Cases where parties suffer real injury (such as the companies harmed by the changes in organic food labeling standards, *supra* notes 3–4 and accompanying text, or defendants sentenced under stricter sentencing guidelines, *see infra* note 65) may satisfy these requirements, but the "injury" in other cases may be too generalized (such as the $10 million for research at the South Pole, *supra* note 4). There are

The purpose of the doctrine, of course, is to minimize instances of simple interest group politics—where Congress enacts legislation without even minimal consideration of the relevant issues merely to serve special interest groups. The underlying theory is that "courts may be able to reduce the power of special interests and foster legislative deliberation by more aggressively overseeing the legislative process."[45] Thus, courts should focus on the presence of certain procedures—indicia of deliberation—that make it more likely that policies receive the attention they deserve before enactment.

On the other hand, some factors counsel against imposing excessive procedural requirements. Legislators need flexibility in gathering information and evaluating policy options. Courts should not make demands that Congress simply cannot meet, or that would undermine valuable informal methods employed in the legislative process. Factfinding and decisionmaking in the legislative arena are inherently more fluid and freeform than the highly stylized and proceduralized adjudicatory process. Certainly, trial-type procedures should not be imposed on Congress. Moreover, separation-of-powers and other concerns are exacerbated by excessively intrusive review; thus, the doctrine should not require any more than is necessary to ensure a minimal level of deliberation.

This Note does not argue that courts should announce categorical rules that particular legislative practices must be employed in every case. For example, it would be foolish for a court to tell Congress that it must always hold at least one hour of floor debate for every proposal under consideration. Rather, the principle to which courts would expect Congress to adhere is that every substantive policy proposal receive some minimal level of congressional attention. That

several ways to address this issue. First, perhaps it is not so troubling that many suits will be dismissed for lack of standing so long as some can proceed and provide an opportunity for a judicial check on the lack of congressional deliberation. Second, although the Court normally requires an "injury in fact" for standing to sue, *see* Ass'n of Data Processing Serv. Orgs., Inc. v. Camp, 397 U.S. 150, 152 (1970) ("The first question [in addressing standing] is whether the plaintiff alleges that the challenged action has caused him injury in fact, economic or otherwise."), the Court could permit a sort of "citizen standing" for legislative due process challenges, *cf.* Flast v. Cohen, 392 U.S. 83 (1968) (granting federal taxpayers standing to sue to prevent government expenditures allegedly violating Establishment Clause). To prevent a deluge of legislative due process challenges under such a theory, Rule 12 of the Federal Rules of Civil Procedure could be amended to impose stricter pleading requirements on plaintiffs, and courts could be given authority to dismiss such challenges sua sponte. Finally, all legislative due process challenges could be centralized in the District of Columbia Circuit to prevent forum-shopping and to ensure that one court of appeals developed a coherent body of law in this area. Additionally, plaintiffs would presumably bear the expense of traveling to that court only if they felt their case had sufficient merit.

[45] Farber & Frickey, *supra* note 5, at 915.

requirement can be satisfied in a variety of different ways—through congressional hearings, debate, or any of the myriad procedures discussed in Part II.B below.

One other consideration deserves mention. As will be discussed below in Part II.C, courts evaluating legislative due process challenges would apply a uniformly weak standard, regardless of the "importance" of the underlying interests. The purpose of this feature of the doctrine is to prevent courts from invalidating statutes based on their perceptions of the merits of the statutory policies. In other words, judges should not require greater evidence of deliberation merely because they believe that the statute infringes upon what they consider to be important interests.

In the end, legislative due process would have to take the form of a "totality of the circumstances" test, because no rigid judicial formula can serve to prevent complete abdication of deliberative responsibility while also avoiding imposition of undue burdens upon Congress. Sometimes line-drawing will be particularly difficult. In those situations, courts should choose not to interfere with the legislative process. Although courts will inevitably have to make post hoc judgments regarding the adequacy of the legislative process in particular cases, they should be cognizant of the need for predictability and should not announce rules that Congress could not have expected. If courts proceed cautiously, they can learn how to evaluate legislative due process challenges in beneficial ways.

The model sketched in this Note can be a starting point, and experience and judgment will hopefully lead to the creation of a viable doctrine. Even the existing doctrine of procedural due process had to begin somewhere, from nothing but a vague textual authorization and broad maxims regarding procedural fairness. Over time, however, workable standards developed. Perhaps legislative due process has the same potential.

B. Indicia of Deliberation

The most difficult aspect of crafting a doctrine of legislative due process is identifying the particular factors that would help a court determine whether Congress deliberated minimally before enacting legislation. Congresspersons communicate with their constituents and one another informally, and much of these communications never find their way into the formal legislative record. Because that record must inevitably serve as the basis for judicial review,[46] there will be

[46] It is highly unlikely that a court could constitutionally require a congressperson to testify as to the particular means by which she came to a decision to vote in favor of a

instances where a large proportion of congresspersons is well aware of the details of a particular policy before it is enacted, but it will not be possible to establish this fact in a judicial proceeding.

However, the fact that courts cannot take judicial notice of methods of deliberation that are not documented in the formal legislative record does not mean that legislative due process would prevent Congress from utilizing such methods. Rather, it would provide an incentive for congresspersons to discuss, in official public proceedings, the views that they initially formed through informal contacts. This, in turn, would make the process through which public representatives make their decisions more transparent. Unless legislators are engaged in extensive backroom dealing, there is little reason why legislators cannot make public their reasons for voting on particular proposals. They can accomplish this by something as simple as adding their names to materials in the legislative record supporting the legislation. So long as courts do not require excessive documentation in the formal legislative record, the concern that legislative due process might ossify the congressional process is minimized.[47]

With these concerns in mind, we can begin to list certain factors that would serve as indicia of deliberation. Some of these factors focus on evidence in the formal legislative record. A court might ask: Is there any evidence in the legislative record suggesting that the consequences of the challenged policy received any consideration by Congress? Was there any floor debate? Were hearings held or studies commissioned? Are there formal findings in the legislative record? Were alternate means of achieving policy goals considered?

Other factors deal with the "procedural posture" of the bill—the method by which it entered and traveled through the formal legislative process. Was the legislation introduced at the end of the legislative session, when Congress rushes to get through its agenda? Was the provision attached as a rider to unrelated legislation or an omnibus bill pertaining to many different subjects, or was it part of a bill addressing a particular issue?[48] If it was a rider, does it appear that it

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policy, as that would likely run afoul of the "Speech or Debate" Clause. *See* U.S. CONST. art. I, § 6, cl. 1 ("[F]or any Speech or Debate in either House, [Senators and Representatives] shall not be questioned in any other Place."). This provision, as well as others governing the congressional process, is discussed in Part IV.A, *infra*.

[47] *But cf.* Frank B. Cross, *Realism About Federalism*, 74 N.Y.U. L. REV. 1304, 1330–32 (1999) (arguing that requirement that Congress make "reasoned and reasonable" determination that federal action is "necessary and proper" in federalism cases would have ossifying effect on Congress similar to that caused by judicial review of administrative rulemaking).

[48] Several of the factors listed here are drawn from provisions in state constitutions designed to ensure legislative deliberation. Because legislators might strategically intro-

was added to a popular bill assured of passage?[49] What was the nature of any action taken by any committees that took up the bill? Was the particular provision before both Houses, or was it added by the last chamber to vote on the bill, or even by the conference committee? If the latter, was it added just moments before passage, or was there sufficient time for other legislators to take notice of the provision and debate its consequences?

Although these and similar factors will help a court determine whether legislation sufficiently engaged the attention of Congress, courts should be particularly cognizant of certain realities of the legislative process, and reject legislative due process challenges even where indicia of deliberation seem otherwise absent. For example, legislation is sometimes passed quickly because of exigent circumstances or political necessity, which may justify what appears to be a lack of deliberation.[50] Moreover, plaintiffs might challenge a particular provision in a bill, arguing that Congress failed to deliberate over the provision sufficiently. However, if that provision was reasonably related to the subject matter of the bill as a whole, and Congress deliberated over the main issues of the bill, a legislative due process challenge to a particular provision that failed to receive detailed atten-

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duce bills late in the session in the hope that they will be enacted without any real debate, some state constitutions bar the introduction of legislation late in the session. Another such provision is the "single-subject rule," which requires that all bills entirely concern a single subject, named in the caption of the bill. This type of provision can prevent legislators from attaching unrelated riders to popular bills to ensure passage of the riders. Some provisions require that every bill receive at least three readings on three legislative days, which (in theory) helps ensure that every bill potentially engages the legislature's attention. For a discussion of such state provisions, see *supra* note 7.

[49] The members of the Senate Appropriations Committee who added various "personal projects" to the Iraq spending bill discussed in Becker, *supra* note 3, "said many of the expenditures were vital and needed to be attached to a bill that was guaranteed approval. Although the president calls the measure a war bill, they said, it is really a wide-ranging appropriations bill that may be the only vehicle for months to enact important provisions." Firestone, *supra* note 4. Similarly, the amendment to the PROTECT Act, discussed in note 65, *infra*, had been "quietly attached [as] a rider to . . . legislation—which had seemed destined for passage." Jason Hoppin, *Bill Aims to Curb Judicial Discretion: Surprise Rider to Stiffen Mandatory Minimums*, THE RECORDER, Apr. 4, 2003.

The point is not that these riders were necessarily unworthy of passage. The point is that if they truly were worthy they should have been considered on their own merits rather than snuck through procedural loopholes.

[50] The Sarbanes-Oxley Act of 2002 might fit this description. Congress certainly considered many of the more salient issues in debating this bill, so a legislative due process challenge against it would likely fail according to the standards laid out above. However, given the policy of the Act as a whole, certain provisions in the statute seem to be rather extreme solutions to relatively minor problems, but apparently received little attention during the hurried legislative process. *See, e.g.*, Sarbanes-Oxley Act of 2002, Pub. L. No. 107–204, § 402, 116 Stat. 787 (to be codified at 15 U.S.C. § 78m(k)(1) (2004)) (prohibiting corporations from making personal loans to executives).

tion should be rejected. Congress cannot be expected to micromanage its business when some bills reach thousands of pages in length.

Additionally, courts should be mindful that Congress's committee structure in effect amounts to an internal delegation of deliberative responsibility. In order to conserve resources and utilize specialized skills, Congress often delegates responsibility internally to committees or other groups with necessary expertise. All members cannot be expected to learn the intricacies of the telecommunications industry—if a committee drafts a bill in this area, it is not unreasonable for other members to trust the committee's specialized knowledge and judgment and simply vote up or down after reading an executive summary (assuming, of course, that the committee properly deliberated the bill). Often, legislation is initiated by the chairperson of a particular committee, which then drafts a bill to be presented to the chamber as a whole. The mere fact that particular members control the agenda and therefore have great influence over the legislative process does not necessarily suggest that Congress as a whole is abdicating its responsibilities—legislative due process need not call into question Congress's entire power structure.[51]

Given the potential difficulties posed by excessive procedural requirements, this doctrine is designed to minimize "false positives" (invalidating legislation where adequate deliberation actually took place), even at the expense of greater "false negatives" (sustaining legislation even though deliberation was inadequate). In other words, if certain policies are upheld because the court is "fooled" into concluding that adequate deliberation occurred (for example, by taking extensive legislative findings as evidence of actual deliberation, although they were actually added to the record by lobbyists), then perhaps the doctrine has not accomplished anything in this situation, but neither has it caused any harm.[52] At worst, we are in the same

[51] Another common legislative practice that might impede deliberation is logrolling. One legislator might agree to vote for another's bill in exchange for a vote on his own. If the two legislators make this agreement without considering the merits of the bills on which they are actually voting, that fact should count in favor of a legislative due process challenge. At the very least, legislators should indicate that they considered the merits of the bills for which they voted, perhaps by adding their names to material inserted into the legislative record by the true proponents of the bill.

[52] Courts should seek to minimize false positives even though the sole remedy for violation of legislative due process is a suspensive veto that theoretically permits reenactment of the identical policy. This is because that route might not be practically available if the political momentum that led to the statute's initial enactment has dissipated by the time of its invalidation.

position we would be in if courts did not review the legislative process for instances of simple interest group politics.[53]

Thus, courts should invalidate only those policies that cannot be said to have received even minimally satisfactory consideration. Plaintiffs should have a high burden of proving an absence of deliberation; there should be a strong presumption that Congress considered the issues absent persuasive evidence to the contrary. Thus, even minimal evidence of deliberation should be sufficient to rebut a legislative due process challenge; the Court should not parse the record and discount certain findings, as it has in the recent federalism decisions.[54] That is, if the form of review employed in those decisions is a sort of "strict scrutiny" of the legislative process, then legislative due process would be more akin to the lax rational basis test.

The paradigmatic case in which a court might "remand" a policy back to Congress is that discussed at the beginning of this Note.[55] With absolutely no debate, findings, or any evidence indicating discussion of any kind, a single legislator was able to enact into law a provision with the potential to undermine an entire industry. The rider was added to the spending bill at such a late stage in the legislative process that virtually no other legislator had the opportunity even to read it, but the rider was nonetheless assured of enactment because it was attached to a bill destined to pass. There was no evidence that any relevant interests were consulted at any stage of the process—not the Department of Agriculture, not representatives from the organic food industry or consumer groups, not even other congresspersons. The amendment reversed an important legislative policy developed after "twelve years of debate, public comment, regulation and legisla-

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[53] On a related note, it is not necessarily problematic that legislative due process cannot address what might be viewed as the inverse of simple interest group politics—situations where legislation has received adequate consideration, and has broad political support, but individual legislators are able to block its passage, perhaps at the behest of a powerful interest. One interesting real-world example (that admittedly did not necessarily involve interest group pressure) is the story of the legislator who attempted to block passage of Title VII by adding an amendment to the bill that included "sex" in the list of impermissible bases for employment discrimination, hoping that this would make the bill so controversial that it would not pass. *See* WILLIAM N. ESKRIDGE ET AL., LEGISLATION: STATUTES AND THE CREATION OF PUBLIC POLICY 14 (3d ed. 2003). Although the legislator's plan ultimately backfired, other similar ploys presumably have been successful. Of course, there is simply nothing courts can do about such situations, but that fact alone does not imply that courts therefore must abandon any effort to address simple interest group politics. *Cf.* Farber & Frickey, *supra* note 5, at 908 (arguing that substantive judicial review cannot solve all problems identified by public choice theory because special interests play key role in blocking legislation as well as passing it).

[54] This point is discussed in more detail in Part III.C, *infra*.

[55] *See supra* notes 3–4 and accompanying text.

tion."[56] Even if the only instances in which legislative due process challenges succeed involve egregious instances of simple interest group politics such as this, there will be a net improvement over the status quo.

This form of judicial review is not intended to be a panacea. So long as some plausible justification can be offered for a policy, "special interest" legislation will be passed, even after receiving some debate and discussion in the legislative process.[57] Greater deliberation will not entirely prevent special interest legislation nor educate the public about its extent. Moreover, a requirement of deliberation might block some policies that actually further the public interest, because other legislators prefer to focus on their own agendas. Thus, legislative due process might impede both naked wealth transfers and socially valuable legislation, but it is fair to assume that requiring minimal deliberation will be less likely to block a proposal that is truly worth pursuing than a completely unprincipled interest group deal.

C. *Structural Features of Legislative Due Process*

This Section discusses some of the broad structural features of legislative due process. Many of these features are a consequence of the fact that the doctrine is not intended to protect any particular substantive constitutional value, but rather to increase the degree of responsible legislating generally. Additionally, these features serve to ensure that judicial review of the legislative process does not impose excessive costs that might exceed its benefits, and to help prevent judges from using legislative due process as a means for furthering their own policy preferences.

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[56] Becker, *supra* note 3. One might argue that it is odd to use this example as a paradigmatic case where judicial intervention would be warranted since the ultimate result was that the burdensome legislation was repealed via political means, suggesting that judicial involvement might be unnecessary in many cases. There are two responses to this contention. First, even in this high-profile case, repeal of the provision was by no means costless—massive political mobilization was required to muster the necessary political support, and this might not be possible in all cases. Judicial review thus serves as a method of overcoming the burden of inertia of enacted legislation, particularly where the problematic provision is not high-profile. Second, since some legislation enacted through simple interest group politics does not command much public attention, judicial review can serve to highlight the shortcomings of the legislative process. Indeed, whether policies ultimately are upheld or invalidated under legislative due process, the doctrine can focus the public's attention on these important issues.

[57] The steel tariffs enacted in 2002 fit this mold. *See* Paul Krugman, *The Smoke Machine*, N.Y. TIMES, Mar. 29, 2002, at A29 ("The steel industry got the tariff it wanted, even though the losses to consumers will greatly exceed the gains of producers, because the typical steel consumer doesn't understand what's happening.").

First, as already discussed, the doctrine should be targeted only at the most egregious cases of lack of deliberation. Rather than imposing strict procedural requirements that Congress could neither have realistically complied with nor foreseen,[58] legislative due process should focus only on legislation that is blatantly the result of mechanical responses to special interests.[59] Indeed, it is likely the stringent nature of the congressional-findings requirements imposed in the Court's recent federalism cases that causes many commentators to oppose due process of lawmaking, including some who were initially optimistic for its potential.[60]

If this seems to be an unrealistic constraint, two further guidelines will prevent the slide down the slippery slope.[61] First, no class of interests should trigger a heightened form of legislative due process review. The standard should be uniformly weak wherever it applies. If legislative due process does not take a tiered form, as current Equal Protection review does, the potential for increasing scrutiny where judges see fit based on their own policy preferences should be minimized.

Additionally, and perhaps counterintuitively, courts should not be limited to evaluating legislative processes only in specific categories of cases, such as those implicating federalism interests, as the Supreme Court has done thus far. Legislative due process should become a baseline standard of review to which all legislation is subject, regardless of whether any particular constitutional interest is implicated at all, just as all legislation, in theory, is currently subject to the substantive "rational basis" test.[62] The primary reason for this is that deliberation is important—and special interest groups may play a role—in

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[58] *See* Colker & Brudney, *supra* note 10, at 85 (arguing that Court has imposed findings requirements that Congress could not have foreseen).

[59] In other words, courts should get involved only when none of the "indicia of deliberation," discussed *supra* Part II.B, are present. As noted above, the story recounted at the beginning of this Note might be such a case. *See supra* notes 3–4 and accompanying text.

[60] *Compare* Frickey & Smith, *supra* note 9, at 1710–11 (arguing that due process of lawmaking may "cause more harm than good"), *with* Farber & Frickey, *supra* note 5, at 926 ("'[D]ue process of lawmaking' has the potential to strengthen the democratic process."), *and* Frickey, *supra* note 10, at 697–98 (discussing *United States v. Lopez* and arguing in favor of legislative findings of fact and other careful congressional processes).

[61] For an interesting recent analysis of the structure of slippery slope arguments, see generally Eugene Volokh, *Slippery Slopes*, 116 HARV. L. REV. 1026 (2003).

[62] This Note is largely agnostic on whether legislative due process should replace rationality review altogether, or should operate alongside it, since rationality review is essentially nothing more than a judicial stamp of approval. On the other hand, legislative due process should not replace the more stringent forms of substantive review, such as the "strict scrutiny" test, for reasons discussed below in this Section, as well as Part III.C.2, *infra*.

the passage of all legislation, regardless of whether the legislation might implicate constitutional interests.

In this way, legislative due process differs markedly from other forms of review advocated by commentators.[63] Although this last feature appears to render legislative due process more, rather than less, objectionable than other models of due process of lawmaking,[64] this is not necessarily so. By subjecting all legislative decisionmaking to legislative due process review, and requiring a uniformly weak standard, the Court would have significant incentives not to apply the doctrine with increased rigor in some cases, because that would require it to apply similarly high rigor in all cases. For example, if the Court were to parse the legislative record very carefully for evidence of congressional deliberation in a case involving federalism interests, it should have to do the same in another case involving legislation that implicated, for example, the rights of criminal defendants,[65] or, indeed, in

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[63] *See, e.g.*, Coenen, *A Constitution of Collaboration*, *supra* note 14, at 1586 (advocating theory of judicial review that would apply primarily where substantive constitutional values were at stake); Sandalow, *supra* note 8, at 1183–90 (arguing that courts should ensure that governmental action affecting fundamental social values should be made only with high degree of deliberation); Fullilove v. Klutznick, 448 U.S. 448, 550–52 (2001) (Stevens, J., dissenting) (adopting approach similar to Sandalow's); Stephen Gardbaum, *Rethinking Constitutional Federalism*, 74 TEX. L. REV. 795, 799–800, 823–24 (1996) (arguing that courts should review legislative process more carefully in cases implicating federalism interests); Jackson, *supra* note 37, at 2229–30 (same).

[64] *See* Cross, *supra* note 47, at 1330 (arguing that enhanced procedural review of legislative decisions in federalism cases proposed in Jackson, *supra* note 63, should be rejected because "Jackson's theory, if accepted, would surely expand into . . . a general judicial review of legislation").

[65] The recent changes in federal sentencing guidelines, which were contained in an amendment to the Prosecuting Remedies and Tools Against the Exploitation of Children Today ("PROTECT") Act, provide an example. The amendment greatly reduced the sentencing discretion available to judges, not just in cases involving kidnapping and sexual exploitation of children (with which the PROTECT Act dealt), but across the board. The provision was added in the House after the Act had already been passed by the Senate, and received strong criticism. The U.S. Judicial Conference "noted that 'one of the most fundamental changes' to the sentencing schemes received a grand total of 20 minutes of debate in the House." Hoppin, *supra* note 49. Ronald Wiech, a former counsel to the U.S. Sentencing Commission and the Senate Judiciary Committee said that "[t]his is the most important development in federal sentencing since the passage of the 1984 Sentencing Reform Act, and it happened with virtually no debate in little more than a week." Dan Christensen, *Stealth Bomber: With Attention Fixed on Iraq, Freshman Florida Congressman Attached Widely Decried Sentencing Rider to Popular Child-Protection Measure*, BROWARD DAILY BUS. REV., Apr. 15, 2003, at A1. The following passage from a newspaper article illustrates the response to the provision:

> [The] amendment was introduced as public attention was riveted on the war in Iraq. No hearings were held, and neither [the amendment's sponsor] nor his backers sought any advance input from the ABA, the nation's federal judges or the U.S. Sentencing Commission. Opponents allege it was introduced at the last minute to dodge a debate on the merits. "Everyone wants to protect children, and they cleverly packed this insidious proposal in a must-pass vehicle."

cases that implicated no particular constitutional interests at all. The purpose of this feature of legislative due process, however, is not to subject every legislative enactment to stringent procedural review. Rather, the purpose is to provide an incentive for courts to think carefully before imposing any new procedural requirements on Congress at all.[66]

Another reason for requiring legislative due process to be applied to all legislation is to avoid two problems associated with confining judicial review of the legislative process to narrow categories. First, if legislative due process were confined to cases implicating important constitutional interests, that itself would pressure judges to engage in more searching review to protect the underlying interests. That, in turn, might lead to excessive judicial interference in congressional lawmaking. Second, if legislative due process was so confined, judges themselves would determine which interests were important enough to merit procedural review, based on their own preferences. Indeed, the Rehnquist Court's generally strong protection of federalism interests might explain why it has reviewed rigorously the legislative record in cases involving those interests.

However, applying legislative due process uniformly across the board largely avoids these problems. In practice, even if the full range of legislative decisionmaking is potentially subject to the doctrine, very few cases actually would result in a suspensive veto, just as only the most blatantly irrational legislation has been substantively invalidated under the deferential rational basis test.[67]

This is to be contrasted with the form of due process of lawmaking once advocated by Justice Stevens, discussed in more detail in

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Id. Chief Justice Rehnquist himself stated that "[b]efore such Legislation is enacted, there should, at least, be a thorough and dispassionate inquiry into the consequences of such action." *Id.*

66 The effect is analogous to the Court's current jurisprudence on retroactivity of "new" constitutional rules of criminal procedure, in which virtually any new rule must be applied retroactively to all cases on direct (or habeas) review. *See* Teague v. Lane, 489 U.S. 288, 300–10 (1989). This strict rule significantly increases the costs of announcing new rules expanding constitutional rights, and thus deters courts from announcing such new rules. For example, had the Court's current retroactivity doctrine been the law when *Miranda v. Arizona*, 384 U.S. 436 (1966), was decided, the Court likely would have been quite hesitant to announce the prophylactic rule in that case, since that would require the release of thousands of defendants who had not had not been read *Miranda* warnings. In fact, the Court in *Miranda* held the decision nonretroactive, and applied it only to the defendant before the Court. *Id.*

67 *See, e.g.*, City of Cleburne v. Cleburne Living Ctr., 473 U.S. 432 (1985). Of course, even where policies have been invalidated under the rational basis test, one must wonder whether the Court truly believed the policy to be utterly irrational, or was (perhaps properly) neither willing to let the government action stand nor accord the interests implicated by the policy greater constitutional protection.

Part III.C.2 below, in which courts would review the legislative process only where strict scrutiny otherwise applied. Justice Stevens's view was based on the reasonable premise that legislation implicating important constitutional values should be passed only with the utmost care and consideration.[68] However, while many scholars have justified due process of lawmaking on this very ground,[69] this Note argues that the best use of such a form of review, if it is to be employed at all, is to improve congressional deliberation and reduce the likelihood that burdensome legislation will be passed unthinkingly at the behest of special interest groups. If courts reviewed the legislative process only where strict scrutiny otherwise applied, judges would have an incentive to employ a particularly strict form of review, in order to safeguard the underlying interest; thus, Justice Stevens's approach would impose greater costs (e.g., in the form of greater separation-of-powers concerns and increased interference with congressional lawmaking) than legislative due process.

Additionally, if due process of lawmaking was employed only where strict scrutiny otherwise applied, it might end up displacing substantive judicial review altogether. That is, if a court taking Justice Stevens's approach determined that Congress deliberated with the utmost care about the constitutional implications of a proposed bill during the legislative process, it might be unwilling to invalidate permanently the resulting statute for violating substantive constitutional standards.[70] Even if a court determined that Congress did not deliberate sufficiently, the lone remedy that legislative due process would offer would be a suspensive veto, which would allow Congress to reenact the challenged legislation after adequate deliberation. Thus, in order to ensure that Congress cannot violate important constitutional guarantees merely by discussing the constitutional implications of a bill sufficiently in legislative proceedings, legislative due process

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[68] *See, e.g.*, Fullilove v. Klutznick, 448 U.S. 448, 550–52 (2001) (Stevens, J., dissenting).

[69] *See, e.g.*, Farber & Frickey, *supra* note 5, at 919 ("The prima facie unconstitutionality of some classes of legislation should be rebuttable, if at all, only by clear and persuasive evidence of congressional deliberation. At least, if evidence establishes that Congress did not make a deliberate choice, otherwise 'suspect' legislation should receive even less judicial deference."); Sandalow, *supra* note 8, at 1189–90 (advocating judicial deference in cases implicating constitutional interests only for "deliberate" legislative decisions).

[70] *See* Mark V. Tushnet, *Subconstitutional Constitutional Law: Supplement, Sham, or Substitute?*, 42 WM. & MARY L. REV. 1871, 1876–80 (2001) (responding to Coenen, *A Constitution of Collaboration*, *supra* note 14, and making similar argument). Indeed, the form of judicial review advocated by Professor Sandalow—which Justice Stevens drew upon in putting forth his version of due process of lawmaking—displaces traditional substantive review in this manner. *See* Sandalow, *supra* note 8, at 1189 ("If judicial review is to be understood in this way . . . courts must be prepared to yield to political decisions that do reflect the deliberate judgment of representative institutions . . . .").

should not displace any of the heightened forms of substantive review currently present in constitutional doctrine. As will be discussed in more detail below in Part III.C.2, racial classifications should continue to receive strict scrutiny, as should certain laws burdening free speech or privacy, and so forth. So long as legislative due process is applied in a uniformly weak manner across the board, the risk that courts would abandon traditional standards of substantive review in favor of legislative due process would be minimized. The doctrine could provide an additional layer of review in these cases, keeping in mind the critical point that the importance of the underlying interest should not lead courts to employ stricter review.

Courts also should not require a finding that legislation is intended to serve "private" rather than "public" interests in order to "remand" a policy back to Congress under legislative due process.[71] Some legislation is passed unthinkingly, even where special interests play little or no role.[72] Such legislation should still be subject to suspensive veto, however, for several reasons. First, deliberation is an important value in and of itself, even aside from its impact on special interest groups. As discussed above, greater deliberation is likely to lead to better policy outcomes and improved accountability.[73] Second, courts might not always be able to detect whether special interests played a great role in the passage of particular legislation. Finally, as discussed above, special interest group influence is not necessarily harmful[74]—it is only the detrimental effects of such influence that should be minimized. The particular effect addressed by legislative due process is the lack of deliberation caused by excessive interest group influence, and the doctrine should focus solely on identifying legislation that suffers from that defect.

III
FOUNDATIONS

This Part aims to provide a theoretical background for legislative due process. Certainly, a proposal for a novel form of judicial review must be accompanied by an explanation of its constitutional and theoretical basis. Part III.A addresses the sources of and obstacles to constitutional authority, including a discussion of the "political process"

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[71] In this manner, legislative due process diverges from the form of judicial review proposed by Professor Sunstein, discussed in Part III.B.1, *infra*.

[72] For example, there is no evidence that some particular interest urged the changes in the federal sentencing guidelines discussed in note 65, *supra*. But, this is a clear example of how the legislative process can be manipulated to avoid deliberation.

[73] *See supra* notes 36–37 and accompanying text.

[74] *See supra* note 39 and accompanying text.

theory of judicial review and the abandonment of Lochnerism. Part III.B then turns to other models of judicial review that might address the problems associated with interest group politics, but concludes that these other models—unlike legislative due process—are ultimately susceptible to the charge of Lochnerism, and therefore are not viable candidates. Part III.C discusses the theory of "due process of lawmaking," as developed by Professors Laurence Tribe and Hans Linde, as well as Justice Stevens, which provides much of the theoretical basis for legislative due process. Part III.D then reviews several areas of current constitutional doctrine where the Court already plays a role in improving congressional deliberation. Part III.D also reviews some recent federalism cases in which the Court closely scrutinized congressional findings, which suggest that the Court may be willing to subject the legislative process itself to judicial review.

A. Constitutional Authority

1. A Preliminary Discussion

What is the source of a judicially enforceable duty to deliberate over the consequences of legislation before enacting it? Legislative due process might not appear, at first glance, to find much support in the constitutional text itself. However, one could imagine that the constitutional command that life, liberty, and property not be deprived "without due process of law" is a requirement that lawmakers make policy through rational procedures.[75] Moreover, if courts were to take seriously the verbal formulation of the current baseline constitutional requirement that all legislation be "rational," they would focus more on the procedures through which laws are made rather than the substance of those laws. Very rarely can a statute truly be said to be "irrational," in the sense of not being even "rationally related" to a legitimate purpose. Legislators usually do not seek to implement their goals through illogical means. Rather, a judicial determination that legislation has no rational basis is in actuality a substantive determination that the legislature has chosen to pursue an impermissible goal. As such, the substantive rational basis test confronts the familiar countermajoritarian difficulty, a point discussed in more detail in Part III.A.2 below. Legislative due process, by contrast, would avoid that difficulty by truly focusing on the "rationality" of legislation, which depends on, among other things, the methods by which legislators informed themselves of the problems

[75] This was the argument made by Professor Linde when he introduced the theory of "due process of lawmaking." *See* Linde, *supra* note 12, at 237. The rest of the argument in the textual paragraph also draws heavily on the work of Professor Linde.

under consideration and whether they deliberated in good faith about the most effective means of addressing those problems.

Moreover, the fact that legislative due process is not closely tied to constitutional text should not be fatal, as the same can be said of other significant constitutional doctrines. For example, it is difficult to classify substantive due process—not only the *Lochner* kind but also the *Roe*[76] and *Griswold*[77] kind—as a mere "interpretation" of the constitutional text. I point this out not to endorse or criticize any particular strand of substantive due process or constitutional interpretation, but only to show that the Court employs other doctrines in reviewing the work of Congress that arguably do not find explicit textual authorization.

Furthermore, just as the principles of federalism and separation of powers have been deduced from the general structure of the Constitution, one could argue that "the American Constitution was designed to create a deliberative democracy."[78] Indeed, the Court has stated that by requiring Congress to legislate only according to the procedures of Bicameralism and Presentment, the "Framers reemphasized their belief . . . that legislation should not be enacted unless it has been carefully and fully considered by the Nation's elected officials."[79] If deliberation is a value of constitutional dimension, then perhaps judicial enforcement of such a value is not unthinkable. This is particularly true in light of the Court's recent federalism decisions, discussed below in Part III.D.2, which suggest that the Court is willing to focus judicial review on the legislative process itself to ensure that adequate deliberation occurred.

2. *Political Process Theory and Lochnerism*

This Section argues that legislative due process is consistent with the well-known "political process" theory of judicial review. That theory aims to solve the countermajoritarian difficulty[80]—the fact that

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[76] Roe v. Wade, 410 U.S. 113 (1973).

[77] Griswold v. Connecticut, 381 U.S. 479 (1965).

[78] SUNSTEIN, *supra* note 30, at 19–20.

[79] INS v. Chadha, 462 U.S. 919, 948–49 (1983). The Court also stated that Bicameralism and Presentment are an "unmistakable expression of a determination that legislation by the national Congress be a step-by-step, deliberate and deliberative process." *Id.* at 959. Of course, *Chadha* invalidated the legislative veto because it violated explicit constitutional provisions governing the legislative process, while legislative due process would require Congress to follow procedures not explicitly spelled out in the constitutional text. Nonetheless, *Chadha* supports the proposition that the Constitution was intended to establish a deliberative legislative process.

[80] *See* BICKEL, *supra* note 24. Professors Frickey and Smith have noted how due process of lawmaking techniques can, in theory, ameliorate the tension between judicial review and democracy. *See* Frickey & Smith, *supra* note 9, at 1709–10.

judicial review allows unelected judges to displace democratic decisions on the basis of inherently ambiguous constitutional provisions. If legislative due process is to be a viable candidate for addressing the problem of simple interest group politics, then it cannot allow judges to promote their own policy preferences under the guise of reviewing the legislative process.

This Section also argues that legislative due process is consistent with the rejection of *Lochnerism*,[81] which is perhaps best understood as a particularly exacerbated version of the countermajoritarian difficulty.[82] Indeed, when one considers the underlying rationale of political process theory in tandem with the rationale for rejecting Lochnerism, the case for judicial review of the legislative process of the type advocated in this Note is strengthened.

The "political process" theory of judicial review, based on the famous *Carolene Products* footnote four[83] and elaborated by

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[81] *See* Lochner v. New York, 198 U.S. 45 (1905). Of course, even if legislative due process can avoid the charge of Lochnerism, one might argue that "[a] doctrine of reasonability or procedural review of congressional action could easily transform itself into the old economic substantive due process analysis of *Lochner*." Cross, *supra* note 47, at 1330. In other words, courts might use judicial review of the legislative process as a covert means to achieve the same undesirable aims that the *Lochner* Court achieved—for example, to invalidate policies with which they substantively disagree but which otherwise received adequate deliberation. This issue is addressed below in Part IV.B.

[82] Lochnerism was a particularly egregious form of the countermajoritarian difficulty because it allowed judges to invalidate social and economic legislation on the basis of "freedom of contract," a concept that has little grounding in the constitutional text. Of course, this is not the only possible understanding of "Lochnerism." For a survey of several possible understandings, see GEOFFREY R. STONE ET AL., CONSTITUTIONAL LAW 718–23 (Aspen 4th ed. 2001). *See also*, Barry Friedman, *The History of the Countermajoritarian Difficulty Part III: The Lessons of* Lochner, 76 N.Y.U. L. REV. 1383, 1386–87 (2001) (arguing that *Lochner* is one example of legal decisions that, while having "legal legitimacy", lack "social legitimacy"); David A. Strauss, *Why Was Lochner Wrong?*, 70 U. CHI. L. REV. 373 (2003) (arguing that problem with Lochnerism was that principle of freedom of contract was too strongly enforced).

There is one view of Lochnerism that, in theory, might be a viable objection to legislative due process. Perhaps the *Lochner* Court's mistake was its apparent determination that legislatures could not act for the purpose of benefiting special interests, because "it would be intolerable, in a representative democracy, for courts closely to scrutinize legislation for public purposes." Cass R. Sunstein, *Public Values, Private Interests, and the Equal Protection Clause*, 1982 SUP. CT. REV. 127, 142 n.59. However, even this conception of Lochnerism does not pose an obstacle to legislative due process because legislative purpose is altogether irrelevant to the inquiry. The Court would focus on whether a minimally deliberative process occurred, and would sustain or invalidate the policy based solely on that factor, irrespective of whether the policy was intended to serve a "private" or "public" interest.

[83] *See* United States v. Carolene Prods., 304 U.S. 144, 152 n.4 (1938) (suggesting that "legislation which restricts those political processes which can ordinarily be expected to bring about repeal of undesirable legislation" may be subject to more exacting scrutiny, and that "prejudice against discrete and insular minorities may be a special condition, which tends seriously to curtail the operation of those political processes ordinarily to be

Professor John Hart Ely,[84] suggests that judicial review can be used to correct defects in the political process, thereby avoiding judicial evaluation of the substance of legislative outcomes. Professor Ackerman explains how the *Carolene* conception of judicial review sought to reverse the countermajoritarian difficulty: "By demonstrating that the legislative decision itself resulted from an undemocratic procedure, a *Carolene* court hopes to reverse the spin of the countermajoritarian difficulty. For it now may seem that the original legislative decision, not the judicial invalidation, suffers the greater legitimacy deficit."[85]

Similarly, legislative due process is premised on the view that legislation that is the product of simple interest group politics is sufficiently undemocratic to warrant judicial intervention. Where legislation is enacted, not because a majority of our representatives believe it is in the public interest, but because a small group of representatives acting at the behest of private interests are able to manipulate the legislative process, the result is no more democratic than legislation that singles out "discrete and insular minorities."

Essentially, both process theory and legislative due process justify judicial review by attacking the presumption—often cited as a justification for judicial deference—that the legislature has balanced the benefits and burdens of a particular policy in a fair and democratic process, and that courts should not undo that balance.[86] While process-theory proponents argue that legislation aimed at "discrete and insular minorities" likely resulted from an undemocratic process in which those minorities were excluded, legislative due process aims at legislation that is produced without any form of legislative balancing whatsoever. In both cases, judicial intervention is warranted—and the countermajoritarian difficulty is avoided—because the court does not invalidate legislation based upon its disagreement with the democratically produced legislative balancing, but because no such balancing occurred.

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relied upon to protect minorities, and which may call for a correspondingly more searching judicial inquiry").

[84] *See generally* JOHN HART ELY, DEMOCRACY AND DISTRUST (1980).

[85] Bruce A. Ackerman, *Beyond* Carolene Products, 98 HARV. L. REV. 713, 715 (1985). However, Professor Ackerman goes on to argue that "the *Carolene* formula cannot withstand close scrutiny." *Id.* at 717.

[86] *Cf.* Gerald Gunther, *The Supreme Court, 1971 Term—Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1, 44 (1972) ("A common defense of extreme judicial abdication [of scrutiny of economic legislation] is that the state has considered the contending considerations. Too often the only assurance that the state has thought about the issues is the judicial presumption that it has.").

Moreover, when one considers process theory along with the implications of the abandonment of Lochnerism, one can identify a further argument in favor of legislative due process. Process theory holds that courts should scrutinize legislation aimed at "discrete and insular minorities," on the theory that prejudice against such groups "tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities."[87] Conversely, since general economic legislation does not involve such "discrete and insular minorities," the theory assumes that judicial protection of economic interests is unwarranted. In this way, political process theory supports the abandonment of *Lochner*-style stringent judicial review of economic legislation. But, as Professor Ackerman has argued, if the rationale for judicial protection is political powerlessness, it seems odd to consider discrete and insular minorities in need of such protection.[88] Relative to such groups, it is the diffuse, anonymous majority that seems to be at a disadvantage in the political process.[89] As another commentator has noted:

> [Minorities] may enjoy an advantage [in the political process], for they are at least cohesive; and other "discrete" minorities, such as racial groups, have occasionally displayed respectable capacities to exert political leverage by virtue of their very discreteness. Not so the isolated economic man who belongs to no identifiable group at all.[90]

The point is not that economic interests deserve some special protection. Rather, the point is that, if judicial review is to be justified by political powerlessness, political realities should be taken into account. Legislative due process does exactly that and is thereby supported by a refined inversion of the *Carolene* theory: Judicial review is justified, not because politically powerless minorities need protection from powerful majorities, but rather because irresponsible legislators allow powerful minorities to extort benefits from powerless majorities.[91]

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[87] *Carolene Prods.*, 304 U.S. at 152 n.4.

[88] *See* Ackerman, *supra* note 85, at 723–24.

[89] This explains how the political process may not produce majoritarian results. For an analysis of how small groups enjoy organizational advantages in the political process over diffuse majorities, see generally MANCUR OLSON, THE LOGIC OF COLLECTIVE ACTION (1965).

[90] Robert G. McCloskey, *Economic Due Process and the Supreme Court: An Exhumation and Reburial*, 1962 SUP. CT. REV. 34, 50 (1962).

[91] Some have argued that interest group theory does not warrant stricter judicial scrutiny. *See* Einer R. Elhauge, *Does Interest Group Theory Justify More Intensive Judicial Review?*, 101 YALE L.J. 31, 32–35 (1991). However, Professor Elhauge explicitly states that "more intrusive judicial review encompasses not only stricter substantive review but also more aggressive statutory interpretation," and explains that his analysis "does [not]

If the justification for judicial review rests on defects in the political process, then the natural target of judicial review would seem to be the process itself. However, aside from difficulties that process theory faces on its own terms,[92] it does not address the defects in the democratic decisionmaking process with which this Note is concerned, namely that of unthinking congressional responses to interest group pressures. Nonetheless, process theory supports the general proposition that courts can play a role in helping the lawmaking process approximate a more ideal form.

B. Other Models of Judicial Review

As discussed above in Part III.A, if Lochnerism is a valid objection against a particular model of judicial review—that is, if courts are able to substitute their policy judgments for those of Congress without clear constitutional warrant—that model is not a viable candidate for addressing simple interest group politics. This Note argues that legislative due process avoids charges of Lochnerism, because judges (theoretically) would not have to make any value judgments at all.

Before turning directly to due process of lawmaking in Part III.C, this Section discusses two particular forms of judicial review that seek to minimize the problem of excessive interest group influence in the legislative process. These two models—Professor Sunstein's theory of "naked preferences" and theories of "actual purpose review"—go far toward addressing the problem of interest group influence generally (but not necessarily the unthinking legislative responses that such influence can elicit). However, because these theories ultimately require courts to evaluate either the permissibility of particular legislative purposes or the rationality of legislative means, this Note concludes that they are susceptible to objections of Lochnerism, and are therefore not viable candidates for addressing the problem of simple interest group politics. Nonetheless, the discussion of these models will illuminate some of the issues relevant to evaluating legislative due process as a candidate for that task.

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address proposals to alter the political process itself." *Id.* at 33–34. Thus, while interest group theory may not support intensive substantive review, it does not necessarily affect the argument for a procedural theory.

92 *See* LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW 1686 n.25 (2d ed. 1988) ("[T]he *Carolene* approach is not really process-based at all; instead of inquiring about the processes underlying legislation, *Carolene* proponents focus on the result. Instead of proving the defect in the political process directly, *Carolene* infers the defect from the discrimination itself." (discussing Lea Brilmayer, Carolene, *Conflicts, and the Fate of the "Insider-Outsider"*, 134 U. PA. L. REV. 1291, 1307–08 (1986))).

1. *Naked Preferences*

Professor Sunstein has long advocated a judicial role in bringing about the deliberative democracy that was the ideal of Madisonian republicanism.[93] He argues that the function of the Equal Protection Clause is to prohibit unprincipled distributions of resources and opportunities. Distributions are unprincipled when they are not an effort to serve a public value, but merely represent the adjustment of private interests.[94] In other words, all special interest legislation that cannot be justified by a public-regarding purpose reflects an impermissible legislative purpose. "When government has responded to political pressure in order to aid politically powerful groups simply by virtue of their political power, the redistribution is merely ad hoc, and no proper justification is furnished."[95]

Professor Sunstein admits that "[i]t is not difficult to see that this principle is not process based. It is frankly substantive, for it grows out of a particular conception of the substantive evil forbidden by the Clause."[96] Indeed, Professor Sunstein states that "the constitutional principle of equality, as I have defined it, bears close resemblance to notions of substantive due process at work in the *Lochner* era."[97] It is precisely this frank admission that compels the conclusion that the theory of naked preferences cannot satisfactorily address the problem of simple interest group politics. As discussed above, theories of judicial review that permit judges to determine whether a legislature has pursued a "permissible" goal are subject to charges of Lochnerism.[98]

Moreover, it is difficult to see how a court can distinguish in a principled way between permissible redistributions of economic wealth and impermissible naked wealth transfers.[99] All economic leg-

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[93] *See* Sunstein, *supra* note 28, at 29–30; Sunstein, *supra* note 31, at 1689–90; Sunstein, *supra* note 82, at 128.

[94] Sunstein, *supra* note 82, at 128.

[95] *Id.* at 137–38.

[96] *Id.* at 138.

[97] *Id.* at 142 n.59.

[98] Of course, Professor Sunstein was not addressing exactly the same problem that this Note addresses. His theory aimed to justify judicial invalidation of "naked wealth transfers," while legislative due process focuses on one particular aspect of interest group politics, namely the lack of deliberation that special interests can cause. Thus his theory had to take a purely substantive approach—delineating certain legislative purposes off-limits. Legislative due process would not bar any particular purpose, but require that those purposes be achieved through a minimally deliberative process. Moreover, Professor Sunstein may have been simply unconcerned with avoiding charges of Lochnerism, while this Note considers this to be an essential criterion for evaluating different models of judicial review.

[99] Other commentators have made this point. *See, e.g.*, Coenen, *A Constitution of Collaboration*, *supra* note 14, at 1868 ("The difficulty is that the pursuit of the public good can provide little practical guidance in forging doctrine because the line between public

islation distributes benefits and burdens amongst different private interests, and can usually be supported by some "public-regarding" justification. Even if courts could distinguish between public and private values, it would inevitably involve judicial value judgments as to what should or should not qualify as a public-regarding justification, and, consequentially, raise the specter of Lochnerism that courts must avoid.

2. *Actual Purpose Review*

An alternative judicial method of disciplining the legislature to avoid mindless responses to interest group pressure—at least in the context of economic legislation, which is currently subject only to minimal rational basis review—is to evaluate such legislation under an enhanced form of rationality review that focuses on the "actual" legislative purpose, rather than whichever hypothetical purposes the court or government lawyers can dream up. The basic theory is that, if Congress is required to justify legislation by its actual purpose, then laws whose "real" purpose is to benefit interest groups will be less common. Several commentators have advocated such an approach,[100] and although the Court has never fully accepted it, as shown in the following discussion, at one time Justice Brennan strongly argued in its favor.

In *United States Railroad Retirement Board v. Fritz*,[101] the Court was confronted with precisely the sort of irresponsible legislating with which this Note is concerned. Professor Sunstein described *Fritz* as "a striking example of a kind of Madisonian nightmare: national legislators abdicating their obligations because of pressure applied by powerful private groups."[102] In *Fritz*, it was apparent that Congress had failed to deliberate about the problems of the bill as drafted, and indeed did not even understand what it was that the bill would in fact accomplish.[103] In evaluating an equal protection challenge, the Court

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and private values is inevitably 'thin.'"); Farber & Frickey, *supra* note 5, at 909–10 (1987) ("[T]he very distinction on which these commentators rely—special interest versus public interest legislation—is highly value-laden and political. . . . The chances are all too great that 'public values' would simply correspond with the judge's favored political program.").

100 *See, e.g.*, Gunther, *supra* note 86, at 43–46 (advocating form of actual purpose review).

101 449 U.S. 166 (1980).

102 Sunstein, *supra* note 28, at 71.

103 Congress had restructured the retirement systems governing railroad worker benefits, apparently intending to equalize windfalls that certain workers were receiving under the former system. However, the actual legislation did not achieve this purpose, and indeed seemed to undermine Congress's intent in certain respects. Moreover, the bill had been drafted by a private joint labor-management negotiation committee, and the legislative history indicated that some members of the committee had misled Congress at hear-

constructed a hypothetical chain of reasoning which, if true, could conceivably form a rational basis for the legislation. The Court refused to inquire whether that was the actual reasoning employed by Congress. The Court stated: "Where, as here, there are plausible reasons for Congress's action, our inquiry is at an end. It is, of course 'constitutionally irrelevant whether this reasoning in fact underlay the legislative decision,' because this Court has never insisted that a legislative body articulate its reasons for enacting a statute."[104] The Court went on to note that it

> disagree[d] with the District Court's conclusion that Congress was unaware of what it accomplished or that it was misled by the groups that appeared before it. If this test were applied literally to every member of any legislature that ever voted on a law, there would be very few laws which would survive it. The language of the statute is clear, and we have historically assumed that Congress intended what it enacted.[105]

Dissenting, Justice Brennan argued that "the mode of analysis employed by the Court in this case virtually immunizes social and economic legislative classifications from judicial review."[106] The proper test was that "[a] challenged classification may be sustained only if it is rationally related to achievement of an *actual* legitimate governmental purpose."[107] By upholding legislation based on the "*post hoc* justifications offered by Government attorneys,"[108] the Court was "defer[ring] not to the *considered judgment of Congress*, but to the arguments of litigators."[109]

Academic commentators have also debated the merits of actual purpose review. Almost a decade before *Fritz*, Professor Gunther argued for a form of rigorous review that would evaluate whether the means chosen by the legislature sufficiently advanced a policy's avowed purpose.[110] Criticizing Professor Gunther's theory, Judge Posner noted the seeming futility of invalidating a statute because the

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ings concerning the effect of the bill. *See Fritz*, 449 U.S. at 182–98 (Brennan, J., dissenting).

104 *Id.* at 179 (quoting Flemming v. Nestor, 363 U.S. 603, 612 (1960)).

105 *Id.*

106 *Id.* at 183 (Brennan, J., dissenting).

107 *Id.* at 188. Justice Brennan quoted numerous statements from prior decisions as authority for this proposition, including a statement that the "'Court need not in equal protection cases accept at face value assertions of legislative purposes, when an examination of the legislative scheme and its history demonstrates that the asserted purpose could not have been a goal of the legislation.'" *Id.* at 187 (quoting Weinberger v. Wiesenfeld, 420 U.S. 636, 648 n.16 (1975)) (citations omitted).

108 *Id.*

109 *Id.* at 198 (emphasis added).

110 Gunther, *supra* note 86, at 20–24.

legislature did not declare that the actual purpose was to serve a narrow private interest:

> [W]hat is to be gained by using the Equal Protection Clause to rub the noses of state legislators in the realities of the interest-group politics out of which legislation arises? If the purpose is to alter the characteristic process and product of a democratic political system, it is a purpose both unlikely to be achieved and unreasonable to attribute to the framers of the Fourteenth Amendment.[111]

While actual purpose review[112] has the salutary aim of ensuring deliberation and explicitness about legislative purposes, it certainly has its difficulties. For example, it may be incoherent to ascribe a single purpose to a collective body comprised of many members who act for multiple, sometimes conflicting reasons. The important point for purposes of this Note is that actual purpose review is subject to the same objection as Professor Sunstein's theory of naked preferences. Ultimately, whether legislation is reviewed in regards to its actual purposes or whichever hypothetical purposes may be proffered in litigation, the court must determine whether the means chosen are "rationally related" to that purpose. Means scrutiny invites courts to determine whether the legislature undervalued the burdens (or overvalued the benefits) of the chosen policy, just as the theory of naked preferences requires a court to determine whether the legislature has pursued a sufficiently public-regarding purpose. In both cases, courts must evaluate the wisdom of legislative policy choices. Because Lochnerism is a viable objection to any sort of traditional substantive rationality review, these models of judicial review cannot satisfactorily address the problem of simple interest group politics.

C. *Due Process of Lawmaking*

1. *Academic Development*

With an understanding of the theoretical basis of legislative due process and the competing models of judicial review, we can now evaluate whether a model based on due process of lawmaking would be a viable candidate for addressing the problem of simple interest group politics. Laurence Tribe and Hans Linde laid the primary groundwork for an academic theory of due process of lawmaking almost thirty years ago. Professor Tribe advocated a theory of "structural due pro-

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111 Posner, *supra* note 33, at 29.

112 For further discussion of actual purpose review, see Paul Brest, Palmer v. Thompson: *An Approach to the Problem of Unconstitutional Legislative Motive*, 1971 SUP. CT. REV. 95; John Hart Ely, *Legislative and Administrative Motivation in Constitutional Law*, 79 YALE L.J. 1205 (1970); Note, *Legislative Purpose, Rationality, and Equal Protection*, 82 YALE L.J. 123 (1972); Colloquium, *Legislative Motivation*, 15 SAN DIEGO L. REV. 925 (1978).

cess,"[113] arguing that "the very phrase 'due process of law' might lead us to consider for a moment a more dynamic and less instrumental picture of policy and its formation . . . in which [we] are as interested in the *process of decision itself* as with the outcomes produced."[114] Professor Tribe's theory is significantly more expansive than that proposed here.[115] A theory which is more closely analogous is Professor Linde's "due process of lawmaking."[116] Professor Linde argued that, as a descriptive matter, courts applying rationality review were not really inquiring into the *rationality* of legislation, but rather the *legitimacy* of the government's policy choice.[117] "The institutional thrust of judicial review is to maintain continuing surveillance over the substance of laws, not over lawmakers."[118] Yet the constitutional command of the Due Process Clause is that government itself must act by due process of law, "not simply to legislate subject to later judicial second-guessing."[119] For Linde, the formula of rationality placed demands upon lawmakers themselves, requiring them to follow certain lawmaking procedures.[120] Thus, "due process of law," in the con-

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113 *See* Tribe, *supra* note 13.

114 *Id.* at 290.

115 For example, structural due process does not merely require courts to evaluate the procedures employed in the legislative process, but envisions a judicial role of "giving structure to the evolution, or rather participating in the structure of the evolution, of social norms and understandings as they come to find expression in the law." *Id.* at 301. The theory focuses on whether "governmental policy-formulation and/or application are constitutionally required to take a certain form, to follow a process with certain features, or to display a particular sort of structure." *Id.* at 291 (emphasis omitted). Thus, structural due process does not merely attempt to address a problem akin to simple interest group politics, but rather aims to synthesize broad areas of constitutional law. Professor Tribe shows how his theory explains widely divergent areas of public law, from abortion to the death penalty, from gender discrimination to actual purpose review, and even administrative law.

116 *See* Linde, *supra* note 12.

117 *See id.* at 212 ("[I]n the end, the constitutional question will be whether the aim of the law is out of bounds, not whether it will miss its target—a question of legitimacy, not of rationality."). Professor Linde discusses the difficulties inherent in such substantive review, such as the familiar problems associated with the choice between actual purpose review and accepting the post hoc rationalizations of counsel, or whether changed factual circumstances can render irrational a law which was "rational" at the time of enactment. *See id.* at 215–22.

118 *Id.* at 217.

119 *Id.* at 222.

120 Linde outlined some of the requirements that he believed due process of lawmaking imposed upon lawmakers:

> Rational lawmaking, if we take the formula seriously, would oblige this collective body to reach and to articulate some agreement on a desired goal. It would oblige legislators to inform themselves in some fashion about the existing conditions on which the proposed law would operate, and about the likelihood that the proposal would in fact further the intended purpose. In order to weigh the anticipated benefits for some against the burdens the law

text of lawmaking, means that "government is not to take life, liberty, or property under color of laws that were not made according to a legitimate law-making process."[121] Indeed, Professor Linde argued, procedural review may be more supportable than substantive review, as "a clause which forbids Government to deprive persons of life, liberty, or property without due process of law appears, at least as a point of departure, to concern the process by which Government impinges on these interests of the individual rather than the reason why it does so."[122] Moreover,

> [f]ear of legislative resentment at judicial interference is not borne out by experience where procedural review exists .... It is far more cause for resentment to invalidate the substance of a policy that the politically accountable branches and their constituents support than to invalidate a lawmaking procedure that can be repeated correctly, yet we take substantive judicial review for granted. Strikingly, the reverse view of propriety prevails in a number of nations where courts have never been empowered to set aside policies legitimately enacted into law but do have power to test the process of legitimate enactment.[123]

Thus, Professor Linde argued, when contrasted with substantive review, the institutional objections to procedural review might be overstated. Yet Professor Linde's theory differs from legislative due process in an important respect. Although Professor Linde believed

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> would impose on others, legislators must inform themselves also about those burdens. These demands on the legislative process imply others. The projections and assessments of conditions and consequences must presumably take some account of evidence, at least in committee sessions. A member who never attends the committee meetings should at least examine the record of evidence before casting a vote, or be told about it, and should certainly never vote by proxy. The committee must explain its factual and value premises to the full body. Surely there is no place for a vote on final passage by members who have never read even a summary of the bill, let alone a committee report or a resume of the factual documentation.... [T]he second house of the legislature could hardly substitute a wholly different version of the bill without repeating the process of inquiry. *These kinds of demands are implicit in due process, if lawmakers are really bound to a rule that laws must be made as rational means toward some agreed purpose.*

Id. at 223–24 (emphasis added).

121 *Id.* at 239.

122 *Id.* at 237.

123 *Id.* at 243; *see also* MAURO CAPPELLETTI, JUDICIAL REVIEW IN THE CONTEMPORARY WORLD 99 & n.8 (1971); Gottfried Dietze, *Judicial Review in Europe*, 55 MICH. L. REV. 539, 541 (1957) ("European courts have usually tested the formal constitutionality of the laws. This consists of a review of the process of enactment .... On the other hand, the testing of the content of a legislative act for its 'intrinsic' [substantive] constitutionality was the exception rather than the rule."); William W. Van Alstyne, *A Critical Guide to* Marbury v. Madison, 1969 DUKE L.J. 1, 20 ("[Procedural review is] far more common in other countries than is substantive constitutional review.").

that legislators were constitutionally bound to follow certain processes, he did not think it appropriate for courts to enforce all the demands of due process of lawmaking. Rather, he argued that judicial enforcement of legislative procedures should be limited to those procedures explicitly spelled out in the Constitution or legislative rules.[124] Professors Farber and Frickey have called this the "procedural regularity model" of due process of lawmaking,[125] which is to be contrasted with the "due deliberation model" that is largely the source of legislative due process.

2. *The Jurisprudence of Justice Stevens*

Justice Stevens has also supported a form of due process of lawmaking in several opinions.[126] In *Delaware Tribal Business Committee v. Weeks*,[127] Justice Stevens cited Linde's article in dissent from the Court's rejection of a claim that a federal statute was unconstitutionally discriminatory, because he found that the statute worked a "deprivation of property without the 'due process of lawmaking' that the Fifth Amendment guarantees."[128] However, Justice Stevens seemed to have a theory in mind that was broader than Linde's version of "procedural regularity"; he would have invalidated the statute even though Congress had "followed accepted legislative procedures in enacting the statute."[129]

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[124] Indeed, Professor Linde was not too concerned with the problem of judicial review, as this was secondary to his inquiry into what the Constitution demands of lawmakers. *See* Linde, *supra* note 12, at 243. He did note, however, that courts might not even be willing to enforce all the explicit rules governing the legislative process, because of the problem of relief: It is sometimes simply too drastic to invalidate a statute for improper enactment, especially because not every procedural violation necessarily amounts to a violation of due process of lawmaking in the constitutional sense. *See id.* at 244–45.

[125] *See* FARBER & FRICKEY, *supra* note 15, at 125–28; Farber & Frickey, *supra* note 5, at 920 n.258; Frickey & Smith, *supra* note 9, at 1711–13. On this view, *INS v. Chadha*, 462 U.S. 919 (1983), which invalidated the legislative veto as inconsistent with the constitutional requirements of bicameralism and presentment, is wholly appropriate. The Court did nothing more than require Congress to adhere to explicit constitutional rules governing the legislative process.

[126] For a discussion of Justice Stevens's jurisprudence in this area, see Comment, *The Emerging Constitutional Jurisprudence of Justice Stevens*, 46 U. CHI. L. REV. 157, 217–32 (1978).

[127] 430 U.S. 73 (1977).

[128] *Id.* at 98 (Stevens, J., dissenting) (citing Linde, *supra* note 12).

[129] *Id.* at 97. Justice Stevens was careful to note that his conclusion was not compelled by Linde's analysis, *id.* at 98 n.11, but it is not entirely clear what his understanding of due process of lawmaking was. He did write, however, that the discrimination at issue was clearly "the consequence of a legislative *accident*, perhaps caused by nothing more than the unfortunate fact that Congress is too busy to do all of its work as carefully as it should." *Id.* at 97.

Justice Stevens stated his theory more explicitly in his dissent in *Fullilove v. Klutznick*.[130] Put simply, he believed that even where Congress has observed all legislative rules in enacting a statute, a lack of due deliberation should affect its constitutionality; however, he would apply the constraints of due process of lawmaking only where suspect classifications or fundamental interests were at issue:

> Although it is traditional for judges to accord the same presumption of regularity to the legislative process no matter how obvious it may be that a busy Congress has acted precipitately, I see no reason why the character of the their procedures may not be considered relevant to the decision whether the legislative product has caused a deprivation of liberty or property without due process of law. Whenever Congress creates a classification that would be subject to strict scrutiny under the Equal Protection Clause . . . , it seems to me that judicial review should include a consideration of the procedural character of the decisionmaking process.[131]

Justice Stevens then quoted an article by Professor Terrence Sandalow, which argued that judicial review should focus on the level of legislative deliberation when fundamental societal values are stake.[132] Under this theory, Justice Stevens argued, invalidation for failure to deliberate properly was preferable to a substantive judicial judgment concerning the validity of the legislative choice:

> A holding that the classification was not adequately preceded by a consideration of less drastic alternatives or adequately explained by a statement of legislative purpose would be far less intrusive than a final determination that the substance of the decision is not 'narrowly tailored to the achievement of that goal.' . . . [T]here can be no separation-of-powers objection to a more tentative holding of unconstitutionality based on a failure to follow procedures that

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130 448 U.S. 448 (1980).

131 *Id.* at 550–51 (Stevens, J., dissenting) (footnotes omitted) (emphasis added).

132 *Id.* at 551 n.27 (quoting Sandalow, *supra* note 8, at 1188). The following passage illustrates Sandalow's theory:

> I am not suggesting that legislation should be held unconstitutional merely because it has failed to receive full-scale consideration by Congress. My point, rather, is that if government action trenches upon values that may reasonably be regarded as fundamental, that action should be the product of a deliberate and broadly based political judgment. The stronger the argument that governmental action does encroach upon such values, the greater the need to assure that it is the product of a process that is entitled to speak for the society. Legislation that has failed to engage the attention of Congress . . . does not meet that test, for it is likely to be the product of partial political pressures that are not broadly reflective of the society as a whole.

Sandalow, *supra* note 8, at 1188.

> guarantee the kind of deliberation that a fundamental constitutional issue of this kind obviously merits.[133]

Thus, Justice Stevens advocated a form of judicial review that, like legislative due process, is based on the due deliberation model of due process of lawmaking, but is both broader and narrower than the doctrine proposed in this Note. Justice Stevens's version is broader in that it requires Congress to demonstrate a very high level of deliberation in order to save a statute that arguably infringes on fundamental values, while legislative due process would require very minimal deliberation. But, Justice Stevens's version is narrower than legislative due process because it would require courts to review the legislative process only when fundamental values were at stake.

As discussed above in Part II.C, legislative due process takes the broader approach in this last regard—allowing courts to review the legislative process in all cases, not only those involving sensitive constitutional interests—for three main reasons. First, to the extent that courts would apply a uniform standard in legislative due process challenges regardless of the underlying interests, applying the doctrine to all legislation would actually keep judicial interference to a minimum, because courts would be unwilling to apply rigorous review in some cases if doing so required them to apply such stringent review in all cases. Second, limiting legislative due process to those cases where important interests were at stake would both allow judges to determine which interests were sufficiently important to warrant protection—which would potentially raise the specter of Lochnerism—and provide an incentive to engage in more intrusive review to protect the underlying interest.

Finally, the Stevens/Sandalow version, by confining judicial review of the legislative process to cases implicating constitutional interests, risks displacing substantive review altogether. After all, if courts are willing to give such weight to the fact that Congress has deliberated extensively about a policy's impact on constitutional interests that they would defer to the Congressional determination that the burden on those interests is not too great, then what rationale could courts have for permanently declaring that Congress has overstepped its bounds? In other words, the suspensive veto might become the courts' only tool in cases implicating constitutional interests, such that Congress could presumably reenact the identical law after satisfying the relevant procedural requirements and deliberating properly. Indeed, Sandalow states that "[i]f judicial review is to be understood in this way . . . courts must be prepared to yield to political decisions

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133 *Fullilove*, 448 U.S. at 551–52 (Stevens, J., dissenting).

that do reflect the deliberate judgment of representative institutions which, just because they are representative, can speak for the society more authoritatively than can courts."[134]

This would turn the concept of judicial protection of fundamental individual rights on its head. Congress should not be able to choose a person's religion, dictate the content of their speech, or discriminate against them on the basis of race, no matter how extensively it considers and documents the salutary effects such regulation might bring about. In such situations, political process arguments lose their force. As the Court has stated:

> The very purpose of a Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts. One's right to life, liberty, and property, to free speech, a free press, freedom of worship and assembly, and other fundamental rights may not be submitted to vote; they depend on the outcome of no elections.[135]

Thus, rather than employing a strict form of due process of lawmaking as the sole method of judicial review of legislation currently subject to strict scrutiny, legislative due process should be applied in such cases—in the very weak form in which it would be applied in all other cases—in combination with the traditional form of substantive review that courts currently apply.

D. Foundations in Supreme Court Doctrine

In addition to political process theory and academic theories of due process of lawmaking, the theory that the Constitution may require legislators to consider adequately the implications of their actions is also grounded in certain areas of Supreme Court jurisprudence.[136] Part III.D.1 discusses the law of gender discrimination and certain canons of construction, both of which suggest that the Court will invalidate certain legislative decisions in order to encourage legislative deliberation. Part III.D.2 discusses the Court's recent trend of examining congressional findings in cases challenging statutes on federalism grounds, which also supports the theory that the legislative process may be a proper subject of judicial inquiry.

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134 Sandalow, *supra* note 8, at 1189.

135 W. Va. Bd. of Educ. v. Barnette, 319 U.S. 624, 638 (1943).

136 Indeed, commentators have noted how some of the doctrines discussed in this Section support the theory of due process of lawmaking. *See, e.g.,* Frickey & Smith, *supra* note 9, at 1718–27. For a detailed, comprehensive study of how the doctrines discussed in this Section, as well as a wide range of other doctrines, support due process of lawmaking, see generally Coenen, *A Constitution of Collaboration*, *supra* note 14.

1. *Judicial Approaches to Encouraging Legislative Deliberation*

In analyzing government policies which embody gender classifications, the Court inquires into whether the policies reflect "unthinking overgeneralizations" about the proper roles of men or women. For example, in *Mississippi University for Women v. Hogan*,[137] the Court stated that the purpose of requiring more exacting scrutiny of gender classification "is to assure that the validity of a classification is determined through reasoned analysis rather than through the mechanical application of traditional, often inaccurate, assumptions about the proper roles of men and women."[138] Similarly, in *Califano v. Goldfarb*,[139] the Court invalidated a provision distinguishing between nondependent widows and widowers in part because "nothing whatever suggests a reasoned congressional judgment"[140] underlying the classification. The Court concluded that "the differential treatment of nondependent widows and widowers results not . . . from a deliberate congressional intention to remedy the arguably greater needs of the former."[141] The government had relied instead upon "'archaic and overbroad' generalizations" that "do not suffice to justify a gender-based discrimination in the distribution of employment-related benefits."[142] Other cases similarly have evaluated governmental gender classifications to determine whether they were products of traditional stereotypes or represented "reasoned congressional judgments."[143]

A requirement of legislative deliberation also is suggested by the familiar canon of statutory construction that courts will not interpret statutes to impinge on constitutional interests unless the legislature makes a "clear statement"[144] that it so intends. When the Court asks Congress for a clear statement of its intent to achieve a particular result, Congress must initiate the legislative process again and deliberate directly about whether it truly intends to achieve that result. Similarly, the Court has used the "nondelegation canon" to interpret

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137 458 U.S. 718 (1982).

138 *Id.* at 725–26.

139 430 U.S. 199 (1977).

140 *Id.* at 214.

141 *Id.* at 216–17.

142 *Id.* at 217 (quoting Schlesinger v. Ballard, 419 U.S. 498, 508 (1975)).

143 *See, e.g.*, Rostker v. Goldberg, 453 U.S. 57, 72–83 (1981) (sustaining validity of gender classification in part because of evidence of congressional deliberation); Califano v. Webster, 430 U.S. 313, 317–20 (1977) (per curiam) (same); Weinberger v. Wiesenfeld, 420 U.S. 636, 648–53 (1975) (invalidating gender-based classification where legislative purpose was found to be not premised on any "special disadvantages of women").

144 *See, e.g.*, Gregory v. Ashcroft, 501 U.S. 452, 460–61 (1991); Kent v. Dulles, 357 U.S. 116, 125–30 (1958).

narrowly delegations of legislative authority to administrative agencies, on the theory that excessively broad grants raise separation-of-powers concerns.[145] This canon is also grounded in the view that important policy judgments should only be made by legislators after due deliberation. These and other rules of statutory interpretation "encourage legislatures to articulate their reasons for their decisions in the legislative language,"[146] and serve as a form of "remand to the legislature" for reconsideration of important issues.

2. *The Federalism Cases and Judicial Review of Congressional Findings*

Some of the Court's recent federalism decisions also suggest that close judicial review of the legislative record may be appropriate, although they do not focus directly on the question of deliberation. In *United States v. Lopez*,[147] the Court invalidated a federal law banning the possession of guns near school zones as beyond Congress's commerce power, and suggested that this holding rested in part on Congress's failure to document adequately the effects of such activity on interstate commerce. This decision sparked some academic commentary concerning judicial review of the legislative record,[148] but the debate seemed to become moot after the Court invalidated the

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[145] The doctrine has taken the status of a canon of construction in recent years. *See, e.g.*, Indus. Union Dep't., AFL-CIO v. Am. Petroleum Inst., 448 U.S. 607 (1980). The Supreme Court actually has invalidated only two statutes on the basis of the nondelegation doctrine, both in 1935. *See* A.L.A. Schechter Poultry Corp. v. United States, 295 U.S. 495 (1935); Pan. Ref. Co. v. Ryan, 293 U.S. 388 (1935). But the Court has not done so again. *See* Frickey & Smith, *supra* note 9, at 1714–15.

[146] Elizabeth Garrett, *Who Directs Direct Democracy?*, 4 U. CHI. L. SCH. ROUNDTABLE 17, 27 (1997). Other commentators have made similar arguments. *See* Frank H. Easterbrook, *The Supreme Court, 1983 Term, Foreword—The Court and the Economic System*, 98 HARV. L. REV. 4 (1984) (suggesting that courts should be realistic about interest group pressures that underlie some statutes and interpret statutes accordingly); Macey, *supra* note 6 (arguing that courts can control interest group pressures through statutory interpretation); Cass R. Sunstein, *The Supreme Court, 1995 Term, Foreword—Leaving Things Undecided*, 110 HARV. L. REV. 4, 27 (1996) (suggesting that techniques of statutory interpretation are "democracy-promoting").

[147] 514 U.S. 549 (1995).

[148] *See* Frickey, *supra* note 10, at 728–29 (arguing that "heightened concern about congressional fact-development and fact-finding suggested by *Lopez* could be a plausible technique for curbing legislative excess"); Friedman, *supra* note 10, at 760 (suggesting that legislative record review could be useful method for "facilitat[ing] the exercise of judicial review and improv[ing] interbranch communication"); Krent, *supra* note 10 (arguing that Court was improperly treating Congress like agency by requiring congressional findings, but endorsing cautious approach to legislative record review because of potential benefits such review may offer, such as improved political accountability, enhanced public monitoring of legislative process, and assistance in enforcement of underenforced constitutional norms).

Violence Against Women Act in *United States v. Morrison*,[149] despite Congress's extensive findings concerning the effects of violence against women on interstate commerce. There, the Court made it clear that the problem was not simply a lack of congressional findings, but rather a chain of logic which, if accepted, would allow Congress to regulate any noneconomic activity under the guise of the Commerce Power.[150]

A recent decision, *Board of Trustees of the University of Alabama v. Garrett*,[151] suggests that the Court may again be endorsing judicial review of the legislative process.[152] In that case, the Court held that the Americans with Disabilities Act could not be applied to states under Congress's power to enforce the Fourteenth Amendment. Although the legislative history of the statute contained elaborate discussion and findings concerning the pervasiveness of discrimination against the disabled, the Court closely parsed the legislative record to determine whether Congress had sufficiently identified a pattern of discrimination by the states.[153]

Commentators already have begun to analyze the implications of *Garrett* on legislative record review.[154] This Note discusses some of these commentators' objections below in Part IV, but for now it is sufficient to observe that the Court seems to have endorsed a form of legislative record review in *Garrett*, at least in the federalism area.[155]

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149 529 U.S. 598, 614–17 (2000).

150 *Id.* at 614–15.

151 531 U.S. 356 (2001).

152 Several other federalism cases are consistent with this trend. *See* Kimel v. Fla. Bd. of Regents, 528 U.S. 62, 89–91 (2000) (finding shortcomings in congressional findings); Fla. Prepaid Postsecondary Educ. Expense Bd. v. Coll. Savings Bank, 527 U.S. 627, 640 (1999) (same). For an argument that the Court has adopted a due process of lawmaking model of judicial review in these cases, see Frickey & Smith, *supra* note 9, at 1718–28.

153 *Garrett*, 531 U.S. at 370–71 (discounting value of Task Force reports); *id.* at 371–72 (dismissing evidence of private sector age discrimination as inapplicable to public sector); *id.* at 372 (noting House and Senate committee reports did not explicitly mention States); *id.* at 373–74 (comparing extensive legislative record supporting Voting Rights Act to relatively minimal record supporting Americans with Disabilities Act).

154 For articles that have been critical of this trend, see Buzbee & Schapiro, *supra* note 10, at 91 (arguing that judicial scrutiny of legislative process is "unjustified and unworkable arrogation of legislative authority"); Colker & Brudney, *supra* note 10, at 86–87 (criticizing "Court's emerging vision in which Congress has substantially diminished powers to conduct its internal affairs or to engage in factfinding and lawmaking that the judicial branch will respect"); Frickey & Smith, *supra* note 9, at 1755 (finding "the *Garrett* approach untenable"). *See also* Bryant & Simeone, *supra* note 9, at 369–89 (arguing, in article published before *Garrett*, that judicial scrutiny of legislative record is inconsistent with precedent, and "fundamentally ill advised").

155 Of course, it is possible to distinguish the recent federalism cases from legislative due process. Those cases arguably follow the Stevens/Sandalow version of the due deliberation model, in which the Court reviews legislative processes only when constitutional interests—such as federalism—are at stake. In other words, the Court is not evaluating the

IV
RESPONSES TO OBJECTIONS

Legislative due process is a rather controversial proposal. Commentators have objected to the Court's new version of legislative-record review, as exemplified in *Garrett,*[156] and some of those objections may also apply to legislative due process. This Part addresses those concerns.[157]

Part IV.A discusses separation-of-powers and other constitutional objections, such as whether judicial review of the legislative process allows courts to treat Congress improperly like a subordinate administrative agency, and whether it is inconsistent with various constitutional provisions governing internal congressional processes. Part IV.B addresses the more pragmatic question of whether legislative due process might cause more harm than good. If the doctrine enabled special interest groups to exercise even more influence in the legislative process, or allowed judges to make substantive value judgments covertly regarding the wisdom of legislative policy decisions, then these would indeed be viable objections. In the course of the discussion, Part IV.B also evaluates whether legislative due process is inconsistent with textualism, which discounts the value of legislative history in statutory interpretation.

A. Constitutional Objections

1. Separation of Powers

Several commentators have noted that judicial review of the legislative process may be directly at odds with the constitutional struc-

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legislative process in these cases because process and deliberation are intrinsically valuable, but rather because the Court must determine whether Congress has overstepped its constitutional authority, and that determination depends on whether Congress has made sufficient findings of fact to support its assertion of authority.

This interpretation makes those cases less relevant to the doctrine advocated in this Note. However, the question is whether judicial review of the legislative process can or should be confined to cases raising federalism concerns. I agree with the commentators cited in note 154, *supra*, that *Garrett* and its predecessors represent an excessively intrusive form of review that should not be applied in any case, regardless of whether important constitutional interests are at issue. However, this Note argues that the Court has properly focused its attention on the problems of congressional inattentiveness, and could use its newly asserted authority to review the legislative process to encourage mildly Congress to enact legislation in a more deliberate and rational manner. The benefits of such an approach do not depend on whether Congress is impinging on constitutional values.

156 *See, e.g.,supra* note 154.

157 This Note addresses only some of the concerns raised by judicial review of the legislative process. For a more complete list, see Coenen, *A Constitution of Collaboration*, *supra* note 14, at 1845–50.

ture of government.[158] Indeed, this may be the strongest theoretical argument against legislative due process. Justice Souter, dissenting in *Lopez*, phrased the objection to a judicially imposed congressional-findings requirement succinctly, stating that "review for deliberateness would be as patently unconstitutional as an Act of Congress mandating long opinions from this Court."[159]

There are several ways to respond to the separation-of-powers objection. First, to understand the contours of that objection, one should compare how traditional substantive review impacts Congress with how legislative due process would impact Congress. The only remedy available in a legislative due process challenge would be a suspensive veto, and the court would sustain a policy that was reenacted after following the proper procedures. When a court invalidates a statute that is substantively beyond the power of Congress, or that violates constitutional rights, this path is unavailable. Because the remedy for violation of legislative due process is more tentative, the doctrine would impose a lesser burden on Congress than that imposed by substantive review.[160] This is true even if one compares legislative due process to the deferential rational basis test. If courts review the legislative process as leniently as this Note suggests that they should, then very few policies would be invalidated, just as very few statutes are held to violate the rational basis test. However, unlike a violation of the rational basis test, a violation of legislative due process would not bar reenactment of the very same policy.

Second, while Justice Souter's analogy of a hypothetical congressional requirement of long judicial opinions is apt with regard to the

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158 *See, e.g.,* Bryant & Simeone, *supra* note 9, at 331 ("[T]he Court's imposition of new procedural conditions on Congress's exercise of its legislative authority raises substantial separation-of-powers questions."); Buzbee & Schapiro, *supra* note 10, at 91 ("[Legislative record review] violates norms deeply rooted in the separation of powers and results in a kind of scrutiny that is unpredictable, unnecessary, and illegitimate."); Colker & Brudney, *supra* note 10, at 122 ("[The Court's] new approach . . . raise[s] serious separation of powers concerns. In undervaluing, if not ignoring, essential elements of the legislative enterprise, the Court's approach cannot help but impede Congress's ability to fulfill its distinct responsibilities."); Cross, *supra* note 47, at 1326–27 ("[B]road, process-oriented proposals could have disastrous separation of powers consequences as they invite the camel's nose of judicial review into the tent of legislative deliberation."); Frickey & Smith, *supra* note 9, at 1750 ("There is a deep separation-of-powers problem at the heart of what we perceive to be the new due-deliberation model of due process of lawmaking.").

159 United States v. Lopez, 514 U.S. 549, 614 (1995) (Souter, J., dissenting).

160 As Justice Stevens stated, separation-of-powers objections to procedural review are not dispositive because a "holding that the classification was not adequately preceded by a consideration of less drastic alternatives or adequately explained by a statement of legislative purpose would be far less intrusive than a final determination that the substance of the decision is not 'narrowly tailored to the achievement of that goal.'" Fullilove v. Klutznick, 448 U.S. 448, 551 (1980) (Stevens, J., dissenting).

stringent type of review employed in *Lopez* and *Garrett*, that analogy is less forceful with regard to a milder form of procedural review like legislative due process. To the extent that the Court has imposed significant procedural requirements on Congress in the federalism cases, Justice Souter's objection carries great force, because the requirements are so burdensome. However, courts need not place such high standards on Congress; as this Note has stressed, courts could play a very minimal role in policing the legislative process, issuing a suspensive veto only against those policies that are demonstrably lacking even minimal deliberation.

Third, Justice Souter's analogy would have to be modified if it were to be used as a direct argument against legislative due process. As it stands, Justice Souter's analogy seems forceful because it assumes, quite correctly, that a congressional requirement of long judicial opinions would be an extreme solution to a nonexistent problem, just as there is little reason to require Congress to deliberate extensively before enacting legislation, even where important federalism interests are at stake. However, consider the issue from the following perspective: Imagine that something analogous to simple interest group politics was occurring within the Court itself—that the Court occasionally allowed individual Justices to decide cases completely on their own, without consulting with the entire Court, and without written opinions. Further, assume that the individual Justices who actually made the decisions did so based on their own political preferences, rather than what the law required. Would separation of powers prevent Congress from requiring the Court to halt these practices? True, a requirement of long opinions would be extreme even in these circumstances, just as stringent *Garrett*-type review seems extreme. But legislative due process is more akin to a congressionally imposed requirement that the Court issue written opinions (of any length) in all cases expressing the Court's reasons for decision, in order to provide some evidence that its internal processes have not been hijacked. In other words, the forcefulness of the long-opinion analogy is largely dissipated when one considers that, compared to the Court's current form of legislative-record review, legislative due process is a relatively mild solution targeted at the particular problem of simple interest group politics.

Moreover, as discussed above in Part III.D.1, courts already employ a range of doctrines that indirectly affect legislative processes and provide incentives for deliberation, but nobody has argued that, for example, clear statement rules violate the separation of powers. Legislative due process is a direct requirement that Congress deliberate minimally, instead of an indirect requirement that it deliberate

extensively. Though the directness of the requirement certainly strengthens the separation-of-powers objection, it does not necessarily make it dispositive.[161]

Finally, if it is not possible to overcome the separation-of-powers objection, perhaps it is worth reconsidering the commonly held understanding of this structural value. Government structure evolves over time, as does our conception of the appropriate relationship between branches. The administrative state would have been unthinkable to the Founders because of separation-of-powers concerns, but the Court adapted its understanding of that value to accommodate changed circumstances.[162] Moreover, unlike acceptance of the administrative state, accepting legislative due process would not require a wholesale revision of our current understanding of the separation of powers. Thus, if legislative due process is otherwise appealing, perhaps the separation-of-powers objection is not insuperable.

2. *"Treating Congress Like an Agency"*

Commentators have also argued that, by imposing congressional-findings requirements, the Court improperly treats Congress like a subordinate agency rather than a coequal branch.[163] In this connec-

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[161] Even traditional substantive review, viewed from a broader perspective, impacts the legislative process to a certain extent. Congress is surely conscious of the substantive constraints courts will apply to the policies they produce should they be challenged in court, and presumably adjusts its behavior accordingly to minimize the risk that such challenges will succeed. For example, if members of Congress fear that a statute might be invalidated as a violation of substantive constitutional guarantees such as free speech, they might redraft the statute to minimize such concerns or include material in the legislative record supporting the argument that the statute raises no constitutional problem (e.g., by including findings or statements of a congressional intent to achieve "non-speech-related" goals rather than to directly regulate speech). If Congress knows that courts take such efforts into account when evaluating the substantive constitutionality of legislation, then it is more likely to undertake such efforts. Legislative due process differs in that failure to follow certain minimal procedures might be sufficient in itself to remand a policy back to Congress, irrespective of substantive concerns. Certainly this is a greater encroachment in the sense that it affects the legislative process more directly, but again, in either case, the legislature conforms its behavior to the standards imposed by the court or risks judicial intervention for failure to do so.

[162] Of course, the courts had to accept the administrative state, because either the New Deal era would begin or the nation would be trapped in depression. There is no similar circumstance today requiring the abandonment of historically held structural commitments. Simple interest group politics may be problematic, but it certainly does not pose a risk to the fate of the nation. The point, however, is that courts should be cognizant of the realities of modern government and be willing to reevaluate their understanding of constitutional structural values.

[163] *See, e.g.*, Bryant & Simeone, *supra* note 9, at 331 ("Congress is simply not an administrative agency, and the reasons that justify 'on-the-record' review in the administrative context, where it arose, do not apply to the legislative branch."); Buzbee & Schapiro, *supra* note 10, at 119–35 (comparing judicial review of administrative agencies to legislative-

tion, consider the fact that a primary rationale for judicial involvement in administrative processes rests on the assumption that "[t]here is an obvious difference between legislative determination and the finding of an administrative official not supported by evidence. *In theory, at least, the legislature acts upon adequate knowledge after full consideration and through members who represent the entire public.*"[164] In other words, judicial review of the administrative process is permissible because there is no reason to assume that agencies "act[ ] upon adequate knowledge after full consideration."[165] Yet legislative due process is based on rejecting that very assumption as it applies to Congress in certain circumstances. That is, when simple interest group politics is at issue, much of the rationale for failing to give judicial deference to administrative determinations might in fact apply to Congress itself. Thus, we may concede that the Court would treat Congress like an agency in a legislative due process challenge, but that does not preclude judicial review of the legislative process. Instead, by recognizing that Congress, like agencies, sometimes acts unthinkingly, we understand why judicial review of the process by which that body came to its decision might be warranted.[166]

The objection based on the administrative-agency analogy can also be understood differently, as an intuitive objection that procedural review violates legislative supremacy by disrespecting Congress. Yet, if the courts would violate legislative supremacy by evaluating legislative processes, why do they not violate legislative supremacy when they invalidate statutes on substantive grounds? Indeed, the unconventional concept of substantive judicial review itself probably met similar arguments about legislative supremacy before Justice

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record review); Colker & Brudney, *supra* note 10, at 83 ("[T]he new activist majority has treated the federal legislative process as akin to agency or lower court decisionmaking; in doing so, the Court has undermined Congress's ability to decide for itself how and whether to create a record in support of pending legislation."); Frickey & Smith, *supra* note 9, at 1751 ("[T]he [federalism] cases may place responsibilities upon Congress that it simply cannot withstand—forcing Congress to behave like an administrative agency, despite the wildly different composition, structure, and goals of a legislature as compared to an agency . . . ."); Krent, *supra* note 10, at 733 ("[R]equiring findings may denigrate the respect due a coordinate branch of government. Findings might transform the legislature into a type of administrative agency, monitored and controlled by the superintending judiciary.").

164 S. Ry. v. Virginia, 290 U.S. 190, 197 (1933) (emphasis added). The Court made this statement in the course of explaining why parties have a right to a hearing prior to agency adjudicatory action, but not prior to legislative action.

165 *Id.*

166 *Cf.* Gunther, *supra* note 86, at 44 (arguing that judicial deference to economic legislation is premised on unrealistic assumption that legislature has "considered the contending considerations").

Marshall invalidated section 13 of the Judiciary Act of 1789,[167] yet substantive review is an accepted part of the constitutional landscape. The fact is that courts disrespect legislatures every time they second-guess the legislative judgment that a policy is consistent with substantive constitutional commands. The failure of legislative due process to have a history and pedigree similar to that of traditional substantive review should not bar consideration of its potential merit.

3. *Constitutional Provisions Governing the Congressional Process*

Legislative due process might also be inconsistent with certain constitutional provisions governing internal congressional processes. The "Rules Clause" provides that "[e]ach House may determine the Rules of its Proceedings."[168] The "Journal Clause" provides that "[e]ach House shall keep a Journal of its Proceedings, and from time to time publish the same, excepting such Parts as may, in their Judgment require Secrecy."[169] The "Speech or Debate Clause" provides that "for any Speech or Debate in either House, [Senators and Representatives] shall not be questioned in any other Place."[170] Some have argued that "[o]ther than these minimal requirements, the Constitution leaves to Congress's determination the manner of record to compile in support of legislation."[171] Indeed, the Supreme Court long ago established the "enrolled bill" rule, under which courts may not inquire into the legislative process leading to a statute's enactment, on the basis of the Rules and Journal Clauses.[172]

This Note offers only preliminary responses to this objection. As an initial matter, the Court has not considered these provisions to be an obstacle to reviewing the legislative record in the recent federalism cases. Of course, the question is whether these provisions *should* preclude the courts from reviewing legislative processes altogether, or at least should preclude such review where no particular constitutional interest is at issue.[173] The most obvious reason to answer this question in the negative is that none of these provisions squarely state that

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167 *See* Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803).

168 U.S. CONST. art. I, § 5, cl. 2.

169 *See id.* at § 5, cl. 3.

170 *See id.* at § 6, cl. 1.

171 Bryant & Simeone, *supra* note 9, at 376. For a discussion of these provisions and the cases interpreting them, see *id.* at 376–83.

172 *See* Field v. Clark, 143 U.S. 649, 668–73 (1892) (holding that signature by President and both Houses of Congress renders statute constitutional, notwithstanding allegation that enrolled bill omits portions of legislation actually passed by both houses).

173 The Court has stated that the enrolled bill rule of *Field v. Clark* is inapplicable when "a constitutional provision is implicated." United States v. Munoz-Flores, 495 U.S. 385, 391–92 n.4 (1990) (emphasis omitted).

courts may not review the legislative process; they simply spell out the powers of Congress to establish internal rules and the duty to record matters in the Journal in certain situations. Even the Speech or Debate Clause, read literally, would not bar legislative due process, because that doctrine does not require the Court to "question[ ]" congresspersons regarding a "Speech or Debate." Judicial review would proceed on the basis of the legislative record, and, indeed, the legislative due process challenge would succeed only if there was no "Speech or Debate" in that record at all.

B. More Harm than Good?

There are two primary ways in which legislative due process may result in more harm than good. First, the doctrine might actually serve to increase interest group influence over the legislative process. For example, such groups may be able to use the doctrine strategically to invalidate policies that they were unable to block in the legislative process. Indeed, textualist approaches to statutory interpretation reject the use of legislative history in part to minimize the influence of interest groups—because such groups are able to get language into legislative history that they are unable to get into statutory language, the theory goes, courts should not look to that history in interpreting statutes.

Second, the doctrine might invite some of the same evils as substantive review, namely judicial value judgments on the merits of a policy. If courts can impose procedural requirements upon legislatures, perhaps they will choose to do so only when they disagree with the substantive policy being challenged.

These arguments carry some weight. Below are several responses.

1. Increasing Interest Group Influence

Might legislative due process actually backfire, and increase the influence of interest groups in the legislative process, by enabling them to block policies through the courts that they were unable to block through the political process? The political acumen of interest groups cannot be overestimated, but in this situation, interest-group power may be limited. Consider the following: If a group brings a legislative due process challenge against a policy that it was unable to block in Congress, that challenge would likely fail, for the simple reason that any evidence of its political efforts to block the policy would insulate the statute from challenge. Congress could avoid this sort of sneak attack by simply including a short statement in the legis-

lative record—perhaps a single sentence—that the group's views were rejected after due consideration. Thus, legislative due process provides a valuable incentive for Congress to detail in the legislative record attempts by interest groups to block legislation.

In this regard, some have argued that legislative record review seems inconsistent with a textualist approach to statutory interpretation, which discounts the use of legislative history.[174] As Justice Scalia has argued, textualism limits the ability of special interests to affect judicial interpretations of statutes by sneaking favorable language into legislative history.[175] However, legislative due process is not inconsistent with textualism, for the simple reason that legislative due process is not a doctrine of statutory interpretation. In most legislative due process challenges, the statutory meaning will be clear, and the dispute will concern the adequacy of the legislative *process*, not the meaning of the legislative *product*. A plaintiff arguing that legislative due process has been violated is not arguing that the statute should be interpreted differently because of some piece of evidence in the legislative record, but that the statute was enacted by an unacceptable procedure.

Indeed, some of the arguments for ignoring legislative history in the context of statutory interpretation actually counsel for scrutiny of the legislative process. For example, some have argued that legislative history is easily manipulable, and that if Congress intends a statute to have a certain meaning, it should be explicit about that meaning in the statutory text, to ensure that legislators are accountable for that meaning.[176] Of course, the manipulability of the legislative process by interest groups is precisely the problem which legislative due process seeks to address. And by requiring explicit consideration of the true impact of government policies, the doctrine also serves to ensure accountability.

2. *Sneaking in Substantive Review*

If courts were to use legislative due process merely to achieve their desired policy outcomes, then the doctrine will have failed. However, there are several responses to this concern. First, if courts were to adhere to the model of judicial review sketched in this Note (e.g., by applying a uniformly weak standard across the board and according legislation a strong presumption of validity), the risks would

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[174] *See* Buzbee & Schapiro, *supra* note 10, at 148–53; Colker & Brudney, *supra* note 10, at 136–41; Frickey & Smith, *supra* note 9, at 1750–51.

[175] *See* ANTONIN SCALIA, A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW 29–37 (1997).

[176] *See id.*

be minimized. Second, it is not unreasonable to assume that judges—well-trained officials with a solid understanding of the functioning of government—would faithfully apply the doctrine and decline to invalidate policies that received adequate deliberation solely because of substantive disagreement. If they did not, rigorous appellate and Supreme Court review would keep lower courts in check.

In any event, the concern that courts would use judicial review as an opportunity to supplant Congress's policy choices with their own political preferences is an ever-present one that applies to all forms of judicial review, because judges will always have discretion in deciding hard cases. The fact that legislative due process may allow courts to abuse that discretion in the same way as other forms of judicial review is certainly a factor to be considered in deciding whether the doctrine is a viable one, but perhaps it is not such a weighty objection that the doctrine should be rejected outright.

CONCLUSION

This Note has attempted to lay out a model of judicial review of the legislative process that would improve congressional deliberation and thereby minimize the detrimental effects of interest group pressures. A doctrine of legislative due process finds support in political process theories of judicial review, academic theories of due process of lawmaking, and several areas of currently existing Supreme Court doctrine. Unlike other potentially competing models of judicial review, it also addresses the problem of simple interest group politics without raising the specter of Lochnerism.

The plainest solution to the problem of simple interest group politics, rather than getting the courts further involved in the political thicket, might be to urge congressional reform of legislative procedure by adopting some of the procedures that have proved workable at the state level. Until such reform is forthcoming, however, it is worth considering whether other institutions can help address the problem of unthinking responses to interest group pressures. This Note argues that if a judicial solution is to be pursued, legislative due process is the best possible form that such a solution could take. Notwithstanding the many practical and theoretical difficulties in putting the doctrine into operation—which may be sufficiently significant to render the doctrine inadvisable—this Note argues that the courts and Congress could work together to fashion effective standards for protecting the values of deliberation. It is up to the reader to decide whether legislative due process is a viable candidate for the task.